CELA

Court File No. 661/89
Court File No. 773/89
Court File No. 811/89

SUPREME COURT OF ONTARIO
(DIVISIONAL COURT)

B E T W E E N:

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

BOOK OF AUTHORITIES OF THE RESPONDENT, THE CITY OF BURLINGTON

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M.J. McQuaid, Q.C.
947-5020

C.J.Tzekas
947-5039

Solicitors for the Respondent,
The Corporation of the City
of Burlington

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Respondents

- and -

B E T W E E N :

THE CORPORATION OF THE TOWN OF MILTON

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 CITY OF BURLINGTON, NSP INVESTMENTS LIMITED, 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, GRAHAM AND EVELYN GILLIES, SALLY VERTULIA, RAY AND ANNETTE WINTER, KIP AND ANNE CHAPUT, WILFRED AND FREDA LAWRENCE,

BILL AND BEVERLEY KETELAARS, JOHN VITETTA, STEVE AND SHIRLEY DOLBY, KEN WETTLAUFER, HOWARD GOWLAND, MR. AND MRS. PIETRO MOSCATO, MR. AND MRS. L. CIACCO, RICK AND COLLEEN SIMMONS, MR. AND MRS. ALBERTA SILVA AND THE HONOURABLE JAMES BRADLEY, MINISTER OF THE ENVIRONMENT

RESPONDENTS

- and -

B E T W E E N:

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, GRAHAM AND EVELYN GILLIES, SALLY VERTULIA, RAY AND ANNETTE WINTER, KIP AND ANNE CHAPUT, WILFRED AND FREDA LAWRENCE, BILL AND BEVERLEY KETELAARS, JOHN VITETTA, STEVE AND SHIRLEY DOLBY, KEN WETTLAUFER, HOWARD GOWLAND, MR. AND MRS. PIETRO MOSCATO, MR. AND MRS. L. CIACCO, RICK AND COLLEEN SIMMONS, MR. AND MRS. ALBERTA SILVA

APPLICANTS

- 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, NSP INVESTMENTS LIMITED, THE WEST BURLINGTON CITIZENS' GROUP 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 OF THE RESPONDENT THE CITY OF BURLINGTON

INDEX

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sition that the local Judge had no jurisdiction to grant judgment against the defendant, because he could not find there was no triable issue without deciding a question of law, which, it is said, he was precluded from doing by such cases as *Orpen et al. v. McCaskey*, [1938] O.W.N. 301, [1938] 3 D.L.R. 758*n*, and *Bank of Toronto v. Stillman* (1930), 65 O.L.R. 375 at pp. 377-8, [1930] 3 D.L.R. 838.

It is, I think, the effect of the judgment of this Court in *Weinberg v. Elliott Hotel Ltd.*, [1960] O.W.N. 233, that the principle of the cases earlier mentioned must be interpreted and applied reasonably; the mere raising in formal terms of an alleged legal defence does not prevent a Master or local Judge hearing a motion for judgment from examining the law as he understands it and seeing whether the facts as raised by the affidavit of merits come at least within arguable distance of a ground of defence known to the law, in the circumstances arising in the particular action. Such an examination in the case at bar reveals at once, in our view, that there is in law no such defence as is sought to be raised, arising from the documents put before the Court.

Accordingly, we are all of the view that the local Judge properly gave judgment for foreclosure as claimed in the specially endorsed writ. The appeal is dismissed with costs, to be taxed as between a solicitor and his client, which costs may be added to the mortgage debt.

Appeal dismissed.

[HIGH COURT OF JUSTICE]

Re Holmes et al. and Regional Municipality of Halton

CORY, J. 4TH MAY 1977.

Planning legislation — Official plan — Public works — By-law proposing land use contrary to official plan — By-law invalid as violating s. 19 of Planning Act, R.S.O. 1970, c. 349.

[*Re Maurice Rollins Construction Ltd. and Township of South Fredericksburgh* (1975), 11 O.R. (2d) 418; *Serre et al v. Town of Rayside-Balfour* (1975), 11 O.R. (2d) 779, consd]

APPLICATION to quash a by-law.

Estrin wins applic to quash.

D. Estrin, for applicants.
R. M. Martin, for respondent.

CORY, J. (orally):—Before proceeding, I would like to thank counsel for their assistance in this matter. They were most helpful in their submissions.

This is an application to quash a by-law of the Regional Municipality of Halton.

At the outset, a question was raised by the respondent as to my jurisdiction to hear the application. The application has been brought pursuant to ss. 283 and 285 of the *Municipal Act*, R.S.O. 1970, c. 284. Those sections appear in Part XI of that Act, "Quashing of By-laws". It is the position of the respondent that the matter should have been brought before the Divisional Court. Reference was made to s. 2 of the *Judicial Review Procedure Act*, 1971 (Ont.), c. 48, and reliance was placed upon two cases.

The first is *Re Maurice Rollins Construction Ltd. and Township of South Fredericksburgh* (1975), 11 O.R. (2d) 418. In that application, the following appears in the judgment of Mr. Justice Thompson, at p. 421:

> Although the applicant, according to its notice of motion, intends that the application shall be by way of *certiorari* to quash or for an order in the nature of *certiorari*, I do not consider it as such. In my view, the more appropriate proceedings under the circumstances here, would have been an application to quash pursuant to s. 283 of the *Municipal Act*, R.S.O. 1970, c. 284, or the alternative procedure by way of action for a declaration that the by-law is void and that it should be set aside.

It is clear that Mr. Justice Thompson was of the view that the appropriate procedure would be an application to quash the by-law pursuant to s. 283 of the *Municipal Act*, the method adopted by the applicants here.

The second case is *Serre et al. v. Town of Rayside-Balfour* (1975), 11 O.R. (2d) 779. Mr. Justice Galligan, delivering the oral judgment for the Divisional Court, stated, at p. 780:

> It is submitted that this is a proceeding which ought to have been brought pursuant to s. 283 of the *Municipal Act*, R.S.O. 1970, c. 284. It is our opinion that this issue is conclusively determined by the decision of the Supreme Court of Canada in *Wiswell et al. v. Metropolitan Corp. of Greater Winnipeg*, [1965] S.C.R. 512, 51 D.L.R. (2d) 754, 51 W.W.R. 513. The majority of the Supreme Court of Canada, in that case held that, notwithstanding a similar section of the Manitoba legislation, the Court had power to make a declaration in an action therefor declaring a municipal by-law invalid.

In my opinion, that case does not go so far as to state that an application to quash would be inappropriate or that the Court would not have jurisdiction to hear such an application. Rather, it stands for the proposition that the Divisional Court has jurisdiction to make an order for the relief that an applicant would be entitled to in proceedings by way of an action for declaration. That is a different procedure from an application to quash a by-law. A review of the sections of the *Municipal Act* relating to quashing of by-laws indicates that the rights of an applicant may be somewhat wider or, in any event, somewhat different from the right of an applicant moving pursuant to the *Judicial Review Procedure Act, 1971*, for relief under the latter statute.

I have, therefore, come to the conclusion that I do have jurisdiction to hear this matter and it is properly before me in Weekly

Court. In any event, there does appear to be some urgency in connection with the case and some need for as expeditious a determination of the issues as possible. If it were necessary, I would have concluded that the urgency clothed me with jurisdiction to hear this matter in any event.

This application arises out of a very fundamental problem that no doubt will repeat itself frequently in the future. The respondent regional municipality is under a statutory duty to provide the facilities for the disposal of waste and to acquire land to carry out that statutory duty. A more difficult duty facing elected representatives of the people it would be hard to imagine. To fulfil the duty is not only onerous but bound to be unpopular with some residents. The provision of this essential service can only be loathed and detested by those who are in close proximity to the chosen site. The service must be provided and decisions with regard to it will have to be made by elected representatives with considerable courage and fortitude. No unnecessary obstacles should be placed in the way of those conscientiously and courageously attempting to carry out their difficult tasks. In situations such as this it is no longer appropriate to say "you can't fight city hall", rather the question is whether city hall can find its way through the convoluted procedural labyrinth imposed upon it.

On the other hand, owners adjacent to the proposed site, with a natural love of their land, may quite properly take all steps to ensure that their rights are recognized.

On March 2nd of this year, the Corporation of the Regional Municipality of Halton passed a by-law in the following terms:

> 1. The actions of the Council of the Corporation of the Regional Municipality of Halton at its meeting held on the 2nd day of March, 1977, in respect of each recommendation contained in the Reports of the Committees and each motion and resolution passed and other action taken by the Council of the Corporation of the Regional Municipality of Halton at this meeting is hereby adopted and confirmed as if all such proceedings were expressly embodied in this By-law.
>
> 2. The Chairman and proper officials of the Corporation of the Regional Municipality of Halton are hereby authorized and directed to do all things necessary to give effect to the actions of the Council of the Corporation of the Regional Municipality of Halton referred to in the preceding section hereof.
>
> 3. The Chairman and Regional Clerk are authorized and directed to execute all documents necessary in that behalf and to affix thereto the Seal of the Corporation of the Regional Municipality of Halton.

To understand the by-law, it is necessary to set out certain of the resolutions which are referred to. Those resolutions are all dated March 2, 1977, and are as follows:

> Number: 18 — Resolution No. 3 — Landfill Sites —
>
> THAT the selection of location F be confirmed as the site of the future landfill for the Region.
>
> Number: 20 — Resolution No. 5 — Landfill Sites —

> AND FURTHER THAT the staff be authorized to negotiate the purchase of sufficient Site F lands to accommodate the landfill requirements in the Region of Halton, not to exceed a period of six years;
>
> THAT the Region apply for approval to the Environmental Review Board to use said lands for a period of 6 years only, and further
>
> THAT the Region proceed as quickly as possible in cooperation with the Province for the installation and operation of a transfer site and "front-end" operations in the Queen Elizabeth Way and Burloak area including instructing our Property Agent to acquire the necessary lands for such facilities.
>
> Number: 21 — Resolution No. 6 — Landfill Sites —
>
> THAT stage 3 hydrogeological investigations be commenced at F.
>
> Number: 22 — Resolution No. 7 — Landfill Sites —
>
> THAT all other necessary steps be undertaken to implement the use of site F.

The proposed site that is referred to in the resolutions in the by-law designated by the letter "F" is on both sides of a north-south road by the name of Tremaine, and running north from the east-west Brittania Rd.

The site is located within the Regional Municipality of Halton. That municipality was formed on January 1, 1974. As yet the regional municipality does not have an official plan. Thus, the official plans of the constituent municipalities and the restrictive area by-laws passed pursuant to those official plans, are in force and in effect within the regional municipality. The site east of Tremaine Rd. was within the planning district of Oakville. Both in its official plan and the restricted area by-law implementing it, the Town of Oakville designated the lands within the site on the east side of Tremaine as agricultural lands. That designation does not include waste disposal sites or landfill sites.

On the west side of Tremaine Rd., the site was within the planning district of Burlington. The zoning of the Municipality of Burlington both in its official plan and implementing restrictive area by-law, again designated those lands as agricultural. Once again, such a designation would not and could not include landfill sites.

The applicants all reside and own property within the Regional Municipality of Halton. Two of the applicants reside in what was the Municipality of Burlington, and the balance within what was the planning district of Oakville. The site would now be within the presently constituted boundaries of the Town of Milton.

As I stated earlier, the regional municipality has the responsibility for providing facilities for the disposal of waste and to acquire and use land for such purposes. Pursuant to s. 6 of the *Regional Municipality of Halton Act*, 1973 (Ont.), c. 70, it is deemed to be a municipality. Section 115 [am. 1973, c. 162, s. 8; 1974, c. 117, s. 42; 1976, c. 43, s. 81; 1976, c. 70, s. 42] of the same Act states that s. 336 of the *Municipal Act* applies *mutatis mutandis*. Thus, the regional municipality must pass a by-law to acquire land.

Section 19 of the *Planning Act*, R.S.O. 1970, c. 349, provides in s-s. (1) as follows:

> 19(1) Notwithstanding any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections 2 and 3, no by-law shall be passed for any purpose that does not conform therewith.

(Subsections (2) and (3) are not applicable.) That same statute defines "public work" to mean any improvement of a structural nature or other undertaking that is within the jurisdiction of a council or local board. The provisions of the *Planning Act* are then applicable to, and binding upon, the Regional Municipality of Halton.

The by-law under consideration proposes a land use that is contrary to the existing official plans.

On its face, the impugned by-law appears to be contrary to the provisions of the *Planning Act* and therefore illegal.

The prime defence put forward by the municipality was that the application was premature. I have difficulty accepting that proposition. The by-law, in my opinion, would immediately affect both the landowners within the designated site and those immediately adjacent to it. Their ability to deal with the land, their ability to use and enjoy the land must surely be restricted, or at least adversely affected by the passage of the by-law. The by-law clearly indicates that certain described lands have been designated as a landfill site by the regional municipality, and that the municipality's agents are to take steps to acquire that land.

It was submitted by the respondent that if the Council did not pass a by-law such as the one before the Court, no preparatory steps can be taken by the municipality. The municipality would find itself in the unfortunate position of being statutorily required to provide the site without being able to undertake any investigations or preparations for the acquisition of the site. Certain testing will undoubtedly have to be done both for the satisfaction of the necessary authorities pursuant to the provisions of the *Environmental Protection Act*, 1971 (Ont.), c. 86, and for the municipality's submissions to the Ontario Municipal Board. The municipality must not and cannot be prevented from undertaking all reasonable and proper steps in the course of its investigations and preparations, including the testing of land to determine its suitability as a landfill site.

However, it would seem to me that enabling by-laws could be passed which would not be contrary to the provisions of the *Planning Act*, which would not require an amendment to the official plan, and yet would permit the municipality to make the requisite and essential tests.

In my opinion, the application is not premature. The by-law is illegal in that it is contrary to the provisions of s. 19 of the *Planning Act*, and it ought therefore to be quashed.

It should be pointed out, I think, that the municipality may proceed by one of two methods to achieve its goal of establishing a landfill site. It may institute proceedings pursuant to the *Environmental Protection Act, 1971*, or by way of the *Municipal Act*, s. 354, para. 77. Pursuant to s. 354, para. 77 of the *Municipal Act*, a municipality may pass by-laws for acquiring land in any local municipality or in territory without municipal organization, for any of the purposes specified in para. 76 which includes "establishing and maintaining a system for the collection, removal and disposal of garbage . . .".

Section 354, para. 77 goes on to provide:

> (*a*) No land shall be acquired in a local municipality under this paragraph without the approval of the local municipality, which approval may be granted upon such terms and conditions as may be agreed upon, or failing such approval or agreement, the approval of the Municipal Board, and no land shall be acquired in territory without municipal organization under this paragraph without the approval of the Municipal Board.
>
> (*b*) The Municipal Board, before giving its approval under this paragraph, shall hold a public hearing and shall give or cause to be given at least ten days notice of the hearing to the clerk of the local municipality concerned and to such other persons in such manner as the Municipal Board may direct and the Municipal Board, as a condition to giving any such approval, may by its order impose such restrictions, limitations and conditions respecting the acquisition or use of such land as to the Municipal Board may appear necessary or expedient and the Municipal Board may order the amendment of any official plan or of any by-law passed under section 35 of *The Planning Act* to permit the use of the land for the purposes for which it is to be acquired.

It may well be that if the municipality decides to proceed under s. 354, para. 77, then perhaps the by-law ought not to be passed without approval of the Ontario Municipal Board, however, I do not need to determine that issue.

The municipality could also undertake the procedure provided by the *Environmental Protection Act, 1971*, authorized in Part V, "Waste Control", ss. 28 to 48, as amended. In either procedure, a hearing is provided to determine if the proposed site is appropriate.

In my opinion, this is not a matter for the awarding of costs. A municipality has a very difficult and tortuous route to pursue before it can acquire an appropriate site. The procedure is technical and new. The issue on its merits will be determined in other hearings and for those reasons, there will be no costs of this motion.

Order accordingly.

chose to place in joint tenancy with his present wife. Much of the remainder was used for the purchase of a motor-home and an automobile. While these assets may not be of a liquid nature, they are capable of supporting a loan, if necessary, and there will, therefore, be an order to provide for maintenance for the applicant in the form of a lump-sum payment of $10,000 to be made within six months of this date.

In view of the respondent's past record I have no confidence in his ability to maintain periodic payments and I shall, therefore, order none. The order with respect to maintenance for the children is intended to equal the amount of arrears now due. If I am wrong in my calculations and counsel cannot agree the matter is referred to the Master for computation of the arrears.

The applicant shall have her costs.

Application granted.

[HIGH COURT OF JUSTICE]

Re Holmes et al. and Regional Municipality of Halton

SOUTHEY, J. 29TH MARCH 1978.

Planning legislation — Official plan — Municipality passing by-law authorizing application for certificate of approval of waste disposal site under Part V of Environmental Protection Act, 1971 and other by-laws providing for raising of money and acquisition of lands — Site in question not to be used as waste disposal site pursuant to provisions of official plan — By-laws illegal — Planning Act, R.S.O. 1970, c. 349, s. 19(1) — Environmental Protection Act, 1971 (Ont.), c. 86.

[*Re Cadillac Development Corp. Ltd. et al. and City of Toronto* (1973), 1 O.R. (2d) 20, 39 D.L.R. (3d) 188, apld]

APPLICATION to quash certain by-laws.

David Estrin, for applicants.
M. E. Royce, for respondent.

Estrin wins - needs amendmnt to OP before EPA.

SOUTHEY, J.:—The applicants own and reside on lands in the Town of Central Halton (formerly the Town of Milton) in the Regional Municipality of Halton ("Halton") that are close to a site chosen by the Council of Halton for use as a waste disposal site for the region. The site was selected from a number of alternatives on the advice of technical consultants and has been designated as site "F". Site "F" is located in an area in which the use of land for a waste disposal site is not permitted under the applicable official plan and restricted area by-law.

Halton does not yet have an official plan of its own, but the official plans and restricted area by-laws of the constituent municipalities from which Halton was formed on January 1, 1974, continue in force. In this case, the applicable official plan and restricted area by-law are those of the former Burlington Planning Area and Town of Burlington, respectively.

The applicants seek an order quashing certain by-laws passed by Halton to the extent that those by-laws relate to the proposed development of site "F" as a waste disposal site. The by-laws thus attacked are:

(a) By-law 50-77 approving a capital budget for 1977, that included the expenditure of $1,588,000 for the development of site "F";
(b) By-law 52-77, as amended by By-law 159-77, providing for levies on area municipalities, that included sums for the development of site "F";
(c) By-law 89-77, approving Resolution 156-77, which approved solicitor's report RS 74-77, recommending that applications with respect to site "F" be made to the Town of Milton, Ministry of the Environment and Ontario Municipal Board for the following matters:

1. Amendments to the relevant official plan and zoning by-law to provide for a proposed waste disposal site;
2. Approval of the acquisition of the required lands;
3. Certificate of approval, or provisional certificate of approval, from the Ministry of the Environment for operation of the proposed waste disposal site;
4. Approval of the financing costs for the proposed waste disposal site.

In the case of By-law 89-77, the applicants acknowledge that a by-law dealing with the first matter mentioned in solicitor's report RS 74-77 is lawful, that is, a by-law providing for applications to amend the relevant official plan and zoning by-law, and that By-law 89-77 should remain effective with respect to that matter. As to matters 2, 3 and 4 in solicitor's report RS 74-77 and the other two by-laws attacked, the submission of the applicant is that the purpose of such by-laws is the development of a waste disposal site in an area where that planned use is not permitted under the official plan and that such by-laws are prohibited by s. 19(1) of the *Planning Act*, R.S.O. 1970, c. 349. That section reads as follows:

> 19(1) Notwithstanding any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections 2 and 3, no by-law shall be passed for any purpose that does not conform therewith.

Subsections (2) and (3) are inapplicable in the present case.

In a judgment delivered on May 4, 1977, Cory, J., quashed a by-law of Halton adopting the selection of site "F" as a landfill site, authorizing the purchase of lands therefor, and authorizing an application for a certificate of approval to the Environmental Review

Board. The boundaries of site "F" were somewhat different at that time and included land on the east side of Tremaine Rd. in another planning district. Cory, J., quashed the by-law on the same ground relied upon by the applicants in this motion, that is, because it proposed a land use that was contrary to the official plan. His reasons for judgment, now reported at 16 O.R. (2d) 263, express with characteristic clarity and sympathy the difficulties and responsibilities facing municipalities and the affected landowners in such matters. Although he quashed the by-law, he stated that the municipality must not and cannot be prevented from undertaking all reasonable and proper steps in the course of its investigations and preparations, including the testing of land to determine its suitability as a landfill site.

He went on to point out alternative methods open to the municipality to achieve its goal of establishing a landfill site. He concluded by referring to the second method in the following words, at p. 268:

> The municipality could also undertake the procedure provided by the *Environmental Protection Act, 1971*, authorized in Part V, "Waste Control", ss. 28 to 48, as amended. In either procedure, a hearing is provided to determine if the proposed site is appropriate.

That paragraph has been interpreted by the municipality as meaning that a by-law can be passed authorizing an application for a certificate of approval under Part V of the *Environmental Protection Act*, 1971 (Ont.), c. 86, in respect of a waste disposal site, before the official plan has been amended to permit such land use in the area in question. I am not satisfied that my brother Cory intended to go that far in his judgment. If he did, it was clearly *obiter* and I consider myself obliged to decide the issue raised before me on the basis that it has not yet been determined against the applicants by the decision of Cory, J.

The applicants, and their solicitor in correspondence with Halton and others, have taken the position throughout that s. 19(1) of the *Planning Act* prohibits a by-law authorizing an application under Part V of the *Environmental Protection Act, 1971* for a certificate of approval for a waste disposal site in the area until such time as the official plan has been amended to permit such land use. When Halton proceeded with its by-laws for the development of site "F", including a by-law authorizing an application under Part V of the *Environmental Protection Act, 1971*, the present application to quash those by-laws was commenced together with proceedings for an interlocutory injunction restraining Halton, its agents, servants, contractors, consultants or any person acting under its instructions, from submitting or advocating an application for a certificate of approval under Part V of the *Environmental Protection Act, 1971*, and from authorizing the raising or expenditure of any moneys for works, plans or studies related to the construction of a waste disposal facility at site "F".

Counsel for Halton submitted that the *Planning Act*, viewed as a whole, attempts to regulate the ownership and use of land, and that s. 19(1) should be interpreted as prohibiting only by-laws dealing with actual ownership or use. He contended that s. 19(1) has no application to the by-laws under attack, because those by-laws relate only to steps sought to be taken by the municipality that lead up to use or ownership of the lands for a waste disposal site.

I am unable to accept that argument. The purpose of the by-law authorizing an application for a certificate of approval under Part V of the *Environmental Protection Act, 1971*, is to enable Halton to proceed with a waste disposal site at site "F". That purpose, in my judgment, does not conform with the official plan, because waste disposal sites are not a permitted use of land at site "F" under the official plan. Accordingly, in my view, the by-law contravenes the prohibition contained in s. 19(1) of the *Planning Act*. The same is true of the by-laws providing for the raising of money and the acquisition of lands. All the by-laws attacked, therefore, are illegal, in my view, to the extent that they are directed towards the development of a waste disposal site at site "F", except in so far as they provide for applications to amend the applicable official plan and zoning by-law.

I find support for my conclusion in the following passage from the judgment of Henry, J., in *Re Cadillac Development Corp. Ltd. et al. and City of Toronto* (1973), 1 O.R. (2d) 20 at p. 28, 39 D.L.R. (3d) 188:

> . . . what the Act does is, by s. 19, to place limits on the passing of future by-laws affecting the area to which the plan relates in that they must conform to it. Thus, it is ensured that as the municipality develops, purposefully or otherwise, the legislative changes through the by-laws necessary to allow land development to proceed are gradually channelled in the direction of implementing the policy set out in the Official Plan. Thus, a municipal council that wishes to give effect to the Official Plan or any part of it is free to proceed (subject to objections being brought before the Ontario Municipal Board) under s. 35 but a council that wishes to permit development that conflicts with the policy of the plan is restrained and must first have recourse to the cumbersome machinery for amending the plan and the meticulous scrutiny it entails.

Halton has now completed the investigation and tests which were necessary before it could properly choose the most appropriate location for the required waste disposal site. On the basis of those investigations and tests, and on the advice of its consultants, it has selected site "F". The effect of s. 19(1) of the *Planning Act*, in my view, is that Halton, before proceeding with the development of site "F" as a waste disposal site, must cause the official plan to be amended to permit that land use in the locality in which site "F" is located. Such amendment of the official plan, in my view, must take place before any by-laws are passed for the development of site "F", now that site "F" has been chosen as the best location.

For the foregoing reasons, there will be an order quashing By-laws 50-77, 52-77, as amended by By-law 159-77 and By-law 89-77, to the extent that each of such by-laws relates to the development of site "F" as a waste disposal site, but not in so far as they provide for applications to amend the applicable official plan and zoning by-law. The applicants will have their costs of the application, with any moneys paid into Court by the applicants under s. 283 of the *Municipal Act*, R.S.O. 1970, c. 284, to be paid out to the applicants.

Counsel for Halton assured me that if I were to decide that an amendment to the official plan was necessary before an application could be made for a certificate of approval under Part V of the *Environmental Protection Act, 1971*, or otherwise for the development of site "F" as a waste disposal site, that Halton would abide by such decision, subject of course, to any right of appeal. The injunction, therefore, is unnecessary and the application for an interlocutory injunction will be dismissed without costs.

Order accordingly.

whose advent might come about in the future which would be eliminated to the detriment of the Owen Sound area.

Accordingly the Board will approve the Official Plan amendment as proposed with the following modifications:

> The second and fourth paragraphs as found on page 6 of the Official Plan Amendment, Part B, being part of Section 2.C, shall be deleted and the following substituted therefor.
>
> > For purposes of this Official Plan Amendment, without derogating from the generality of the foregoing definition of Major/Traditional Department store, any one of Eaton's, Simpson's, Sears and the Bay shall be deemed to be such a store and an example of what is intended by the definition.
> >
> > For purposes of this Official Plan Amendment, without derogating from the generality of the foregoing definition of a Discount/Promotional Department Store, any one of Woolco, Towers, K-Mart, Zellers and Miracle Mart shall be deemed to be such a store and an example of what is intended by the definition.

By-law 1980-12 serves to implement the intent of the Official Plan amendment and is satisfactory. It is approved.

The Board's decision is obviously not to the satisfaction of the Core Development Committee. The Board in that connection points out that it seriously doubts that the Core Development Committee's position could have been more strongly or ably presented. In the Board's view, the facts and the reasonable interpretation of them simply do not support the position taken in objection.

RE REGIONAL MUNICIPALITY OF HALTON AND TOWN OF MILTON et al.

Ontario High Court of Justice, Osler J. July 3 and September 9, 1981.

Official Plan — Appeal — Contempt of Court — Ontario Municipal Board ordering town to amend Official Plan to provide for regional sanitary landfill site — Board's order filed as judgment of Supreme Court — Town Council refusing to implement Board's order — Whether town councillors in contempt of Court for refusing to pass requisite by-laws.

Zoning — Appeal — Contempt of Court — Ontario Municipal Board ordering town to amend zoning by-law to provide for regional sanitary landfill site — Board's order filed as judgment of Supreme Court — Town Council refusing to implement Board's order — Whether town councillors in contempt of Court for refusing to pass requisite by-laws.

Statutes and regulations — Ontario Municipal Board Act, R.S.O. 1970, c. 323, s. 85(1) — Contempt of Court — Ontario Municipal Board's order directing amendments to Official Plan and zoning by-law filed as judgment of Supreme Court — Town council refusing to implement Board's order — Whether town councillors in contempt of Court for refusing to pass requisite by-laws.

Milton: held in contempt for refusal to implement bylaws implementing OMB decision

Procedure — Contempt of Court — Town Council refusing to implement Ontario Municipal Board order directing amendments to Official Plan and zoning by-law — Board's order filed as judgment of Supreme Court — Whether town councillors in contempt of Court for refusing to pass requisite by-laws.

Applications by a regional municipality (Halton) to amend its area municipality's local Official Plan and zoning by-law to permit a regional sanitary landfill site, were refused by the local municipality (Town of Milton). Appeals to the Ontario Municipal Board were granted, and the Board orders directing the changes were filed as judgments of the Supreme Court of Ontario pursuant to s. 85(1) of the *Ontario Municipal Board Act*, R.S.O. 1970, c. 323 (now R.S.O. 1980, c. 347). When the Council of the local municipality still refused to implement the changes, contempt of Court proceedings were commenced by the regional municipality.

Held, the members of Council were in contempt of the judgments of the Court consequent upon the filing of the Ontario Municipal Board orders. The Legislature had given the Board the power to make such mandatory orders directing changes to Official Plans and zoning by-laws, with enforcement being left to the Court. The motive of members of Council in their persistent refusal to pass the by-laws was irrelevant to the question of whether contempt was established, although motive may be an important factor to take into consideration when penalties are considered. An opportunity to purge the contempt by passing the requisite by-laws was granted by the Court, and the by-laws were thereafter passed by the town. In the circumstances, it was an adequate penalty to require the respondents to pay the costs of the applicant on a solicitor-and-client basis.

APPLICATION to the Supreme Court of Ontario for an order finding municipal councillors in contempt of Court for wilfully disobeying orders of the Ontario Municipal Board.

E. Sexton, Q.C., for appellant.

L. S. Gangbar, for respondents.

OSLER J. (orally):—I am dealing today with an application made by the Regional Municipality of Halton for an order finding the Mayor and each councillor of the Town of Milton and the Corporation of the Town of Milton in contempt of Court for wilfully disobeying orders of the Ontario Municipal Board issued on June 15, 1979, and entered on March 5, 1980, and for consequent penalties.

The matter arose from an unfortunate but persistent disagreement between the two municipal bodies as to the creation and location of a landfill site to fill a portion of the requirements of the region for waste disposal. Upon its creation in 1974, the Regional Municipality adopted the ongoing intention of its predecessor municipality to create a new sanitary landfill for regional disposal purposes on what is known as site "F", a location within the Town of Milton which is itself, of course, within the region.

The region requested the town to pass the necessary by-laws.

The region's own instruments having been struck down by the Courts by reason of their being contradictory to the town's Official Plan [*Re Holmes et al. and Regional Municipality of Halton* (1977), 16 O.R. (2d) 263, 2 M.P.L.R. 153], the region applied to the Municipal Board for orders requiring the town to amend its Official Plan so as to provide for the use as a landfill site of the location proposed and to create by by-law the actual site. After a hearing that lasted through a period of three months, the Board decided in favour of the regional municipality and ultimately the formal orders of the Board as settled by the Board and which attached the actual by-laws required were entered on March 5, 1980. Appeals from the decision of the Board were taken to the Divisional Court and to the Lieutenant-Governor in Council on behalf of the town and both were dismissed.

After the filing of the present application before me, an application was made to the Ontario Municipal Board by the town to modify or amend its original orders. The decision of the Board rejecting the application was released this day and, in fact, these proceedings were adjourned for some hours pending the receipt of that decision. Meanwhile, the orders of the Board which must now be taken as final, every avenue of appeal or amendment having been exhausted, were entered in this Court on April 29, 1981, and under the *Ontario Municipal Board Act*, R.S.O. 1970, c. 323 [now R.S.O. 1980, c. 347] such orders thereby became judgments of this Court. It is quite plain from the material before me, consisting very largely of correspondence between solicitors and officials of the two municipalities, that the Council of the Town of Milton has refused to implement the orders. This being a motion to hold the respondents in contempt, I must be satisfied beyond a reasonable doubt that this is so and I am so satisfied. The motive of the members of council in their persistent refusal is a matter that is really irrelevant to my basic decision though it may be an important factor to take into consideration when penalties are being considered. Having made the finding I have, I really have no alternative but to find the Mayor, and I refer to the present Mayor and Council and, once again, I refer only to the present members of Council, in contempt of the judgments of this Court consequent upon the filing of the Municipal Board orders.

motive only relevant re. penalty

I refrain from any finding with respect to members of Council who had ceased to be such on April 29, 1981, as I have made no decision regarding the possibility of any date earlier than the filing date being taken into consideration in such a finding. Counsel for the town says, and I have no reason to ignore or disbelieve his representations, that Town Council and its members have been sincerely concerned over the effect of s. 6(1) of the *Environmental Assessment Act*, 1975 (Ont.), c. 69 [now R.S.O. 1980, c. 140]. This concern may well have been genuine, but in my view is not well founded. Paragraph (1)(*a*) of s. 6 provides:

> 6(1) Where a proponent is required under this Act to submit to the Minister an environmental assessment of an undertaking,
>
> (*a*) a licence, permit, approval, permission or consent that is required under any statute, regulation, by-law or other requirement of the Province of Ontario, an agency thereof, a municipality or a regulatory authority, in order to proceed with the undertaking shall not be issued or granted; and
>
> . . . . .
>
> unless,
>
> (*c*) the environmental assessment has been submitted to and accepted by the Minister; [and certain other things have followed]

The short answer is that the section did not exist in its present form or apply at the date of the Board's decision and has no retrospective effect so far as that decision is concerned.

By reason of a change in the regulations, it now appears, as the parties agree, that there must be an environmental assessment hearing before the landfill site can be proceeded with. The town will, therefore, have its opportunity to present to the hearing Board the arguments favouring an alternate site favoured by the town and, in effect, to oppose what will then be its own by-law. Nevertheless, the Legislature in its wisdom has given the Ontario Municipal Board the power to make mandatory orders of this kind; enforcement has been left to the Court and I therefore have no alternative but to make the finding I have enunciated above. The contempt may be purged by passing the requisite by-laws in the form imposed by the Board not later than July 31st of this year. The application will be adjourned until Wednesday, September 9th, to consider the matter of penalty.

September 9, 1981.

This application was disposed of by me on July 3, 1981, and at that time I made a finding that the Council and its current members were in contempt by reason of their failure to conform to orders of the Ontario Municipal Board which had been made effectively judgments of this Court.

The matter resulted from what sometimes appears to be the unnecessary proliferation of levels of Government in our community and the Corporation, as I have found, had a sincere difference of opinion with the Regional Municipality with regard to the siting of a waste disposal facility. Notwithstanding such difference of opinion, it was the duty of the Corporation to give effect to the orders of the Board and I found myself persuaded beyond a reasonable doubt that they had failed to do so.

In brief reasons given at the initial hearing on July 3, 1981, *supra*, I indicated that the contempt might be purged by passing the requisite by-laws in the form imposed by the Board not later than July 31, 1981. I am assured by counsel that this instruction was carried out on July 27, 1981, and under those circumstances it would not be appropriate to impose a severe penalty upon the Corporation or its members. This is a case where it would be appropriate to accept the submissions of counsel that an adequate penalty would result from requiring that the respondents pay the costs of the applicant on a solicitor-and-client basis.

I have had some concern about the impact of this decision upon the various respondents including individual members of council as well as the Corporation. In the circumstances, I am not inclined to differentiate and the order for the payment of costs will therefore be made against all respondents dealt with in my reasons of July 3, 1981.

Judgment accordingly.

RE NIAGARA PLANNING AREA OFFICIAL PLAN

Lieutenant-Governor in Council. August 6 and 20, 1981.

Official Plan (agricultural) — Comprehensive Regional Plan — Preservation of unique Niagara fruit lands — Government policy — Extent of urban area boundaries — Factors to be considered — Restrictive consent to convey policies appropriate — Whether Official Plan may limit granting of consents — Minimum separation formula for livestock operations considered.

Severance — Official Plan policies — Restrictive consent to convey policies appropriate in unique agricultural area — Whether Official Plan may provide for consents "only" when certain criteria are fulfilled — Whether undue interference with Committee's legislative function to grant consents — Special provisions for retiring farmers added by Cabinet — Bona fide, full-time farmer defined.

Government policy — Preservation of unique farm lands — Tender fruit and grape lands of Niagara Region — Restrictive policies governing consents to convey appropriate — Extent of urban area boundaries in issue — Factors to be considered reviewed.

Jurisdiction — Official Plan providing for consents to convey "only" if certain criteria met — Whether interference with discretionary powers held by Committee of Adjustment or Land Division Committee — Whether Official Plan may include policies limiting consents to convey — Comparison with powers of Committee on minor variance application.

owners also argue that levies cannot be made on rezonings — only on plans of subdivision.

The appeals before the Board for an order of the Board directing the City of Mississauga to pass the necessary by-laws to rezone the subject lands for industrial purposes are not opposed by the city on the usual planning grounds. Industrial zoning of the tablelands is accepted as appropriate and conforms to the city's Official Plan.

The city's position is that development should be by plan of subdivision and that, since the owner has no specific development plans at this time, rezoning is premature. The city argues that proper controls over development, particularly when the acreage involved is substantial, can only be achieved through the subdivision process.

Evidence before the Board confirms that the zoning proposed for both the Yelodim and Carlro lands conforms with the Official Plan of the city of Mississauga. The zoning is considered "appropriate" by the city as well as by the owners.

Evidence also confirms that all necessary municipal services are available to the site. On proper planning grounds, rezoning of the subject lands cannot be considered premature.

The city's case for prematurity is based on inability to extract lot levies from the developer at the rezoning stage — not sufficient nor proper grounds to deny the rezoning proposed.

The Board believes that the city can exercise adequate control in development through the application of site plan controls under s. 40 of the *Planning Act*, R.S.O. 1980, c. 379, and under the consent process, should application for severance of part or parts of the appellants' holdings be made at some future date.

The appeals therefore are allowed and the City of Mississauga is directed to pass by-laws in the form of those filed as exs. 31 and 32 in these proceedings.

TOWN OF MILTON v. REGIONAL MUNICIPALITY OF HALTON

OMB decision not to vary OMB orders

E. A. Seaborn and A. J. L. Chapman, Q.C. *July 3, 1981.*

Motion for review — To vary Ontario Municipal Board orders requiring passage of Official Plan and zoning amendments to permit Regional sanitary landfill site — Public hearing under Environmental Assessment Act, 1975 required by subsequent Regulation — Town refusing to pass amendments ordered — Town objecting that it might be open to Court action if amendments passed prior to obtaining final approvals under other Acts — Whether Environmental Assessment Act, 1975 applicable when Board's order already finalized — Discretion of Board to grant review not exercised in circumstances.

Services — Garbage disposal — Sanitary landfill site — Ontario Municipal Board's orders issued March, 1980, directing passage of Official Plan and zoning by-law amendments permitting sanitary landfill site — Town refusing to implement orders and seeking motion to review — Public hearing under Environmental Assessment Act, 1975 required as of February, 1981 — Whether amendments premature until final approvals under other Acts obtained — Whether Environmental Assessment Act, 1975 applicable when Board's order already finalized — Discretion of Board to grant review not exercised in circumstances.

Statutes and regulations — Environmental Assessment Act, 1975 (Ont.), c. 69, s. 6 — Ontario Municipal Board orders, issued March, 1980, directing passage of amendments to Official Plan and zoning by-law to permit sanitary landfill site — Public hearing under Environmental Assessment Act, 1975 required as of February, 1981 — Town seeking to review and vary Board's orders by delaying implementation — Whether amendments premature until final approvals under other Acts obtained — Whether Environmental Assessment Act, 1975 applicable when Board's order already finalized — Discretion of Board to grant review not exercised in circumstances.

MOTION under s. 42 of the *Ontario Municipal Board Act*, R.S.O. 1970, c. 323, for review of Board orders directing amendments to an Official Plan and restricted area by-law (R 781380, R 781381 and E 781673).

F. E. Leitch, Q.C., for Corporation of the Town of Milton.
J. Edgar Sexton, Q.C., and *Douglas Hodgson*, for Regional Municipality of Halton.

A. J. L. CHAPMAN, Q.C., MEMBER:—The Municipal Corporation of the Town of Milton brings this motion to vary the Ontario Municipal Board's orders, dated June 15, 1979, and issued and entered March 5, 1980, so that an Official Plan amendment and the restricted area by-law amendment thereby ordered to be passed would not have to be passed and come into effect until approval of the use of the lands for a sanitary landfill site, pursuant to the provisions of the *Environmental Assessment Act*, 1975 (Ont.), c. 69 [now R.S.O. 1980, c. 140], had been obtained.

The motion is brought under s. 42 of the *Ontario Municipal Board Act*, R.S.O. 1970, c. 323 [now R.S.O. 1980, c. 347]. Section 42 reads as follows:

> 42. The Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it.

The power given to the Board by that section to vary its orders is clearly discretionary. The Board has considered the affidavits of Roy Main, filed, the affidavit of Dennis Y. Perlin, filed, and the submissions of counsel for the Town and the Region of Halton, and after thinking about it for a few days, we both feel strongly that this is not an instance where the Board should exercise its discretion in favour of the town and grant the order requested and, accordingly, the motion is dismissed.

The facts are set out in the affidavits filed. Briefly, after a lengthy hearing, the Board's decision was released June 15, 1979. The Town of Milton asked the Divisional Court for leave to appeal that decision. The Divisional Court dismissed the application for leave to appeal with costs. The Town of Milton and others asked the Cabinet to rescind the said decision or order a new public hearing. The Cabinet dismissed the town's petition and confirmed the Board's decision. In January of 1980, the Region of Halton, because agreement with the town on the form of the order could not be reached, brought a motion to this Board for directions in settling the form of the orders. On March 5, 1980, the Board's orders were issued and entered and it will be noted from an examination of those orders that the Official Plan amendment and amending by-law were attached to the orders as schedules and made part of the Board's orders. All that remained to be done was for Council of the Town of Milton to pass the by-laws.

On or about June 3, 1980, the Regulations under the *Environmental Assessment Act, 1975* were changed so as to bring municipal projects under that Act at the discretion of the Minister [O. Reg. 468/80, s. 2]. On February 9, 1981, the Minister of the Environment issued an order under the *Environmental Assessment Act, 1975*, that the Act applied to the proposed undertaking at what is referred to in these proceedings as Site "F" and that the public hearing be under the provisions of that Act and not under the provisions of the old *Environmental Protection Act*, 1971 (Ont.), c. 86 [now R.S.O. 1980, c. 141].

June 3/80 municp. brt under EAA.

Feb. 9/81

On May 7, 1981, the Region of Halton launched contempt proceedings against the Town of Milton [12 O.M.B.R. 292]. That matter was adjourned until July 3, 1981, at the request of the Town of Milton and the Board was informed by Mr. Leitch, counsel for the town, that he will be requesting a further adjournment on the 3rd of July next in the event the Board's decision on this motion, which was brought by Milton on May 28, 1981, has not been received. Briefly, those are some important dates and happenings in this long and unhappy history. The facts are set out, and set out in more detail, in the affidavits filed and there is really little dispute about them.

Mr. Leitch argues that if the Board's orders are complied with and the landfill site is not approved after the environmental hearing, it might be difficult to amend the Official Plan and rezone the land. We hardly think so and we note a permitted use is "Agricultural Uses" which was the zoning on the lands before the Board's hearing. There is no merit in that argument at all. Mr. Leitch further argues that if the Region fails to get approval at the environmental hearing for Site "F", others, meaning the present owners of the land, could apply for approval of the site as a sanitary landfill under the existing zoning. Why would a private owner go the expense of an environmental assessment hearing when a public body had failed to obtain the necessary approval? There is no merit in that submission.

Mr. Leitch further argues that, from a practical point of view: "How is the Region hurt if the Board does decide to vary its orders as requested?" One might well ask: "How is the Town hurt if the Board declines to vary its orders?" There is no merit in the argument, but it leads us to his main argument and that is based on s. 6 of the *Environment Assessment Act, 1975*.

Mr. Leitch argues that s. 6 of the said Act might leave Town Council open to Court action if, at this date, it passed an Official Plan amendment and zoning by-law authorizing a sanitary landfill site at Site "F" before final approvals under other Acts were obtained. The Board notes that before the *Environmental Assessment Act, 1975*, was in the picture, the Region had attempted to start this exercise by making application for approval under the *Environmental Protection Act, 1971*. At that time the Town of Milton supported successfully an application to the Courts, the position that first, you must have the zoning in place. Accordingly, the Region commenced the Official Plan amendment and zoning amendment applications that led to the Board's orders of June of 1979.

Everything was completed, the hearing, the decision, the appeal process, long before the *Environmental Assessment Act, 1975*, came into the picture. The Town of Milton was in a position where it had to pass the subject by-laws before the Regulation was changed. We cannot conceive that Milton would be in conflict with s. 6 of the 1975 Act if it now passed the by-laws because the Act did not apply when the Board's orders were finalized and all appeals against them exhausted.

We can find no reason why the Board should vary its orders at this date. On the other hand, we do find that the Town of Milton, by its conduct, has refused to date to carry out the Board's orders. Everyone knows the Town of Milton does not like or agree with the Board's orders. They have appealed to the Courts and the Cabinet against them as they have a perfect right to do, but they lost. They are on record as saying they will oppose a sanitary landfill site at Site "F" at the environmental hearings and that is their right and the Board's refusal to vary its orders will not prevent this nor will it allow the Region to commence to place garbage at Site "F" until all the necessary approvals have been obtained. One must start somewhere. But the Board's willingness to amend its orders in these circumstances would amount, in our view, to awarding Milton for delay in implementing the planning process as contemplated by the *Planning Act*, R.S.O. 1970, c. 349 [now R.S.O. 1980, c. 379], which amounts, in our view, to holding the planning process up to ridicule.

There are many rules and regulations that are, no doubt, unpopular. We can oppose them, but when we have opposed them and lost, they should be obeyed until the rules or regulations are changed. If that is expected of the ordinary citizen, surely our elected representatives should set the example.

If we were to amend our orders at this time under these circumstances, we would set a precedent that would, if followed, lead eventually to disrespect for and complete breakdown of the planning process as developed over many years. The Board is not prepared to do so. The motion is dismissed. No costs were asked for so the Board makes no order as to costs.

REGIONAL ASSESSMENT COMMISSIONER, REGION 20 v. CANADIAN MEDICAL LABORATORIES LTD.

W. E. Dyer, Q.C. February 2, 1981.

Business tax — Sale of services — Company operating 14 specimen collection centres for its medical testing laboratories — All services performed through doctor's referrals — Services not available to public directly — Whether nature of business falling under "selling services" from chain of "stores, shops or outlets" within Assessment Act, R.S.O. 1970, c. 32, s. 7(1)(e).

Statutes and regulations — Assessment Act, R.S.O. 1970, c. 32, s. 7(1)(e) — Business tax — Sale of services — Company operating 14 specimen collection centres for its medical testing laboratories — All services performed through doctor's referrals — Services not available to public directly — Whether nature of business falling under "selling services" from chain of "stores, shops or outlets" within taxing section of Act.

[*Regional Assessment Commissioner, Region 10 et al. v. Xerox of Canada Ltd.* (1978), 9 O.M.B.R. 330; revd 10 O.M.B.R. 271, 27 O.R. (2d) 269, 106 D.L.R. (3d) 147; affd 11 O.M.B.R. 238, 30 O.R. (2d) 90, 115 D.L.R. (3d) 428; revd 13 O.M.B.R. 41, 127 D.L.R. (3d) 511n, distd]

APPEAL under s. 63 of the *Assessment Act* (Ont.), from a decision of a County Court Judge (M 80429).

[COURT OF APPEAL]

CA.

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.

use of affid. evid to pt. to complete absence of evid. on an essential pt.

[*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]

Facts - whether fight or not

APPEAL from a judgment of the Divisional Court granting an application for judicial review of an arbitration award and quashing the award.

Div Ct for applic - JR
CA Appeal allowed.

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 admissibility 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.

arbitration - 2 ees fired for ftng, - one filed griev. - arbitrator dismissed grievance

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

I see no reason to characterize the kind of error referred to in : 2(3) as either jurisdictional or non-jurisdictional. It is a statutor ground of judicial review, probably designed to overcom perceived defects in the common law (see Report of the Roy: Commission — *Inquiry into Civil Rights* (1968), vol. 1, at pp. 26: 3 and 310-3), and should not be encumbered with common la limitations on the admissibility of evidence which relate to th ground of error of law on the face of the record. Further, b virtue of s. 2(1), para. 1 of the *Judicial Review Procedure Act 1971* an applicant for judicial review is entitled to the relief h could have obtained on an application for *certiorari*, which woul include the right to relief based on error of law (including absenc of evidence) appearing on the face of the record. It is reasonable therefore, to regard s. 2(3) as accomplishing something more tha: 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 becaus the arbitrator's findings of fact are not required by any statute o law to be based exclusively on evidence admissible before him an on facts of which he may take notice. He refers to s. 37(7)(*c*) of th *Labour Relations Act* which empowers the arbitrator:

> (*c*) . . . to accept such oral or written evidence as the arbitrator or th 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.

difference c̄ our case - policy grds

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.

// > one instance where no evid > but still evid of of fight

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 . . .".

not go beyond supervisory funct to appellate nature. cites Nat Bell.

no complete absence on hydrogen.

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.

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.

to him in some respects to transfer him to a prison in Western Canada, it is not possible now.

a The appeal fails and must be dismissed.

Appeal dismissed.

b **Re Cadillac Fairview Corp. Ltd. et al. and Retail, Wholesale & Department Store Union et al.**

DIV Ct
1987
applic for
JR dism.

[Indexed as: Cadillac Fairview Corp. Ltd. v. R.W.D.S.U.]

High Court of Justice, Divisional Court, Van Camp, Gray and Bowlby JJ.
November 30, 1987.

c **Employment — Labour relations — Certification — Right of access — Shopping centre evicting union organizers seeking to organize employees of store — Employee entrances to store all through centre — Store part owner of company holding leases of shopping centre, although daily management by another company holding majority of shares of leasehold company — Labour board finding companies holding leasehold and managing centre were persons acting on behalf of employer and interfering in union organization — Remedy**
d **allowing union access to shopping centre — Board decision not patently unreasonable — Labour Relations Act, R.S.O. 1980, c. 228, ss. 64, 89(4) — Trespass to Property Act, R.S.O. 1980, c. 511, s. 2(1).**

During a certification drive to organize employees of a large department store which was a prime tenant of a shopping centre, union organizers made approaches
e to employees and distributed leaflets within the shopping centre. There was no employee access point to the employer's store other than through the shopping centre. On several occasions when organizers appeared outside the store's premises in the shopping centre, security personnel evicted them. The union brought an unfair labour practice complaint, alleging violation of s. 64 of the *Labour Relations Act*, R.S.O. 1980, c. 228, which prohibits interference in the formation or selection of a trade union by an employer or a person acting on behalf
f of an employer. The complaints were brought against the company holding the head leasehold interest in the mall (T), which was owned 20% by the store whose employees were being organized and 60% by a second respondent to the complaint, C.F. The store also had two directors on the leasehold company's board, although day-to-day management of the shopping centre rested with C.F. The board found that the two companies, T and C.F., were "persons acting on behalf of an
g employer" within s. 64 and ordered access for union organizers.

On an application for judicial review of the decision, **held**, the application should be dismissed.

privative clauses.
↓
note here some.

Decisions of the Labour Relations Board are protected by the privative clauses in ss. 106(1) and 108 of the Act. The board did not shift the legal burden of proof to
h the applicant companies to demonstrate that they lacked the requisite intent for the commission of an unfair labour practice. Board decision-making by inference is a necessary part of its adjudicative function. In reaching its finding of intent to violate s. 64, the board sought to balance the interests of the applicants and the union. It gave effect to this balance by requiring a finding of intent for a violation of s. 64 and by weighing the strength of the alleged business justification for

Bd's approach was not patent ly unreasonable.

applying the no-solicitation policy to the statutorily-protected union activity. This balancing of interests is the kind of activity to which the board, with its industrial relations expertise, is particularly well-suited. It is not the kind of exercise with which a court ought lightly to interfere. ~~Accordingly, the board's~~ approach and its decision on the question of intent were not patently unreasonable. In finding that the applicants were acting on ~~behalf of the employer, the board~~ weighed the evidence and reached a result which is not patently unreasonable.

The board's order requiring the applicant to allow union organizers orderly access to their property was directly related to the breach of the Act and was neither unreasonable nor incorrect. It did not infringe their rights to demand removal of union organizers under the *Trespass to Property Act*, R.S.O. 1980, c. 511, for s. 2(1) of that Act creates an offence only if a person is not acting under a right or authority conferred by law. The conduct was sanctioned by a valid order of the Labour Relations Board.

Harrison v. Carswell (1975), 62 D.L.R. (3d) 68, 25 C.C.C. (2d) 186, [1976] 2 S.C.R. 200, [1975] 6 W.W.R. 673, 75 C.L.L.C. ¶14,286, 5 N.R. 523, **distd**

Other cases referred to

Re Ontario Public Service Employees Union and Forer (1985), 52 O.R. (2d) 705, 23 D.L.R. (4th) 97; *Re Tandy Electronics Ltd. and United Steelworkers of America* (1980), 30 O.R. (2d) 29, 115 D.L.R. (3d) 197, 80 C.L.L.C. ¶14,017; *Re City of Ottawa and Ottawa Professional Firefighters' Ass'n, Local 162, Int'l Ass'n of Firefighters* (1987), 58 O.R. (2d) 685, 36 D.L.R. (4th) 609; *Re Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board* (1984), 14 D.L.R. (4th) 457, [1984] 2 S.C.R. 412, 84 C.L.L.C. ¶14,069, 55 N.R. 321 *sub nom. Canadian Broadcasting Corp. v. Syndicat des Employes de Production du Quebec et de L'Acadie*; *Gendron v. Municipalité de la Baie-James*, [1986] 1 S.C.R. 401, 66 N.R. 30; *Blanchard v. Control Data Canada Ltd.* (1984), 14 D.L.R. (4th) 289, [1984] 2 S.C.R. 476, 84 C.L.L.C. ¶14,070, 55 N.R. 194; *Syndicat des professeurs du collège de Lévis-Lauzon v. Collège d'enseignement général et professionel de Lévis-Lauzon*, [1985] 1 S.C.R. 596, 85 C.L.L.C. ¶14,028, 59 N.R. 194; *Re Keeprite Workers Independent Union and Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513, 114 D.L.R. (3d) 162; leave to appeal to S.C.C. refused 35 N.R. 85*n*

Statutes referred to

Canada Labour Code, R.S.C. 1970, c. L-1, ss. 182 (rep. & sub. 1977-78, c. 27, s. 64), 189 (re-enacted 1972, c. 18, s. 1; am. 1977-78, c. 27, s. 68; 1983-84, c. 39, s. 37)
Labour Relations Act, R.S.O. 1980, c. 228, ss. 11, 64, 89(4), (5), 106(1), 108
Trespass to Property Act, R.S.O. 1980, c. 511, s. 2(1)

APPLICATION for judicial review of decisions and directions of the Ontario Labour Relations Board.

William J. McNaughton and *J. Gregory Richards*, for applicants.

Paul J.J. Cavalluzzo, for respondent, Retail, Wholesale and Department Store Union AFL-CIO-CLC.

Stephen T. Goudge, Q.C., for respondent, Ontario Labour Relations Board.

The judgment of the court was delivered by

a GRAY J.:—This is an application by Cadillac Fairview Corporation Limited and T.E.C. Leaseholds Limited for judicial review of decisions and directions of the Ontario Labour Relations Board dated June 12, 1985, and November 13, 1985. By these decisions the board found the applicants to be persons "acting on behalf of" the employer, the T. Eaton Company Limited, and, by their
b conduct, to be in breach of s. 64 of the *Labour Relations Act*, R.S.O. 1980, c. 228. These decisions also contain findings and orders against Eaton's. However, those aspects of the decisions and directions dealing with Eaton's are not under review. The decisions and directions are sought to be quashed only in so far as
c they affect the applicants.

The issues on this application may be summarized as follows:

1. Did the board err in law by finding the applicants to be persons "acting on behalf of" the employer within the meaning of s. 64 of the *Labour Relations Act*?
d
2. If such an error was committed, was it of a "jurisdictional" nature so as to deprive the board of the protection of the privative clauses found at ss. 106(1) and 108 of the Act, and so as to require intervention by this court?
e
3. Did the board exceed its remedial jurisdiction in directing the applicants to permit the respondent access to their property for purposes of their campaign to organize Eaton's employees?

Background

The complaints before the board arose out of the circumstances
f surrounding the respondent's unsuccessful attempt to organize the employees of Eaton's at its "flagship" store in the Eaton's Centre.

The Centre is a large retail and commercial complex with over 300 stores and two office towers. It occupies a large part of a city block extending from Dundas St. in the north to Queen St. in the
g south. It is bordered on the east by Yonge St. and on the west, proximately, by Bay St. Eaton's is located at the north end of the complex.

As noted by the board, the unusual feature of the Eaton's store is that none of the employee access points abut public property;
h rather, all are contained within the private property of the Centre itself. One of these entrances is through the St. James Mews at the north-west corner of the mall. The other more popular entrance is also at the north end, but at the level of "two-below" the ground floor. The two-below entrance is at one end of the

Dundas Mall lobby in a semi-enclosed area. At the other end of the lobby is the exit from the northbound subway. In the middle of the lobby is the escalator coming down from "one-below", where the exit from the southbound subway is located.

The head leasehold interest in the land comprising the Eaton's Centre is held by the applicant T.E.C. Leaseholds Limited. The ownership of T.E.C. is made up as follows:

60% Cadillac Fairview

20% Toronto-Dominion Bank

20% Eaton's

The Board of Directors of T.E.C. is comprised of 11 members: seven from Cadillac Fairview; two from the Toronto-Dominion Bank; and two from Eaton's. All of the officers of T.E.C. are from Cadillac Fairview. Day-to-day management and control of the Centre rests solely with Cadillac Fairview and the security personnel in the Centre are in the employ of Cadillac Fairview. Eaton's, along with the other stores in the Centre, are tenants of T.E.C. Eaton's employs more than 3,000 at the Centre, over half of whom are part-time.

In March, 1984, the respondent commenced an organizing campaign for the support of Eaton's employees. The campaign began with distributions of literature on Eaton's premises both by Eaton's employees and by non-employee organizers. Initial distributions were followed by meetings at various off-premises locations. Throughout this initial period correspondence was exchanged between Eaton's and the respondent, with both sides expressing dissatisfaction as to the conduct of the other. Eaton's objected to the respondent's "unauthorized" entry onto their premises and to the "unauthorized" solicitation of its employees during business hours. The latter was deemed by Eaton's to be an unlawful interference and disruption of its business. By letter dated May 18, 1984, Eaton's advised the respondent that all future entry onto their premises for such purposes was prohibited and would be treated as a violation of the *Trespass to Property Act*, R.S.O. 1980, c. 511. The respondent advised Eaton's that it viewed these allegations of misconduct as being wholly unsubstantiated and suggested that Eaton's was acting in violation of the *Labour Relations Act*. The respondent added, however, that attendance at Eaton's premises would not be as necessary if Eaton's would supply a list of names and addresses of potential bargaining unit employees. This list does not appear to have been forthcoming and, in any event, the respondent decided to suspend further in-store distributions by non-employee organizers.

At about 9:30 a.m. on June 22, 1984, the respondent stationed its organizers outside the entrance to Eaton's at the level of two-below. Their intention was to distribute a notice of an upcoming meeting to incoming employees. They were shortly interrupted by security personnel from Cadillac Fairview who advised them that they were on Cadillac Fairview property and that solicitation and distribution of leaflets was prohibited. They were then directed outside to the street line.

The next morning members of the respondent were back at the Centre. This time they were distributing union shopping bags to customers at each of the mall entrances to Eaton's. Approximately five minutes after an employee organizer was admonished by the Eaton's Personnel Manager, a security officer from Cadillac Fairview appeared and the organizers were ejected.

The respondent then continued its organizing efforts through mail-outs to the employees for whom it had addresses. This material exhorted employees to join the union and advised them of the names and telephone locals of employee organizers from whom further information could be obtained. This practice earned a written rebuke from Eaton's on the footing that company telephones were not to be used for union business.

Some time in the summer of 1984, the respondent began stationing organizers outside the entrance to Eaton's at the level of two-below. This occurred both prior to opening in the morning and after the close of business in the evening. With the assistance of a view of the premises, the board confirmed the submission of Cadillac Fairview that usage of the two subway entrances and the escalator is heavy and regular at that time. However, the board also determined that the bulk of this traffic turns away from the direction of Eaton's at a distance from the entrance of some 30 to 40 feet. In addition, the board noted that there had been only one complaint by pedestrians of interference from union organizers.

In September, 1984, the respondent decided to carry out further distributions in the mall area to take advantage of the distraction that would be caused by the visit of the Pope. The plan was to commence distributions outside the store and, when confronted, to retreat to the subway. On these occasions, union supporters were joined by members of an anti-union group called Stop The Union Now (S.T.U.N.).

By the end of September, the applicants had decided to reassert control over their property. They sent a letter to the respondent indicating that all congregating by union and anti-union forces outside the entrance to Eaton's would be prohibited. The union responded by reintroducing its supporters for purposes of further distributions both within and without Eaton's premises. This activity resulted in eviction by Cadillac Fairview security personnel and in employee reprimands by the Eaton's personnel manager.

On October 27, 1984, union supporters reattended at the mall with the support of a city alderman. When approached by Cadillac Fairview security personnel the alderman intervened and the security personnel departed.

Throughout this period the union organizers continued their morning vigil and, upon refusing the request of security personnel to leave the premises, were advised that they could remain so long as they did not impede traffic or distribute leaflets.

Finally, at the end of October, Cadillac Fairview made a decision not to challenge the organizers in any way that might create a media event and deter Christmas shoppers. Accordingly, after an incident on November 9th in which union organizers refused the request of Cadillac Fairview security personnel to stop leaflet distribution, no further preventative action was taken.

In addition to these facts the board considered a letter from the applicant's solicitors directed to the respondent advising of their broad "no-solicitation" policy. The letter states that this policy applies to all malls operated by Cadillac Fairview. It indicates that although there is no written policy as to who may or may not be allowed to solicit or distribute material or use the Eaton's Centre in particular, the practice is to allow charitable, non-profit or public service groups to use the Centre at specific times and locations. Other functions directly related to the commercial activities of the tenants may also be allowed. The letter lists five classes of permitted non-commercial activities, none of which encompass the conduct of the respondent. All of these activities are designed to foster the image of Cadillac Fairview as a "good corporate citizen". The letter also indicates that all tenants are prohibited from soliciting, canvassing, or peddling in or about the Centre. Should tenants or others attempt such distributions or solicitations they are asked to cease by security personnel.

The board also heard testimony on behalf of Cadillac Fairview as to the manner in which the Centre is operated. It was indicated that the operation of the Centre rests solely within the judgment of Cadillac Fairview and that, although a call from any tenant will be met by the attendance of a security officer, the decision as to whether action will be taken rests solely with the officer or his superior.

One of the respondent's co-ordinators testified that union access to the entrance level at two-below was essential to advise employees of their rights to organize and of upcoming meetings. It was added that not all employees read the newspapers and that the cost of newspaper advertising was prohibitive.

Decision of the board

Section 64 of the *Labour Relations Act* states:

> 64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

There was no question that the applicants' conduct had interfered with the "formation, selection or administration of a trade union". Accordingly, the board framed the issues in respect of the applicants as follows:

> [C]an Cadillac Fairview be said on the facts before us to be a person acting on behalf of the employer Eaton's when it acted to prohibit certain organizing activities of the complainant, and did it have the requisite intent to constitute an unfair labour practice when it did so?

// statutory language

Decision of the board dated June 12, 1985, *Board Record*, at p. 181.

The board recognized that the facts relating to both of these issues "were, to a large extent, intertwined". Accordingly, its findings in respect of the question of intent merged with those relating to the issue of whether Cadillac Fairview was "acting on behalf of" Eaton's.

In dealing with these issues, the board took account of the following factors:

1. The 20% holding of T.E.C. in Eaton's;
2. the two seats held by Eaton's on the T.E.C. board of directors;
3. the relationship of landlord and prime tenant between T.E.C. and Eaton's;
4. the finding that Cadillac Fairview pursued an over-all policy that was clearly in line with the desires of Eaton's;
5. the destructive effect of applying the broad no-solicitation policy to the union organizing drive;

6. the finding that Cadillac Fairview lacked a "sustainable business justification" for the application of its broad no-solicitation policy to the organizers stationed at the two-below entrance to Eaton's.

With respect to the last-mentioned factor, the board did not find convincing the evidence of the applicants' management personnel that the policy was pursued independent of the wishes of Eaton's. The board stated:

> Where, however, neither interference, nor, indeed, contact with the shopping public can be shown to exist at all, it becomes more difficult for the landlord to argue that it is acting pursuant to any interest other than that of satisfying the wishes of its tenant (and in this case, its prime tenant in the shopping centre which bears the tenant's name), in restricting, to the extent that it has, the efforts of those seeking to organize the employees of that tenant.

Decision of the board dated June 12, 1985, *Board Record*, at p. 183.

The board considered the effect of the broad no-solicitation policy as follows:

> The problem is, as with the case of employers, that a broad solicitation policy does not stand on the same legal footing *vis-a-vis* activities which are specifically protected by statute, and those which are not.

Decision of the board dated June 12, 1985, *Board Record*, at p. 183.

In the result, the board concluded:

> With respect to the respondent Cadillac Fairview, the Board concludes that its reliance upon a broad no-solicitation policy that interferes with the statutory organizing rights of Eaton's employees, and their access to the complainant at a time and place in the mall where the lack of normal contact with other users of the mall vacates any business justification, is an act done "on behalf of" the employer Eaton's, and in violation of s. 64.

Decision of the board dated June 12, 1985, *Board Record*, at p. 191.

Standard of review

Decisions of the board are protected by the privative clauses found at ss. 106(1) and 108 of the Act. Courts give effect to such provisions by refusing to interfere with decisions of administrative tribunals unless they are the product of a patently unreasonable interpretation of the relevant statute.

The basis for this functional approach to judicial review is set out in the reasons of Blair J.A. for the Court of Appeal, in *Re Ontario Public Service Employees Union and Forer* (1985), 52 O.R. (2d) 705 at pp. 719-20, 23 D.L.R. (4th) 97 at p. 112:

> The judicial attitude to tribunals has changed. Restraint has replaced intervention as judicial policy. Courts now recognize the legitimate role of administrative tribunals in the development and execution of economic, social and political policies ordained by the Legislature. Judges also recognize that tribunals bring to bear in their decisions knowledge and expertise in their particular fields beyond the usual experience of the courts. The new judicial attitude towards tribunals is sometimes described as "curial deference".

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At p. 721 O.R., p. 113 D.L.R., Blair J.A. quoted with approval the following passage from the reasons of Cory J. in *Re Tandy Electronics Ltd. and United Steelworkers of America* (1980), 30 O.R. (2d) 29 at p. 42, 115 D.L.R. (3d) 197 at p. 210, 80 C.L.L.C. ¶14,017:

> ". . . a cautious approach must be taken by the Courts when considering whether a tribunal has lost jurisdiction as a result of something it did during the course of a hearing. The Board may well make a mistake. Unless that mistake is patently unreasonable, or so fundamentally erroneous, that it cries aloud for intervention by the reviewing Court, it should not constitute a ground for depriving the Board of the protection of the privative clause."

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See also *Re City of Ottawa and Ottawa Professional Fire-fighters' Ass'n, Local 162, Int'l Ass'n of Firefighters* (1987), 58 O.R. (2d) 685, 36 D.L.R. (4th) 609.

too broad

In *Re Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board* (1984), 14 D.L.R. (4th) 457, [1984] 2 S.C.R. 412, 84 C.L.L.C. ¶14,069 (the "C.B.C." case), Beetz J., speaking for the Supreme Court of Canada, said that the test of patent unreasonableness does not apply to the interpretation of a provision which "describes, limits or lists" the powers of an administrative tribunal. The court went on to quash as incorrect a board order requiring the parties to submit an outstanding grievance to arbitration during the course of an unlawful strike. This was held to be beyond the powers conferred on the board to deal with unlawful strikes by s. 182 of the *Canada Labour Code*, R.S.C. 1970, c. L-1, which states:

here not ? // of statutory interp

> 182. Where an employer alleges that a trade union has delcared or authorized a strike, or that employees have participated, are participating or are likely to participate in a strike, the effect of which was, is or would be to involve the participation of an employee in a strike in contravention of this Part, the employer may apply to the Board for a declaration that the strike was, is or would be unlawful and the Board may, after affording the trade union or employees an opportunity to be heard on the application, make such a declaration and, if the employer so requests, make an order
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> (*a*) requiring the trade union to revoke the declaration or authorization to strike and to give notice of such revocation forthwith to the employees to whom it was directed;
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> (*b*) enjoining any employee from participating in the strike;
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> (*c*) requiring any employee who is participating in the strike to perform the duties of his employment; and

(*d*) requiring any trade union, of which any employee with respect to whom an order is made under paragraph (*b*) or (*c*) is a member, and any officer or representative of that union, forthwith to give notice of any order made under paragraph (*b*) or (*c*) to any employee to whom it applies. a

More recently, this analysis was applied by the court to overturn a decision of the Quebec Labour Court which had ordered a second arbitration of an employee grievance: *Gendron v. Municipalité de la Baie-James*, [1986] 1 S.C.R. 401, 66 N.R. 30. b

In *Blanchard v. Control Data Canada Ltd.* (1984), 14 D.L.R. (4th) 289, [1984] 2 S.C.R. 476, 84 C.L.L.C. ¶14,070, and *Syndicat des professeurs du collège de Lévis-Lauzon v. Collège d'enseignement général et professionel de Lévis-Lauzon*, [1985] 1 S.C.R. 596, 85 C.L.L.C. ¶14,028, 59 N.R. 194, the court failed to mention the analysis of Beetz J. in the "C.B.C." case and adopted a restrained approach to the review of arbitral decisions. c

In a recent article, Professor Mullan suggests that the results in the "C.B.C." case and *Baie-James*, *supra*, may be explained as a product of the conflict between the remedial powers claimed by the tribunal and a second statutorily sanctioned dispute resolution mechanism: Mullan, "The Supreme Court of Canada and Jurisdictional Error: Compromising New Brunswick Liquor?" 1 C.J.A.L.P. 71 (1987). d

In light of the specific statutory language considered in that case and the approach adopted by the Court of Appeal in *Forer*, *supra*, I would exercise caution in the application of the "C.B.C." analysis to the facts of this case. e

Decision

The submissions of the applicants deal separately with the board's findings and order. f

The board's findings

The applicants challenge the findings of the board on a number of bases. First, it is submitted that the board improperly shifted the onus of proof to the applicants to demonstrate that they lacked the requisite intent for the commission of an unfair labour practice. This is said to be a jurisdictional error of law in that it is alleged to be the product of a "patently unreasonable" interpretation of the Act. g

In support of this submission, the applicants refer to s. 89(5) of the Act, which states: h

89(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act

> as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

This provision shifts the legal burden of proof in cases of unfair labour practice allegations against employers and employers' organizations. Its object is to relieve the complainant of having to adduce affirmative evidence of an anti-union intent. It contains no reference to persons "acting on behalf of" an employer. Nevertheless, the applicants contend, the board's decision amounts to an application of this provision to them.

For a number of reasons, I find this submission to be untenable. First, it is clear that the board did not rely on s. 89(5) itself to satisfy the requirement of intent in respect of the applicants. Second, it is equally clear that the board did not shift the legal burden of proof to the applicant by reliance on a presumption of intent. In reviewing the relevant portion of the board's reasons, it appears that the words "presumption" and "inference" were used interchangeably to describe a situation in which intent might be arrived at after a consideration of the effects of the impugned conduct, the applicants' explanations and all the circumstances of the case.

Board decision-making by inference is a necessary part of its adjudicative function. In Adams, *Canadian Labour Law* (1985), at p. 490, the author offers the following explanation for the approach adopted by labour relations boards to the question of intent:

> Since employers are not likely to confess to anti-union animus, tribunals have to rely on circumstantial evidence to draw inferences about [improper] employer motivation.

This approach, which appears to have been adopted by the board in the present case, is both a necessary and pragmatic response to the requirements of the Act.

In reaching its finding of intent, the board sought to balance the interests of the applicants and the respondent union. It has given effect to this balance by requiring a finding of intent for a violation of s. 64 and by weighing the strength of the alleged business justification for applying the no-solicitation policy to the statutorily-protected union activity. This balancing of interests is the kind of activity to which the board, with its industrial relations expertise, is particularly well-suited. It is not the kind of exercise with which this court ought lightly to interfere. Accordingly, I find neither the board's approach nor its decision on the question of intent to be patently unreasonable.

The applicants' second argument suggests that in finding it to be "acting on behalf of the employer", the board has reached a patently unreasonable conclusion. They support this contention by reference to the "direct and uncontradicted" evidence that the applicants were pursuing an independent policy of no-solicitation.

However, as indicated earlier, the board reached this conclusion after due consideration of the six factors referred to earlier, including the evidence of the independent no-solicitation policy. Although this evidence is largely circumstantial and inferential, I would add that it is unlikely to be otherwise. Here again, I find that the board has weighed the evidence and reached a result which cannot be said to be patently unreasonable.

The applicants also argue that the board based its conclusion on "no evidence" and thereby committed a jurisdictional error. However, in light of the requirement that there be a complete absence of evidence before the courts will intervene (*Re Keeprite Workers Independent Union and Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513, 114 D.L.R. (3d) 162 (C.A.)) this ground of challenge must also fail.

The board's remedy

The applicants' second set of submissions relate to the board's order requiring them to allow the respondent's organizers orderly access to their property at times and places where normal contact with other mall users does not exist.

The board's remedial authority in this case derives from s. 89(4) of the Act which states:

> 89(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,
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> (*a*) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
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> (*b*) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
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> (*c*) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu

of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

This provision is drafted in very broad language and confers a large measure of remedial discretion on the board. As such, it is clearly distinguishable from the provision under consideration in C.B.C., *supra*. It more closely resembles the remedial authority conferred on the Canada Labour Relations Board by s. 189 of the Code, about which Beetz J. had this to say at p. 474 D.L.R., p. 435 S.C.R.: "Though they are not unlimited, these powers are much wider than those the Board has regarding unlawful strikes, and expressly authorize it to itself define the proper remedies . . .".

In *Re Tandy and United Steelworkers of America*, *supra*, this court considered whether identical language to s. 89(4) contained in its predecessor section allowed the board to make an award of damages. At p. 47 O.R., p. 215 D.L.R., Cory J. stated:

> So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent, and provisions of the Act itself, then the award of damages is within the jurisdiction of the Board. The mere fact that the award of damages is novel, that the remedy is innovative, should not be a reason for finding it unreasonable.

In the present case, the remedy granted by the board is directly related to the breach of the Act not only in kind but in extent. Although the issue has since been rendered moot, the effect of the order would be to specifically reverse the conduct that was found to be in violation of the Act. As I read the order, it is likely that the organizing activities must be confined to that narrow strip of property immediately before the entrance to Eaton's at the level of two-below for perhaps one-half hour each day both before opening and after closing. The remedy, therefore, "flows from the scope, intent and provisions of the Act itself". Its novelty renders it neither unreasonable nor incorrect.

The applicants submit, however, that the order infringes their rights to demand removal of the union organizers pursuant to the provisions of the *Trespass to Property Act*. Section 2(1) of this Act states:

> 2(1) Every person who is not acting under a right or authority conferred by law and who,
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> (*a*) without the express permission of the occupier, the proof of which rests on the defendant,
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> (i) enters on premises when entry is prohibited under this Act, or
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> (ii) engages in activity on premises when the activity is prohibited under this Act; or

> (*b*) does not leave the premises immediately after he is directed to do so by the occupier of the premises or a person authorized by the occupier,
>
> is guilty of an offence and on conviction is liable to a fine of not more than $1,000.

I would note that this provision expressly recognizes an exception for persons acting under "a right or authority conferred by law". The applicants seek to support their contention, however, by reference to the decision of the Supreme Court of Canada in *Harrison v. Carswell* (1975), 62 D.L.R. (3d) 68, 25 C.C.C. (2d) 186, [1976] 2 S.C.R. 200. This decision relates to the ability of a mall owner to invoke an equivalent Manitoba statute against an individual picketing a tenant in support of a lawful strike. It would appear to be distinguishable, however, in that the employee conduct had no prior sanction. It did not arise as the result of an otherwise valid order issued by the Labour Relations Board. I do not read this decision as immunizing a mall owner from the reach of decisions and orders issued pursuant to the terms of the *Labour Relations Act*. In this connection, I note the following passage from the majority reasons of Dickson J. at p. 83 D.L.R., p. 219 S.C.R.:

> Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by *due process of law*.

(Emphasis added.)

I do not feel that anything further is gained by the applicants' characterization of their rights as those of a third party. Suffice it to say that having been brought within the scope of the Act, they are no longer a third party to the dispute.

Finally, I do not accept the argument of the applicants that s. 11 of the *Labour Relations Act* impliedly excludes this kind of order. Section 11 states:

> 11. Where employees of an employer reside on the property of the employer, or on property to which the employer has the right to control access, the employer shall, upon a direction from the Board, allow the representative of a trade union access to the property on which the employees reside for the purpose of attempting to persuade the employees to join a trade union.

Section 11 is a limited and specific provision designed to deal with an unusual and well-defined employment circumstance. I do not regard it as conclusive of the balance to be drawn in unfair labour practice complaints relating to access involving non-employers.

The application is dismissed with costs payable by the applicants to the respondent union after assessment thereof. The respondent Ontario Labour Relations Board did not seek or ask for costs.

Application dismissed.

Roy et al. et Hackett et al.*

[Répertorié: Roy c. Hackett]

Cour d'appel, Lacourcière, Cory et Tarnopolsky JJ.A. *19 Octobre 1987.*

Droit constitutionnel — Charte des droits — Droit à l'assistance d'un interprète — Procédure d'arbitrage en français — Plaignant demande un interprète lorsque un témoin témoigne en anglais — Requête accordée — Plaignant ensuite contre-interrogé sur sa connaissance de la langue anglaise — Pas de violation du droit à l'assistance d'un interpète — Charte canadienne des droits et libertés, art. 14.

Droit constitutionnel — Charte des droits — Champ d'application — Société d'état congédie un employé — Syndicat prétend une violation du droit, garanti par la Charte, à l'assistance d'un interprète dans une procédure d'arbitrage — Société mandataire de la couronne et soumise à la Charte — Tribunal d'arbitrage assujetti aux règles de justice naturelle et droit à l'assistance d'un interprète garanti par la Charte — La Charte canadienne des droits et libertés, art. 32 — Loi sur la Monnaie royale canadienne, S.R.C. 1970, c. R-8, art. 5 — Loi sur l'administration financière, S.R.C. 1970, c. F-10, art. 105.

Dans une procédure d'arbitrage entre la Monnaie royale canadienne et un syndicat au sujet du congédiement d'un employé, le plaignant a demandé les services d'un interprète pour l'aider à suivre un témoin qui témoignait en anglais. Le tribunal d'arbitrage a accordé la requête sans entendre le plaignant sur sa connaissance de la langue anglaise. Le plaignant était de langue française, et la plupart de la procédure s'était déroulée en français. Pendant le contre-interrogatoire du plaignant, le procureur de la Monnaie royale l'a contre-interrogé sur sa connaissance de la langue anglaise pour attaquer sa crédibilité. Le tribunal d'arbitrage a confirmé le congédiement. Le syndicat a ensuite présenté une requête en révision judiciaire, soumettant que devant le tribunal il y avait eu violation du droit du plaignant à l'assistance d'un interprète garanti par art. 14 de la *Charte canadienne des droits et libertés*. Le juge d'instance a acceuilli la requête et a annulé la sentence arbitrale. En appel, *arrêt*, le pourvoi est accueilli.

La Cour divisionnaire était un tribunal compétent pour la révision judiciaire de la décision du tribunal d'arbitrage établi en fonction du *Code canadien du travail*. Article 14 de la Charte s'applique à la procédure. L'employeur, la Monnaie royale canadienne, est mandataire de la couronne et ne peut exercer ses pouvoirs que sous le régime de la *Loi sur la Monnaie royale canadienne*, S.R.C. 1970, c. R-8, art. 5 et la *Loi sur l'administration financière*, S.R.C. 1970, c. F-10, art. 105. De plus, La Monnaie royale est sujette au contrôle direct de Sa Majesté par l'inter-

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*An English translation of the following headnote and reasons for judgment will be found at p. 365 *post*.

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difficult to conclude that an immediate termination of the short positions with their almost limitless hazards, was anything but for the protection of the broker.

In my opinion, the appellant acted, under the circumstances, in a manner plainly permitted by its agreements with each of the respondents and there was no breach of contract. In any event, even if necessity and reasonableness were requisites to the deeming that the appellant's action was necessary for its "protection", as found by the learned trial Judge, I am unable to agree with him that the appellant's exercise of its right to purchase the shares was unnecessary and unreasonable.

I agree with the reasons given in the Court of Appeal in their entirety. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Bull, Housser & Tupper, Vancouver.

Solicitors for the defendant, respondent: Drost, Coultas, Stanfield & Whitehall, Vancouver.

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re dealing in reasons evid. with SCC.

Leslie Leonard Woolaston and Roslyn Pamela Woolaston *Appellants*;

and

The Minister of Manpower and Immigration *Respondent.*

1972: May 8, 9; 1972: June 29.

Present: Abbott, Judson, Ritchie, Pigeon and Laskin JJ.

ON APPEAL FROM THE IMMIGRATION APPEAL BOARD

Immigration—Application for permanent admission made after expiry of authorized temporary stay—Deportation order affirmed by Immigration Appeal Board—Evidence that applicant prevented from making formal application before expiry date

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Leslie Leonard Woolaston **Pamela Woolaston** *Appe*

et

Le ministre de la Main-d' **et de l'Immigration** *Intin*

1972: les 8 et 9 mai; 1972:

Présents: Les Juges Abbott, et Laskin.

EN APPEL DE LA COMMISS L'IMMIGRATION

Immigration—Admission après l'expiration du séjour donnance d'expulsion confi d'appel de l'immigration— a été empêchée de faire s

—Court unable to conclude Board ignored evidence —No error of law.

The male appellant, LW, then unmarried, made a timely application on August 30, 1968, for permanent admission to Canada. On being assessed he failed to meet the required minimum standard, both in the opinion of the immigration officer before whom he first appeared on October 7, 1968, and in the opinion of the Special Inquiry Officer before whom he appeared on March 20, 1969. An order of deportation was made against him and that order was subsequently affirmed by the Immigration Appeal Board.

On November 2, 1968, LW married the female appellant, RW, a non-immigrant student under a certificate which permitted her to remain in Canada until December 5, 1968. It was not until after her husband had been ordered deported on March 20, 1969, that she herself formally applied for permanent admission under an application dated April 3, 1969. Her application was not entertained by the immigration authorities who, instead, instituted deportation proceedings against her. She was ordered deported on June 23, 1969.

On appeal to the Immigration Appeal Board, the Board affirmed the order of deportation made against RW on the ground, *inter alia,* that she was not a qualified applicant for permanent admission under the *Immigration Regulations,* not being lawfully in Canada at the time of her formal application for admission.

On appeal to this Court from the decisions of the Immigration Appeal Board affirming the orders of deportation against the appellants, counsel for the spouses conceded that the husband's appeal could not succeed unless that of the wife succeeded, in which case he proposed to submit that had the wife's application been entertained she would have been entitled, if successful, to sponsor the admission of her husband under s. 31(1)(*a*) of the Regulations.

Held: The appeals should be dismissed.

Evidence that, prior to December 5, 1968, RW attended the immigration office and reported her marriage and her intention to apply for permanent residence, but was prevented from making a formal application by being informed that she could not apply on account of her marriage and would be included in her husband's application, was before the

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Arrêt: Les appels dc

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Immigration Appeal Board as part of the transcript of proceedings before the Special Inquiry Officer. It could not be concluded that the Board ignored that evidence and thereby committed an error of law to be redressed in this Court. The fact that it was not mentioned in the Board's reasons was not fatal to its decision. It was in the record to be weighed as to its reliability and cogency along with the other evidence in the case, and it was open to the Board to discount it or to disbelieve it.

What was presented as an error of law was properly a matter of fact upon which no appeal lies to this Court. It followed that the appeal of the wife must be dismissed, and in consequence that of the husband as well.

APPEALS from two decisions of the Immigration Appeal Board affirming orders of deportation against the appellants. Appeals dismissed.

J. A. Ryder, for the appellants.

S. F. Froomkin, for the respondent.

The judgment of the Court was delivered by

LASKIN J.—The appellants, husband and wife, are before this Court by its leave following separate applications for leave and separate appeals from two decisions of the Immigration Appeal Board, dated November 4, 1970, affirming orders of deportation made against them on March 20, 1969, and June 23, 1969, respectively.

The husband, then unmarried, made a timely application on August 30, 1968, for permanent admission to Canada. No objection is taken to the consequential proceedings in the course of which he was assessed under the norms set out in Schedule A to the *Immigration Regulations,* as enacted by P.C. 1967—1616 of August 16, 1967. He failed to meet the required minimum standard, both in the opinion of the immigration officer before whom he first appeared on October 7, 1968, and in the opinion of the Special Inquiry Officer

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C.P. 1967—1616 du
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before whom the male appellant appeared on March 20, 1969. On his appeal to the Immigration Appeal Board, heard on October 6, 1970, that tribunal reviewed the assessment; and although it varied it upward the male appellant still fell below the required minimum standard.

He married the female appellant on November 2, 1968, shortly after his examination by the immigration officer. She, like her husband, had entered Canada on a non-immigrant visitor's visa. She had her status changed to that of a non-immigrant student under a certificate which permitted her to remain in Canada until December 5, 1968. It was not until after her husband was ordered deported on March 20, 1969 (without his wife being included in that order) that she herself formally applied for permanent admission under an application dated April 3, 1969. She was then clearly in breach of the Regulations by reason of the previous expiry of her period of lawful sojourn in Canada. It appears that because of this her application was not entertained by the immigration authorities, who, instead, initiated deportation proceedings against her. The deportation order made against her on June 23, 1969, was grounded on the foregoing breach of the Regulations and on the further ground that she was a member of a prohibited class under s.5(*o*) of the *Immigration Act,* now R.S.C. 1970, c.I-2, as a member of a family accompanying a member thereof who was not admissible to Canada, and the Special Inquiry Officer being of the opinion that hardship would be involved in their separation.

Her appeal to the Immigration Appeal Board was heard, without objection, concurrently with the appeal of her husband. The Board affirmed the order of deportation against her on the ground, *inter alia,* that she was not a qualified applicant for permanent admission under the Regulations, not being lawfully in Canada at the time of her formal application for admission. This feature of the case undercut the submission of the female appellant's counsel, made to the Board, that she was entitled under the *Canadian Bill of Rights* to

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de temps après avoir ét
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Son appel à la Commis
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have her application for permanent admission considered in her own right and independently of that of her husband. The Board correctly noted that no issue of discrimination on the ground of sex or otherwise arose on the facts of the case.

The contention made in this Court on behalf of the wife is that reflected on the question on which leave to appeal here was given. It is as follows:

> Did the Board err in law in holding that the applicant was not entitled to have her application for permanent residence processed in accordance with the *Immigration Act* and regulations thereunder for the sole reason that her application was filed on the 3rd of April, 1969 while her temporary stay in Canada authorized by an Immigration Officer expired on December 5, 1968, without taking into consideration uncontradicted evidence that before the last mentioned date she did attend the Immigration Office and reported her marriage solemnized November 2, 1968 and her intention to apply for permanent residence, but was prevented from making a formal application by being informed that she could not apply on account of her marriage and would be included in her husband's application made on October 7, 1968?

In advancing this contention, counsel for the spouses conceded that the husband's appeal could not succeed unless that of the wife succeeded, in which case he proposed to submit that had the wife's application been entertained she would have been entitled, if successful, to sponsor the admission of her husband under s.31(1)(*a*) of the Regulations. I point out, without ruling upon it, the rejoinder of counsel for the Minister that the husband as a deportee at the material time would not have been eligible to be sponsored. I need not, however, rule on this counter-submission because I am of the opinion that the wife's contention in this Court fails.

Counsel for the spouses relies on slim evidence given by the wife during the hearing held by the Special Inquiry Officer on June 23, 1969, into

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[TRADUCTION] La Com
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the legality of her continued stay in Canada. She testified as follows:

Q. Were you included on your husband's original application for permanent residence?

A. No, I wasn't.

Q. Was the reason for that because you were not married at that time?

A. Yes.

Q. After you were married, did you attend this Immigration Office to advise them that you were married and that you wished to be included in your husband's application?

A. I did come down at a later date but I applied at the desk, and she said I could not apply because I was married at the time, and I would be included in my husband's application.

Q. You would be included in your husband's application?

A. Yes, that is what she told me at the desk.

Q. Would you have come down prior to the expiry of your non-immigrant status which was 5 December, 1968?

A. No I didn't.

Q. You think it was after that?

A. Yes, I think—no, it must have been before because I could remember that it was expiring.

Q. You noticed that it was going to expire so you came down to have that adjusted, did you?

A. Yes.

The female appellant was not then represented by counsel, but she did have counsel before the Immigration Appeal Board, and the evidence upon which she now relies to raise the point of law on which leave was given was before the Board as part of the transcript of proceedings before the Special Inquiry Officer. She had indicated at the conclusion of the hearing by the Special Inquiry Officer that she wished to appeal to the Board and to appear in person before it. She gave evidence before the Board, and her counsel referred to the transcript of the special inquiry in the course of her examination, but without mentioning the portion of the evidence upon which re-

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[TRADUCTION] C
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Q. Vous seriez
époux?

R. Oui, c'est ce
ception.

Q. Vous y êtes
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1968?

R. Non.

Q. Vous pensez

R. Oui, je crois
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Q. Vous vous ê
et vous êtes venue

R. Oui.

L'appelante n'é
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liance is now placed. She herself did not return to this evidence in testifying before the Board.

I am unable to conclude that the Board ignored that evidence and thereby committed an error of law to be redressed in this Court. The fact that it was not mentioned in the Board's reasons is not fatal to its decision. It was in the record to be weighed as to its reliability and cogency along with the other evidence in the case, and it was open to the Board to discount it or to disbelieve it.

especially lengthy & extensive record as was case in Hurn

I am satisfied upon a review of the entire record that what has been presented as an error of law is properly a matter of fact upon which no appeal lies to this Court. It follows that the appeal of the wife must be dismissed, and in consequence that of the husband as well.

Appeals dismissed.

Solicitors for the appellants: Cameron, Brewin & Scott, Toronto.

Solicitor for the respondent: S. F. Froomkin, Ottawa.

Gray Coach Lines Limited *Appellant*;

and

The Corporation of the City of Hamilton *Respondent.*

1972: June 21, 22; 1972: October 18.

Present: Judson, Hall, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Compensation—Expropriation of appellant's bus depot—Whether appellant entitled to compensation for "reasonable cost of equivalent re-instatement"—Whether lands "devoted to a purpose of such a nature that there is no general demand or market for land for that purpose"—Basic compensation—The Expropriations Act, 1968-69 (Ont.), c. 36, ss. 13, 14(1), (2).

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Elle n'a pas elle-même
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Appels rejetés.

*Procureurs des appe
Scott, Toronto.*

Procureur de l'intim

Gray Coach Lines Lim

et

The Corporation of the Hamilton *Intimée.*

1972: les 21 et 22 juin;

Présents: Les Juges Juds
Laskin.

EN APPEL DE LA COUR

*Expropriation—Indem
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14(1), (2).*

SCC

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.

Bd. dismissed Assoc's appn for union

SCA - mandamus granted agst union

SCC - appeal by union granted

Union internatior
services, local no.

et

Nipawin District
(*Requérante*) *Inti*

et

Nipawin Union H
des relations de t
Intimés.

1973: le 18 juin; 197

Présents: Les Juges
et Dickson

EN APPEL DE
SASKATCHEWAN

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La Commission a
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ciation. L'Union a ensuite int
Cour.

Held: The appeal should be allowed and the Board's dismissal of the association's application confirmed.

Arrêt: L'appel doit être accu
Commission de la demande de l'

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.

re stat. defn.

La Commission a traité de
était saisie, à savoir si l'associat
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prétention selon laquelle, en ce
conclu que la S.R.N.A. était
représentant d'un employeur ou
Conseil de la S.R.N.A. étaient d
représentants d'employeurs, et s
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La Commission a conclu sp
S.R.N.A. n'était pas un «syndic
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courant de la définition
«employeur» et «représentant d
dans le *Trade Union Act*, et qu
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volontairement omis d'en tenir
conclu que l'association était un
née par l'employeur.

Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796, [1970] S.C.R. 425, distinguished.

Distinction faite avec l'arrêt
Insurance Co. c. International
Engineers, Local 796, [1970] R.C

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.

APPEL à l'encontre d'un
d'appel de la Saskatchewa
ordonnance de la Commissio
travail et ordonnant qu'un br
mandamus soit délivré comm
l'association intimée. Appel a

G. J. D. Taylor, Q.C., for the appellant.

G. J. D. Taylor, c.r., pour l'

J. E. Gebhard, for the Labour Relations Board of Saskatchewan.

J. E. Gebhard, pour la Co
tions de travail de la Saskatch

D. K. MacPherson, Q.C., for the Nipawin District Staff Nurses Association.

D. K. MacPherson, c.r., po
trict Staff Nurses Association

[1] [1973] 4 W.W.R. 616, 36 D.L.R. (3d) 440.

[1] [1973] 4 W.W.R. 616, 36 D.L.R.

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 d

LE JUGE DICI
l'intimée Nipaw
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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:

stat. defn

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 interje
appel à cette Cour.

Les clauses *a*), *b*) et *c*)
mesure où ils sont applicabl
suit:

[TRADUCTION] 5. La Commi
ordonnances:

a) déterminant si l'unité a
aux fins de négocier collecti
unité d'employeur, une unité
unité d'établissement, ou un
dernières ou quelque autre un

b) déterminant quel syndicat,
la majorité des employés d
ployés appropriée;

c) enjoignant un employeur
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Les articles suivants du *Tr*
aussi pertinents:

[TRADUCTION] 2. (*l*) «syndica
nisation de travail qui n'est
dominée par l'employeur.

. . .

e) l'expression «organisatio
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formation ou l'administration
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g) «employeur» signifie:

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ii) un employeur qui empl
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iii) en ce qui concerne les e
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que la Commission peut, à s
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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.

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-

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Saskatchewan;

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En rejetant la
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S.R.N.A. tentait

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 deviendraient pas membres non-infirmières». L'assemblé l'Association intimée a été p des relations de travail de la été tenue au Nipawin Unior des relations de travail avait d'ordre du jour ainsi qu'un p constitution pour la nouvell dépenses ont été payées pa demande d'accréditation a é de la Commission avec une gnement émanant de lui. Il a les services de l'avocat repr tion à l'audition tenue devant été retenus et payés par la S. de la décision de la Commi demande se trouve dans l'alin

[TRADUCTION] Sur la preuve q ment à cette demande, la Comn exprimé par Miss Sutherland da pense qu'une organisation domi le conseil de la S.R.N.A. équi équivaloir en fait à un contrô négociation par la gestion ou le p

«L'avis exprimé par M^lle^ Su contenu dans le numéro d'av Bulletin publié par la S.R.N. Sutherland, alors agent des r de la S.R.N.A. a déclaré:

[TRADUCTION] Le conseil de la S toujours constitué d'infirmières c l'approbation du conseil équivau contrôle du processus de négocia Cependant, il sera nécessaire de p ment le statut de l'association d'i au sein de la S.R.N.A.

Les motifs de la décision d contiennent une citation tiré *Collective Bargaining Law in* 207, et qui se lit comme su «Les lignes de conduite déc indiquent clairement que les s être libres de l'influence ou de l'employeur», et la Commis motifs en statuant que l'Asso est une organisation dominée

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

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[2] [1962] S.C.R. 48.
[3] [1969] S.C.R. 898.

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[2] [1962] R.C.S.
[3] [1969] R.C.S.

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.

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[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.

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[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.

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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.

Je suis donc confirmer le re demande de l'A: Cour et en Cour dication de dépe ou contre elle.

Appeal allowed with costs.

Appel accueill.

Solicitors for the appellant: Goldenberg, Taylor, Tallis & Goldenberg, Regina.

Procureurs Taylor, Tallis &

Solicitors for the applicant, respondent: MacPherson, Leslie & Tyerman, Regina.

Procureurs de Tyerman, Reginc

Solicitor for the Labour Relations Board of Saskatchewan: J. E. Gebhard, Regina.

Procureur de travail de Saskai

I should add that if I had thought that Dr Gerson had failed in his duty to inform her of the implications inherent in the second injection, I would not have been satisfied that if properly informed Miss Chatterton would have chosen not to have it. The whole picture on the evidence is of a lady desperate for pain relief, who has just been advised by Mr Crymble to let Dr Gerson try again. When asked what she would have done she said that she would have refused because she knew her family was opposed to the second operation, because she knew how much it hurt and what it was like, and because she still had the pain and was beginning to learn to put up with it. She did not say she would have refused because the numbness following the first injection was unacceptable, or that she was not prepared to risk slight muscle weakness again. In my judgment the reasons which she did mention would all have been equally cogent whether she had been told again what she had been told before the first injection or not.

12 Conclusion

Accordingly the action fails and must be dismissed.

Judgment for the defendants.

Solicitors: *Chapman & Wilson*, Brighton (for the plaintiff); *Hempsons* (for the defendant).

K Mydeen Esq Barrister.

Whitehouse v Jordan and another

HOUSE OF LORDS

LORD WILBERFORCE, LORD EDMUND-DAVIES, LORD FRASER OF TULLYBELTON, LORD RUSSELL OF KILLOWEN AND LORD BRIDGE OF HARWICH

27th, 28th, 29th, 30th OCTOBER, 3rd NOVEMBER, 17th DECEMBER 1980

Medical practitioner – Negligence – Test of liability – Error of judgment – Hospital registrar testing forceps delivery – Registrar pulling fetus several times with obstetric forceps – Baby born with brain damage – Whether error of clinical judgment amounting to negligence – Whether doctor negligent.

Appeal – Evidence – Finding of fact of trial judge – Inference from finding of fact – Whether appellate court entitled to substitute own inference from finding of fact.

The defendant, a senior hospital registrar, took charge of the plaintiff's delivery as a baby after the mother had been in labour for a considerable time. The notes made by the consultant professor in charge of the hospital maternity unit identified the pregnancy as likely to be difficult and noted that a 'trial of forceps' delivery would have to be tried before proceeding to delivery by Caesarian section. Trial of forceps was a tentative procedure requiring delicate handling of the baby with forceps and a continuous review of the baby's progress down the birth canal, with the obligation to stop traction if it appeared that the delivery could not proceed without risk. Having examined the mother and read the professor's notes, the defendant embarked on a trial of forceps delivery. He pulled on the baby six times with the forceps coincident with the mother's contractions, but when there was no movement on the fifth and sixth pulls he decided, some 25 minutes after the commencement of the trial of forceps, to abandon that procedure and to proceed to a Caesarian section. He then quickly and competently delivered the plaintiff by Caesarian section. The plaintiff was found soon after the delivery to have sustained severe brain damage due to asphyxia. Acting by his mother as next friend he claimed damages for negligence against the defendant alleging that he had pulled too long and too hard on the plaintiff's head in carrying out the trial of forceps and thereby caused the brain damage. At the trial the mother gave evidence that she was 'lifted off' the bed by the application of the forceps and although that description of what happened was rejected by the judge as being clinically impossible, on the suggestion of an expert witness he interpreted it to mean that the forceps were applied with such force that she was pulled towards the bottom of the bed in a manner inconsistent with a properly carried out trial of forceps. The defendant gave evidence that when there was no progress on the fifth pull of the forceps he pulled once more to see if he could ease the head past what might have been only a minimal obstruction but as there was no further progress he decided to proceed to Caesarian section and he had easily pushed the head slightly upwards to effect the Caesarian section. He denied that the head was wedged or stuck prior to the Caesarian section. The judge interpreted his evidence to mean that he had pulled too long and too hard, causing the head to become wedged or stuck. There was also in evidence a report made by the consultant professor shortly after the delivery, from clinical notes and after discussion with the defendant, the tenor of which was that the mother had received correct and skilled treatment and that no blame attached to anyone for the plaintiff's condition. However, in the report the professor referred three times to 'disimpaction' of the head prior to the Caesarian section. At the trial the professor gave evidence that he had used that term as meaning no more than that a gentle push of the head up the birth canal was needed before proceeding to the Caesarian section. There was no unanimity of opinion among the other medical experts as to the meaning of the term 'impacted' or whether it meant that there had been excessive or unprofessional traction with the forceps. The evidence of the medical experts made it clear, however, that the amount of force to be properly used in a trial of forceps was a matter of clinical judgment, although there should be no attempt to pull the fetus past a bony obstruction, and if the head became so stuck as to cause asphyxia excessive force had been used. The judge inferred from the professor's use of the term 'disimpacted' that the plaintiff's head had become so firmly wedged or stuck in the birth canal as to indicate that excessive force had been used in the trial of forceps. The judge found that the brain damage probably occurred during the trial of forceps. From his interpretation of the mother's evidence, the defendant's evidence and the professor's report the judge concluded that in carrying out the trial of forceps the defendant had pulled too long and too hard with the forceps so that the plaintiff's head had become wedged or stuck, that in so doing or in getting the head unwedged or unstuck he had caused the plaintiff's asphyxia, and that in so using the forceps he had fallen below the standard of skill expected from the ordinary competent specialist and had therefore been negligent. The judge accordingly awarded the plaintiff substantial damages. The defendant appealed. The Court of Appeal ([1980] 1 All ER 650) reversed the judge's decision on the grounds that (i) if the judge's finding that the defendant pulled too long and too hard with the forceps during the trial of forceps was accepted, that amounted only to an error of clinical judgment and as such was not negligence in law, and (ii) in any event the court was entitled to, and would, reverse that finding because it was based on an unjustified interpretation of the evidence. The plaintiff appealed to the House of Lords.

Held – Although the view of the trial judge (who had seen and heard the witnesses) as to the weight to be given to their evidence was always entitled to great respect, where his decision on an issue of fact was an inference drawn from the primary facts and depended on the evidentiary value he gave to the witnesses' evidence and not on their credibility and demeanour, an appellate court was just as well placed as the trial judge to determine the proper inference to be drawn and was entitled to form its own opinion thereon. Since the judge's conclusion of fact that the defendant had pulled too long and too hard with the forceps was primarily an inference from the primary facts, no issue of credibility was involved. Accordingly, his conclusion was open to reassessment by the appellate court and it was entitled to find that the evidence did not justify the inference that the defendant negligently pulled too hard and too long with the forceps. It followed that the Court of Appeal was entitled to reject the judge's finding of negligence. The appeal would therefore be dismissed (see p 270 *g h*, p 273 *e* to *g*, p 274 *g*, p 275 *a h j*, p 276 *a b*, p 278 *j*, p 280 *f* to *h*, p 281 *d* to *f*, p 282 *f* to *h*, p 283 *d* to *g*, p 284 *g h*, p 285 *a* to *e*, p 286 *c* to *e*, p 287 *j* and p 288 *f h*, post).

The Hontestroom [1927] AC 37 and *Powell v Streatham Manor Nursing Home* [1935] All ER Rep 58 applied.

Per Lord Edmund-Davies, Lord Fraser and Lord Russell. To say that a surgeon has committed an error of clinical judgment is wholly ambiguous and does not indicate whether he has been negligent, for while some errors of clinical judgment may be completely consistent with the due exercise of professional skill, other acts or omissions in the course of exercising clinical judgment may be so glaringly below proper standards as to make a finding of negligence inevitable. The test whether a surgeon has been negligent is whether he has failed to measure up in any respect, whether in clinical judgment or otherwise, to the standard of the ordinary skilled surgeon exercising and professing to have the special skill of a surgeon (see p 276 *h* to p 277 *c*, p 281 *b c* and p 284 *j*, post); dictum of McNair J in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 121 approved.

Per Lord Wilberforce and Lord Fraser. While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation (see p 276 *a b* and p 284 *h*, post).

Decision of the Court of Appeal [1980] 1 All ER 650 affirmed.

Notes

For the duty to exercise the special skill required in the practice of a profession, see 34 Halsbury's Laws (4th Edn) para 12, and for cases on the degree of skill or knowledge required of a medical practitioner, see 33 Digest (Repl) 526, *65–74*.

Cases referred to in opinions

Bland v Ross, The Julia (1860) 14 Moo PCC 210, Lush 224, 15 ER 284, PC, 1(1) Digest (Reissue) 386, *2696*.

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, [1957] 1 WLR 582, 33 Digest (Repl) 527, *81*.

Chin Keow v Government of Malaysia [1967] 1 WLR 813, PC, Digest (Cont Vol C) 666, *81a*.

Clarke v Edinburgh and District Tramways Co 1919 SC (HL) 35.

Glannibanta, The (1876) 1 PD 283, sub nom *The Transit* 34 LT 934, 2 Char Pr Cas 18, 3 Asp MLC 233, CA, 1(1) Digest (Reissue) 385, *2689*.

Hontestroom (Owners) v Owners of Steamship Sagaporack, Owners of Steamship Hontestroom v Owners of Steamship Durham Castle [1927] AC 37, 95 LJP 153, 136 LT 33, 17 Asp MLC 123, HL, 51 Digest (Repl) 815, *3712*.

Powell v Streatham Manor Nursing Home [1935] AC 243, [1935] All ER Rep 58, 104 LJKB 304, 152 LT 563, HL, 51 Digest (Repl) 816, *3720*.

Appeal

By a writ dated 14th December 1972 the plaintiff, Stuart Charles Whitehouse, an infant suing by his father and next friend Victor Edward Whitehouse, claimed damages against Joseph Alan Jordan and Professor H C McLaren, respectively a senior registrar and consultant professor of obstetrics at Queen Elizabeth Hospital, Edgbaston, Birmingham, and the West Midlands Regional Health Authority for personal injuries sustained on or about 7th January 1970 in the course of his birth at the Queen Elizabeth Hospital, Edgbaston, Birmingham. By notice of discontinuance dated 31st March 1976 the plaintiff discontinued his action against the second defendant, Professor McLaren. On 26th September 1976 Eileen Whitehouse, the plaintiff's mother, was substituted as his next friend. At the trial of the action Bush J gave judgment on 1st December 1978 for damages against the first and third defendants in the sum of £100,000. On 5th December 1979 the Court of Appeal (Lord Denning MR and Lawton LJ, Donaldson LJ dissenting) ([1980] 1 All ER 650) reversed his decision and refused leave to appeal. The plaintiff appealed by leave of the House of Lords granted on 21st February 1980. The facts are set out in the opinion of Lord Wilberforce.

Michael Wright QC and *Desmond Perrett* for the plaintiff.

Ian Kennedy QC, Bernard Hargrove QC and *R Warne* for the defendants.

Their Lordships took time for consideration.

17th December. The following opinions were delivered.

LORD WILBERFORCE. My Lords, Stuart Whitehouse is a boy now aged ten; he was born on 7th January 1970, with severe brain damage. In these circumstances, tragic for him and for his mother, this action has been brought, by his mother as next friend, in which he claims that the damage to his brain was caused by the professional negligence of Mr J A Jordan who was senior registrar at the hospital at Birmingham where the birth took place. There were originally also claims against Professor McLaren, the consultant in charge of the maternity unit to which Mr Jordan belonged, and also against the hospital on its own account. But these have disappeared and the hospital, more exactly the West Midlands Regional Health Authority, remains in the case only as vicariously responsible for any liability which may be established against Mr Jordan.

A large number of claims have been made since the event most of which have now been eliminated or withdrawn. The negligence ultimately charged aginst Mr Jordan is that in the course of carrying out a 'trial of forceps delivery', he pulled too long and too strongly on the child's head, thereby causing the brain damage. The trial judge, after a trial of 11 days in which eminent medical experts were called on each side, and numerous issues were canvassed, reached the conclusion which he expressed in a most careful judgment, that the plaintiff had made good his case: he awarded £100,000 damages. His decision was reversed by a majority of the Court of Appeal (Lord Denning MR and Lawton LJ, Donaldson LJ dissenting) ([1980] 1 All ER 650) which refused leave to appeal to this House. Leave was, however, granted by an Appeal Committee. The essential and very difficult question therefore has to be faced whether, on a pure question of fact, the Court of Appeal was justified in reversing the decision of the trial judge.

My Lords, I need not elaborate on the principles of law which have to be applied. First, it is necessary, in order to establish liability of, and to obtain an award of compensation against, a doctor or a hospital that there has been negligence in law. There is in this field no liability without proof of fault. Secondly, there are strict limitations on the power of an appeal court to reverse the decision of the judge on an issue of fact. These have been well and clearly stated, notably by Lord Sumner in *The Hontestroom* [1927] AC 37 and by the Court of Appeal in *The Glannibanta* (1876) 1 PD 283 at 287. The Court of Appeal had them fully in mind. The main reason why, in the absence of an error of law, the judgment of the trial judge calls for the utmost respect, is that he has seen and heard the witnesses, often, as in this case, including the rival parties (the mother and Mr Jordan). The strength of this consideration will vary from case to case according as conclusions have to be reached as to credibility, or based on demeanour. In the present case they exist but are not compelling. A view had to be and was expressed as to the credibility of the mother; she was, generally, found to be incapable, in the understandable circumstances, of giving reliably precise evidence, but there remains a question whether, though what she said was unacceptable, something of evidentiary value can be extracted from it. On this I consider that the Court of Appeal was entitled to form an opinion. As to the evidence of Mr Jordan, no question of credibility arose; there was no doubt that he was telling the truth as he saw it. The judge did not express disbelief of his account; what he did was to appraise it in relation to such other evidence as was available; this he was entitled to do, but the Court of Appeal, while bound to attach great weight to the judge's views, was able to evaluate it for itself. Thirdly, there was the evidence of Professor McLaren. I think that his demeanour in the witness box must have had an influence on the judge's views, and this calls for complete respect. But as I shall hope to show, the ultimate conclusion to be drawn depends much more on the setting in which his evidence was given, and the relation which it must be thought to have to the events which occurred. Lastly, there were the expert witnesses. The judge was entitled to be impressed by the way in which each of them gave evidence, but he gave no indication how this factor balanced out. In the end, as to the standard of skill to be expected of Mr Jordan, there was little difference of opinion; such as there was related to what they respectively thought Mr Jordan had actually done. This brings us back to the primary issue, as to what really happened in the critical 25 minutes.

The appeal brought out, very clearly to my mind, that the issue does not depend on the *a* endless refinements (for example on the meaning of 'impactation') of the experts, but on one issue: what, if any, evidence of negligence was provided by (a) the evidence of the mother, (b) the report and evidence of Professor McLaren, (c) the evidence of Mr Jordan? Unfortunately the solution of this issue remains one of immense difficulty.

Mr Jordan was at the time a senior registrar, of near consultant status, esteemed by his professional colleagues. There is no question but that he brought the utmost care to bear *b* on Mrs Whitehouse's labour and delivery. If he was negligent at all, this consisted in a departure, in an anxious situation, from a standard accepted by the profession at the time. Put very briefly, it was said to lie in continuing traction with the forceps after an obstruction had been encountered so that the baby's head became 'impacted'. I shall not explain this word at this stage. It is obvious that the error, if error there was, lay centrally in the area of the exercise of expert judgment and experienced operation. Mr Jordan was *c* a member of the obstetrical unit at the hospital headed by Professor McLaren, which had a high reputation; Professor McLaren himself was a distinguished obstetrician, unfortunately ill at the time of the birth.

Mrs Whitehouse was accepted as 30 years of age; this was her first baby. She was small, only 4ft 10½in in height. She was a difficult, nervous and at times aggressive patient. She was unable, or refused, to agree to vaginal examination during her pregnancy, or to *d* have a lateral X-ray taken, though urged to do so by Professor McLaren. These processes would have helped to discover the exact shape of the pelvis. It is fair to say that when Mr Jordan came on the scene he was not greatly handicapped by this, because Mrs Whitehouse was at that time under epidural anaesthetic, and he was able to examine her vaginally. However, he had not the advantage of accurate measurements of the pelvis or of the ischial spines.

e I need say little about the prenatal history of the case. It is fully told in the judgments of the trial judge and Lord Denning MR. The mother was seen by a number of doctors in the course of her pregnancy including Professor McLaren and Mr Jordan. I do not think that any criticism can be made of what they did. She was identified clearly as likely to be a difficult case; on 31st December 1969 Professor McLaren recorded that he thought the outlet was tight and that a trial of labour would be needed. This means that *f* labour would be permitted to start and to proceed under close supervision in order to see whether the head could, with safety, proceed down the birth canal.

Mrs Whitehouse was admitted to the hospital at 0200 hrs on 6th January 1970, her membranes having ruptured shortly before. The vertex was recorded as engaged at 0230, and this was confirmed by Mr Kelly, of consultant status, at 1000 hrs. He noted 'fair sized baby'.

g So at this point we have a small woman, anxious and distressed, awaiting a baby, for her on the large side, with the head in a favourable position and engaged in the pelvis; noted as being probably a case for 'trial of labour'. At 1130 she was given an epidural anaesthetic which would prevent her from feeling pain and probably from sensation below the waist.

At 1830 she was seen by Dr Skinner. He examined her vaginally and abdominally. *h* He reported 'vertex engaged, fetal heart satisfactory . . . pelvis seems adequate'.

Now comes the period critical for this case. At 2330 Mr Jordan, who was not on duty, came to talk to Dr Skinner. On his radio communicator the latter was told that Mrs Whitehouse was fully dilated. Dr Skinner thought that this was the case for a more senior man than he, and Mr Jordan agreed to go; he saw her at 2330 and examined her abdominally and vaginally. He read the notes on the case, which, as the above summary *j* shows, informed him precisely of what he had to deal with; a difficult case calling for great care.

He made a detailed note which I need not copy in full. It gave all the necessary medical details. Against 'pelvis' he wrote 'small gynaecoid' (ie of appropriate female shape) and then 'Normal delivery out of the question'.

He decided to embark on a trial of forceps and did so at 2345. The full expression for this is 'trial of forceps delivery' which, as the evidence showed beyond doubt, means the operator tries to see whether with the use of forceps a delivery per vaginam is possible. This involves two things, first tentative and delicate handling at least at the start; second the necessity of continuously reviewing progress with the obligation to stop traction if it appears that the delivery per vaginam cannot be proceeded with without risk. Then delivery will take place by Caesarian section.

Two things must be said at this stage. First, though for the plaintiff it was at one time otherwise contended, the decision to try for vaginal delivery rather than go at once to a Caesarian section was unquestionably the right and correct procedure, in order to avoid if possible the risk to the mother inevitably involved in section. Secondly, for the plaintiff an attempt was made to draw a line between trial of forceps, on the one hand, and delivery by forceps on the other hand, and to make a case that Mr Jordan was, unjustifiably, proceeding to the latter. This, to my mind, completely failed. There is no such clear-cut distinction. A trial of forceps (delivery) is what it says: it is an attempt at delivery accompanied by the two special conditions I have mentioned. There can be no doubt that this is what Mr Jordan was attempting. I take what happened from his notes. Under 'summary of reasons for operation' he wrote: 'Trial of forceps under epidural anaesthetic. Lower segment Caesarian section under G.A.' Then:

> '(1) Forceps begun at 23.45, 6 1 70. Head rotated to OA [occiput anterior] with Kiellands—no problem. [Kiellands is a kind of forceps used by some operators to rotate the head. This procedure was correct]. A very tight fit. No episiotomy [cutting of the perineum]. After pulling with 5 or 6 contractions, it was obvious that vaginal delivery would be too traumatic—so Caesarian section.'

He then recorded the Caesarian which everyone agrees was impeccably performed in two minutes. He noted 'no apparent (vaginal) trauma'. To complete the history, the baby, extracted apparently unharmed, was handed over to the paediatricians, found apnoeic, and made to breathe after 35 minutes, by which time irretrievable brain damage had occurred.

Here, with one possible exception, is a record of a birth carried out with all correct procedures, with, as unhappily occurs in the best managed hospitals and the best medical care, tragic results. The possible exception lies in the reference in Mr Jordan's own report to 'pulling with 5 or 6 contractions'. Did Mr Jordan pass the limits of professional competence either in continuing traction too long, or in pulling too hard? That is the whole issue. As direct evidence from persons present there was evidence of Mr Jordan, Mrs Whitehouse and Dr Skinner. There was no ward sister present and the two attending midwives could not be traced. As indirect evidence there was a report from Professor McLaren made to the hospital administrator some time between 22nd January and 10th March 1970, based on his reading of the notes, a conference with Mr Jordan, and his own experience. On top of this there was expert evidence on each side as to what Mr Jordan ought to have done, and as to the correctness of what he did. What is clear is that, in a trial of forceps, the operator should not attempt to pull past an obstruction, or at least not past a bony obstruction. Did Mr Jordan do this?

My Lords, at this point it is vital to recall that we are not here entitled to retry the case. We have indeed read almost the whole of the transcripted evidence. But it is not for us to say how we would have decided the case at trial. What we can properly do is to examine the judge's findings and to reach a conclusion, difficult though this may be, whether they can reasonably be supported on the evidence, recognising his advantages and, as fairly as we can, his difficulties, and whether the Court of Appeal was justified in reversing them.

One point must be put out of the way: was whatever occurred at the birth causative of the brain damage, in itself a very difficult question? The baby was apparently undamaged at birth: brain damage does occur for no ascertainable reason, and in normal births. Many alternatives were considered. The judge was able to find and did so that the probability was that the damage occurred between 2345 and 0010 on 6th–7th January, i e during the period in which the forceps were used. Whether I, or any other judge, would have reached the same conclusion is not here or there: the finding had evidence to support it and cannot be disturbed. It does not of itself, of course, prove that *a* the damage arose from lack of skill; that is a point which must be independently decided.

There were three critical pieces of evidence.

First, there was the evidence of the mother, in the abstract the best person to know exactly what happened. In the concrete, the situation was otherwise. She had been in labour for nearly 24 hours; recorded as distressed; there had been vomiting; she was, for understandable reasons connected with her family, intensely anxious and tense; she was *b* in a condition of lack of confidence in the medical procedure. She was under epidural anaesthetic, so inhibited from feeling, unless very imprecisely, what was going on. In these conditions she testified as follows: '[When the forceps were applied] It felt like a deadened electric shock that lifted my hips off the table, up off the bed.' This is also what she told the eminent professors who on this basis prepared their report for the plaintiff. But the judge, inevitably, did not accept this. No witness regarded it as possible: any *c* traction must have been downwards. Dr Skinner, who was standing by her side the whole time, said that nothing like this occurred: he would have seen it and remembered it 'for its fantasticness'. With all allowance for professional loyalty this evidence is too strong to be totally discounted. But, though rejecting this account, the judge did make some use of it: he said 'it could be that she was pulled towards the bottom of the delivery bed *depending on the amount of force used*' (emphasis mine). But this does not prove that *d* excessive force *was* used, and that is what is required. Again, in the crucial conclusory part of his judgment he says:

> 'Though Mrs Whitehouse's description of what occurred to her when the forceps were applied may not be exact in its clinical detail, I believe her, in so far as her description can be taken to be understood as a pulling of her toward the bottom of the delivery bed in a manner and with such force as to be inconsistent with a trial *e* of forceps properly carried out.'

But I must agree with the majority of the Court of Appeal that I cannot accept this as a defensible finding. A process by which, after rejecting the account given by a witness, and it was more than inexact 'in clinical detail', that account is reconstructed so as to be evidence not of a general character, but of a precise and critical degree of traction *f* supposed to differ from what would have been quite proper, seems to me with all respect to be illegitimate. If excessive traction is otherwise proved, her evidence might be consistent with that, but it cannot be used itself as evidence of that excess. I think that the Court of Appeal was quite right to discard this finding. In this they were unanimous.

The next piece of evidence consists of Mr Jordan's own testimony. He was examined *g* and cross-examined at length. In his judgment the judge made comparatively little reference to this evidence, relying much more heavily on the secondhand evidence of Professor McLaren. For myself, I would regard Mr Jordan's firsthand account of the matter as of cardinal importance. Parts of it, indeed, may be regarded as the most solid evidence against him. I have anxiously considered it with the reservations proper in a case when a man is defending himself against a serious claim. The tenor of it, read as a *h* whole, was that this was a very tight fit, that with the very first few pulls, made (correctly) with the contractions, some progress was made. With the fifth pull he realised that he was not making progress; he tried once more to see if he could ease the head past what might be minimal obstruction. Failing this, he thought that delivery per vaginam, though possible, would be too traumatic and that a Caesarian section was needed. With a view to this he eased the head slightly upwards with the forceps.

j The attack on this was really twofold. First, it was to say that Mr Jordan pulled too hard. There was no direct evidence of this except that of the mother which I have already discussed. Dr Skinner, though I accept that not too much weight can be placed on his description, said that he had never ever (sic) seen Mr Jordan violently pull forceps in his life.

Then, and this was the critical point, it was said that Mr Jordan tried to pull past a bony obstruction, which would be contrary to the best medical practice, and got the head 'wedged' or 'stuck' or 'impacted'. In his judgment the judge quoted this passage:

> 'Q. Perhaps I should end by asking you this: did you try to pull past any bony part? *A.* My trial by forceps was to overcome what may be minimal obstruction so one did, as it were, pass the level of the ischial spines. a
>
> 'Q. The question was not well phrased. Did you try to pull despite them? *A.* No.'

The judge's comment on it is that 'perhaps some clue was given by [it]'. b

But if the first answer is somewhat obscure, the second is a plain denial that he tried to pull despite (ie over any resistance of) the ischial spines.

I would compare with this his final answer given in reply to the learned judge:

> '*Bush J.* Mr Jordan, on that aspect of it that you have been talking about, what was it that made you believe that to continue the traction might be harmful to the baby? *A.* Because one is aware from the very nature of the forceps delivery that there is some resistance, and the aim of a trial of forceps is to ease the baby past whatever resistance there may be, whether it is the pelvic floor or the side walls of the pelvis, and you pull slowly and tentatively and then you form an impression that to continue with that rate of progress may take too long, or too much traction, and I think that is all.' c

d

Other passages exist to the same effect. And what I think Mr Jordan is trying to explain is that, in a trial of forceps, the operator, who has to work on feel, and instinct, and experience, is by the nature of things always working against resistance, just because of the narrowness and irregular shape of the birth canal. This he has to do, with of course care, and a margin of safety. What he must not do, and what Mr Jordan denies that he did, was to pull past a bony obstruction: then he must stop. e

This leads on to the issue of whether the head was 'stuck' or 'wedged'. So far as Mr Jordan is concerned he firmly denied that it ever was. It would not, without risk, go any further, but that was all. At the end he was able without difficulty to push it back up a little in preparation for the Caesarian. I think it is possible to carry this point further. Sir John Dewhurst, Professor at Queen Charlotte's Hospital and at Chelsea Hospital for Women, and the author of an important book, Integrated Obstetrics, gave evidence *after* f Mr Jordan and *after* hearing the latter's evidence, an advantage not possessed by the plaintiff's witnesses. He found nothing wrong in the procedure which Mr Jordan had followed, including the resort to five or six pulls.

I reach the conclusion, then, that here too the Court of Appeal, particularly Lawton LJ, was justified in taking, contrary to the view of the judge, Mr Jordan's evidence as evidence that he did not get the head wedged or stuck. g

So finally there is Professor McLaren's report and evidence, on which the judge placed much reliance. I have explained that his report was prepared on the basis of the hospital notes and conference with Mr Jordan. It is therefore evidence against Mr Jordan, to the extent, and only to the extent, that it may be taken to incorporate Mr Jordan's account at the time to his superior. It must be borne in mind that it was written in order to answer a long letter of complaints by Mr Whitehouse as to the conduct of the birth, one h of his complaints relating to the pulls exerted by Mr Jordan. The tenor of the report was to maintain that Mrs Whitehouse had received correct and skilled treatment and that no blame attached to anyone for the sad result which followed. Though this was the purpose of the report it was said that nevertheless it 'let the cat out of the bag' in two respects revelatory of a failure of skill by Mr Jordan.

In a critical passage he wrote: j

> 'A trial of forceps was carried out under epidural anaesthesia the head rotating with ease with Kiellands forceps. Descent, however, did not follow traction and *in the interest of the child* the head was disimpacted prior to speedy delivery by Caesarian section. However, there was need to switch from epidural to general anaesthetic for section.' (Professor McLaren's emphasis.)

of the Court of Appeal, of the judge's care and clarity, I must agree that this is a case where an appeal court can and should interfere. a

One final word. I have to say that I feel some concern as to the manner in which part of the expert evidence called for the plaintiff came to be organised. This matter was discussed in the Court of Appeal and commented on by Lord Denning MR. While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies b of litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self defeating.

I would dismiss the appeal.

LORD EDMUND-DAVIES. My Lords, I have wrestled long and hard over this appeal. The evidence at the trial occupied 11 days, and the judgment delivered 10 days c later by Bush J is a model of clarity and care. But the fact that this award of £100,000 to the grossly disabled infant plaintiff was reversed by a majority at the conclusion of a four-day hearing in the Court of Appeal and that the appeal to this House occupied five days should serve to demonstrate that difficult issues are involved.

I gratefully adopt the narrative of salient facts prepared by my noble and learned friend Lord Wilberforce, and I shall add little to it. There arose an acute conflict on many d points and between both lay and expert witnesses. It has long been settled law that, when the decision of a trial judge is based substantially on his assessment of the quality and credibility of witnesses, an appellate court 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong' (see *Bland v Ross, The Julia* (1860) 14 Moo PCC 210 at 235, 15 ER 284 at 293 per Lord Kingsdown). And that is so irrespective of whether or not the trial judge made any e observation with regard to credibility (*Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35 at 36 per Lord Shaw).

Certain important matters are not in doubt. The first (as the learned judge himself stressed) is that the delivery of a brain-damaged baby does not necessarily connote negligence by anyone, for such a misfortune can inexplicably occur in circumstances where there are no grounds for suspecting any lack of proper skill. Again, although the f obdurate attitude of Mrs Whitehouse during her pregnancy had created a lack of information regarding the dimensions of her birth canal, before Mr Jordan started even an exploratory pull on the fetus he contemporaneously noted that he was confronted by 'a very tight fit', a situation which Dame Josephine Barnes described as 'certainly a high risk case' and one which Sir John Dewhurst said would have occasioned him 'considerable concern'. On the other hand, it was unchallenged that Mr Jordan was right to use g forceps, for, although vaginal delivery by contraction alone was out of the question, it was inadvisable to proceed directly to Caesarian section.

The principal questions calling for decision are: (a) in what manner did Mr Jordan use the forceps? and (b) was that manner consistent with the degree of skill which a member of his profession is required by law to exercise? Surprising though it is at this late stage in the development of the law of negligence, counsel for Mr Jordan persisted in h submitting that his client should be completely exculpated were the answer to question (b), 'Well, at the worst he was guilty of an error of clinical judgment'. My Lords, it is high time that the unacceptability of such an answer be finally exposed. To say that a surgeon committed an error of clinical judgment is wholly ambiguous, for, while some such errors may be completely consistent with the due exercise of professional skill, other acts or omissions in the course of exercising 'clinical judgment' may be so glaringly j below proper standards as to make a finding of negligence inevitable. Indeed, I should have regarded this as a truism were it not that, despite the exposure of the 'false antithesis' by Donaldson LJ in his dissenting judgment in the Court of Appeal, counsel for the defendants adhered to it before your Lordships.

But doctors and surgeons fall into no special category, and, to avoid any future disputation of a similar kind, I would have it accepted that the true doctrine was enunciated, and by no means for the first time, by McNair J in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 121, [1957] 1 WLR 582 at 586 in the following words, which were applied by the Privy Council in *Chin Keow v Government of Malaysia* [1967] 1 WLR 813:

> '... where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus becauses he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill.'

If a surgeon fails to measure up to that standard in *any* respect ('clinical judgment' or otherwise), he has been negligent and should be so adjudged.

Mr Jordan said that, in the situation confronting him, he embarked on a trial of forceps, its object being to establish whether there was any disproportion or obstruction in the birth canal sufficient to put at risk a vaginal delivery. Trial by forceps needs to be carried out gently and tentatively, 'progress being observed when reasonable traction is exerted', as Sir John Dewhurst, a defence witness, put it. If progress is achieved, the process of pulling with contractions, opening the forceps when a contraction ceases, then applying them again with the next contraction continues until (in Mr Jordan's words) 'such time as the baby was delivered or (as in this case) it became apparent that further attempt at delivery may be unwise'. He accepted that during the trial of forceps the surgeon is *not* embarking on a delivery, but merely exploring the possibility of vaginal delivery being achieved, and that—

> 'Before undertaking mid-forceps delivery, the physician's clinical judgment must permit him to conclude unequivocally that he can in fact deliver the baby safely per vaginam, and that this method of delivery placed less risk to the mother and baby than Caesarian section.'

How far had Mr Jordan proceeded before he abandoned the notion of a vaginal delivery and decided on a Caesarian section? He said he had pulled with five or six contractions, and formed the view that the head was making satisfactory progress after the first four pulls. There came a fifth pull with possibly no 'movement'. When asked, 'What conceivable factor can there be which would stop you on the fifth?', his significant reply was 'The spines', i e the ischia. A little later he said: 'If I got difficulty on the fifth, then I would confirm it on the sixth.' Asked how in such circumstances he could justify pulling yet once more, Mr Jordan answered:

> 'What one wants to know is, is there at this particular moment, and this is the crucial part as far as the trial of forceps is concerned, or would this little extra pressure or traction deliver this head past the bony obstruction or not? In these circumstances, realising that this was the point at which the decision had to be made finally, as to continue or go back, it is justified to see whether or not a little more, a little extra traction with other contractions, would be enough to overcome the resistance one is feeling.'

That answer has to be considered in the light of the directive in a work prepared by Sir John Dewhurst that: '*No obstruction below the head*. This is an absolute rule. The head should never be pulled past an area of obstruction. Caesarian section is indicated.'

Mr Jordan insisted that the trial of forceps terminated at the stage when the factor of the *safety* of the baby arose, although he entertained no doubt that vaginal delivery could have been achieved. As to this, and the case generally, the conclusion of the learned judge was expressed in this way:

> 'I am doubtful whether Mr Jordan was in fact undertaking a trial of forceps, as opposed to an attempt at vaginal delivery which failed, and in the course of which the baby was wedged, stuck, or jammed, and which on anyone's view of the matter would be unjustified. However, in any event, if it were a trial of forceps then he

> pulled too hard and too long, so that the fetus became wedged or stuck. In getting it wedged or stuck, or unwedged or unstuck, Mr Jordan caused asphyxia which in a its turn caused the cerebral palsy. In this respect Mr Jordan fell below the very high standard of professional competence that the law requires of him.'

In the light of the conflicting evidence, is that a conclusion to which the experienced trial judge was entitled to arrive? With the single exception of Dame Josephine Barnes, the medical witnesses on both sides agree that, as the judge put it—

> '... if in fact the trial of forceps proceeded to the lengths where the fetal head was b wedged or stuck and had to be unwedged or unstuck with the use of force, then unprofessional force would have been used, both in getting it wedged and in having to unwedge it.'

His observations on this cardinal issue began with the evidence given by the mother, and he dealt with it in this way: c

> 'According to Mrs Whitehouse, when the forceps were applied, "It felt like a deadened electric shock that lifted my hips off the table", and she described her buttocks and hips as being lifted off the table. This cannot be an accurate description, since the pull is downwards, but it could be that she was pulled towards the bottom of the delivery bed, depending on the amount of force used. She was a little woman and it would be a question of degree whether this indicated in itself d the use of excessive force.'

When Sir John Stallworthy, a plaintiff's witness, was cross-examined to establish that the mother would not be lifted off the bed, he said:

> 'What very frequently happens, and I would have thought (I don't know) what probably happened from her description was with the forceps she was pulled down e to the end of the bed. She is a small woman and it was a big baby, and it would have been perfectly reasonable with an ordinary, successful forceps delivery for this to have happened.'

But two comments on that evidence are called for. (1) We are not here concerned with an accomplished forceps delivery, but with what was described as a trial of forceps which f was abandoned at a stage when it was still open to Mr Jordan to change his mind and proceed to a Caesarian section. (2) Dr Skinner, who was standing nearby in the operating theatre when the baby was delivered, said that Mr Jordan never went further than trial of forceps. He added that there was no violent pulling, and spoke of the 'fantasticness' of the allegation of Mrs Whitehouse being lifted off the bed. That does not in terms negative a *downward* pull, but it controverts the use of force beyond that customary in g a trial of forceps.

Regarding this important matter the learned judge said:

> 'Though Mrs Whitehouse's description of what occurred to her when the forceps were applied may not be exact in its clinical detail, I believe her, in so far as her description can be taken to be understood as a pulling of her toward the bottom of the delivery bed in a manner and with such force as to be inconsistent with a trial h of forceps properly carried out.'

My Lords, I have some difficulty in following how anything in Mrs Whitehouse's testimony could be 'understood' in the sense adopted by the learned judge. She was the only witness who in direct terms spoke adversely of the degree of force exerted by Mr Jordan, and he had found her unreliable in several respects. Once more the learned j judge rejected her evidence, this time in relation to what happened when the forceps were applied. In its place he 'believed' an account which, while to a degree in conformity with what Sir John Stallworthy said *could* happen in forceps delivery, was one which she herself did not advance. It was accordingly not such a finding as an appellate court, lacking the judge's advantage of seeing and hearing the witnesses, is normally obliged to leave undisturbed. It was in truth a finding without an evidential basis.

I turn to consider another matter which undoubtedly operated powerfully on the judge's mind, and which, indeed, he described as 'perhaps the strongest piece of evidence that something untoward was done...' It has perplexed me perhaps more than any other part of this worrying case, and I entertain no strong conviction even now that I have reached the right conclusion about it. I have in mind the report prepared by Professor McLaren, head of the unit and himself a defendant to these proceedings until they were discontinued against him in March 1976. He drafted the report after discussions with Mr Jordan which began a few days after the baby was delivered. Each knew that Mrs Whitehouse was very upset and angry, and on 22nd January 1970 there arrived a letter from her husband making grave complaints against the unit staff. The hospital administrator therefore called for a report, and this led to discussions on points which both the professor and Mr Jordan realised were of 'the utmost importance'. It was in the light of these discussions and the hospital notes that Professor McLaren prepared his undated report, and, in due course, showed it to Mr Jordan before submitting it to the hospital administrator on 10th March. Judging from the time factor, accordingly, it does not appear to have been hastily prepared. It can, I think, be fairly described as in some respects an odd document for a person with the professional experience and sophistication of Professor McLaren to have prepared, and for Mr Jordan, in his turn, to have passed without amendment. Certainly one can well understand the learned judge being very troubled by it. But, having said that, what is beyond doubt is that the report set out to be wholly exculpatory of Mr Jordan and of the entire hospital staff. Thus, it refers to 'this well-conducted trial of labour of forceps', to Mrs Whitehouse's 'first-class obstetric care', and it concluded: 'We accept no criticism or implication that in terms of being humane, or in technical skills, we neglected Mrs Whitehouse.' Yet the learned judge found it possible to conclude that the report was actually confirmatory of the charge of negligence made against Mr Jordan, and this mainly on the strength of the inclusion therein of the following observations. (1) 'A trial of forceps was carried out under epidural anaesthesia... *Descent, however, did not follow traction*, and *in the interest of the child the head was disimpacted* prior to speedy delivery by Caesarian Section'. (2) In relation to the fetus having sustained a cerebral haemorrhage, 'It could be that a congenital weakness of a blood vessel existed, *so that the fixing of the head in the pelvis and its disimpaction* for Caesarian Section led to a leaking of blood in the skull'. (3) 'Possibly at Caesarian Section *the disimpaction of the head* was critical and cerebral haemorrhage followed.' (My emphasis in each case.)

For my part, I cannot attach significance to the observation that 'Descent... did not follow traction', as it is the plaintiff's own case that descent to a point there certainly was. But at the trial, in the Court of Appeal, and again in this House many hours were spent considering the much more important matter of the threefold use of the word 'disimpaction'. Is 'impaction' its converse and what situation or action does each word connote? Mr Jordan himself, in common with several of the expert witnesses, accepted as accurate the Steadman's Medical Dictionary (23rd Edn, 1976) meaning of 'impacted' as 'Denoting a fetus that, because of its large size or narrowing of the pelvic canal, has become wedged and incapable of spontaneous advance or recession.'

Professor McLaren, too, accepted that it had the generally accepted meaning of 'stuck', but he averred that his repeated use of 'disimpaction' had no relation to unsticking or unwedging, or fixation or any state of immovability. He apologised for his misuse of language and explained that in his vocabulary 'disimpaction' involves no more than a gentle pushing of the head upwards with one finger before proceeding to a Caesarian section.

My Lords, the point is important in the light of the expert evidence supportive of the view that, if the head of the fetus had become so stuck as to cause asphyxia, excessive force had been used. I remain mystified why, in the drafting of what was known to be an extremely important report, its author should have used in the sense claimed by him a variant of the word 'impaction' which in medical science has such a different meaning, and why Mr Jordan (who was familiar with that accepted meaning) should have allowed 'disimpaction' to go forward without comment.

I could well understand the McLaren report taking the form it did were the version of events then intended to be advanced that Mr Jordan had gone past the trial of forceps stage and had decided on vaginal delivery, that he had proceeded with proper skill to implement that decision up to the stage when he could with safety go no further and therefore turned to Caesarian section, and that the misfortune which occurred did not arise from any negligence on his part. But the defence presented to the judge was that Mr Jordan never went beyond a trial of forceps. It is true that, if all goes well, there may be no clear line of demarcation between trial of forceps and actual delivery by forceps, the one merging into the other. But that is not to say that there does not arise, however fleetingly, a stage when the operator has to consider whether he can safely go further. At one time, however, Mr Jordan referred in evidence to his 'attempt at forceps delivery, followed by Caesarian section', and in his pleaded defence it was expressly admitted that he 'attempted but abandoned a forceps delivery and then proceeded to deliver the plaintiff by Caesarian section', an admission which his counsel told this House was due to an oversight and should not have been made. It could well be that it was on the basis of such material that the learned trial judge expressed himself as 'doubtful whether Mr Jordan was in fact undertaking a trial of forceps, as opposed to an attempt at vaginal delivery which failed . . . '

But the point is a fine one, and it should not of itself lead to the condemnation of the defendant. In his dissenting judgment, Donaldson LJ concluded that the evidence of Mrs Whitehouse being 'pulled down towards the bottom of the bed, in the sense that her body was moved' could not be right, and he added ([1980] 1 All ER 650 at 666):

> 'But, having said that, I still have to decide whether the judge's conclusion was wrong, and I am not satisfied that it was. Reading the judgment as a whole, it seems to me that Mrs Whitehouse's evidence was treated as no more than consistent with, or, at most, confirmatory of Professor McLaren's report, and that even if Bush J had put her evidence on one side, he would still have reached the same conclusion.'

If that is right, as with respect it seems to be, the outcome of these proceedings was regarded by the learned judge as finally turning on the use of one word. I dare say that at times even greater issues have turned on less. But that word cannot properly be considered out of context, and I again stress that the whole drift of the lengthy McLaren report was that the Whitehouse baby had been delivered in accordance with the highest professional standards. Such being the setting, to hold that the threefold use of 'disimpaction' should be regarded as establishing that the complete opposite was the truth is, in my judgment, to impose on it an excessive and unsupportable burden.

Such, at least, is my conclusion about this distressing case. It has evidently caused me greater difficulty than it has any of my noble and learned brethren. But I have at last found myself impelled and compelled to hold that, despite the great care and ability manifested by the learned judge, there was lacking the evidence needed to uphold his basic finding that Mr Jordan 'pulled too hard and too long, so that the fetus became stuck'. I therefore concur in holding that the appeal should be dismissed.

LORD FRASER OF TULLYBELTON. My Lords, this is an action of damages for professional negligence against a senior registrar at Birmingham Maternity Hospital. After a long trial, the learned judge held negligence established against the registrar, but the Court of Appeal by a majority (Lord Denning MR and Lawton LJ, Donaldson LJ dissenting) ([1980] 1 All ER 650) reversed his decision. They did so not because they considered that the learned trial judge had misstated the relevant law. Clearly he did not; he said, rightly in my opinion, that negligence for the purposes of this case meant 'a failure . . . to exercise the standard of skill expected from the ordinary competent specialist having regard to the experience and expertise that specialist holds himself out as possessing'. He added the proviso that the skill and expertise to be considered were those applying in 1969 to 1970. Although that statement was not criticised in the Court of Appeal, Lord Denning MR did criticise a later sentence in the judgment because, in his view, it suggested that the law made no allowance for errors of judgment by a professional man. Referring to medical men, Lord Denning MR said ([1980] 1 All ER 650 at 658): 'If they are to be found liable [sc for negligence] whenever they do not effect a cure, or whenever anything untoward happens, it would do a great disservice to the profession itself.' That is undoubtedly correct, but he went on to say this: 'We must say, and say firmly, that, in a professional man an error of judgment is not negligent.' Having regard to the context, I think that Lord Denning MR must have meant to say that an error of judgment 'is not *necessarily* negligent'. But in my respectful opinion, the statement as it stands is not an accurate statement of the law. Merely to describe something as an error of judgment tells us nothing about whether it is negligent or not. The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that a man, acting with ordinary care, might have made, then it is not negligence.

The main reason why the Court of Appeal reversed the judge's decision was that they differed from him on the facts. The question therefore is whether the Court of Appeal was entitled to reverse the judge's decision on a pure question of fact. The view of the judge who saw and heard the witnesses as to the weight to be given to their evidence is always entitled to great respect. We were reminded particularly of dicta to that effect in *The Hontestroom* [1927] AC 37 and *Powell v Streatham Manor Nursing Home* [1935] AC 243, [1935] All ER Rep 58, and there is other high authority to the same effect. But in this case, unlike cases such as *Powell* and *The Hontestroom*, no direct issue of credibility arises. It is not suggested that any witness, or body of witnesses, was giving dishonest evidence. The only witness whose reliability is seriously in question is Mrs Whitehouse, the mother of the plaintiff, and I shall refer to the critical part of her evidence in a moment. Apart from her evidence, the important facts are almost entirely inferences from the primary facts, and in determining what inferences should properly be drawn, an appellate court is just as well placed as the trial judge. Accordingly this is a case where the judge's decision on fact is more open to be reassessed by an appellate court than it often is.

The learned judge expressed his conclusion as to the primary facts which had been established with admirable clarity and conciseness, as follows:

> 'On the balance of probabilities I have come to the conclusion, firstly that the damage to the brain of Stuart [the infant plaintiff] was not the result of inherent maldevelopment, and secondly that asphyxia or anoxia caused the brain damage, and thirdly that the asphyxia itself was caused by some event between 2345 and 0025 hrs, that is between the commencement of the trial of forceps and the delivery of the child by Caesarian section.'

That passage in the judgment is immediately followed by a repetition of the caution, to be found elsewhere in the judgment, that such damage may be caused by the violent event of birth itself and 'may occur without professional fault on the part of those having the care and management of the patient'. So the learned judge was evidently on his guard against treating this case as a case of res ipsa loquitur.

He then turned to consider what evidence there was on the vital question of whether 'unprofessional force', by which he evidently meant excessive force, had been applied by Mr Jordan when using forceps. He relied firstly on the evidence of Mrs Whitehouse herself, and secondly on what he regarded as 'perhaps the strongest piece of evidence that something untoward was done', namely the report by Professor McLaren who was the head of department in which Mr Jordan worked, and who himself was a distinguished obstetrician. Professor McLaren was ill at the time and was not present at the birth. Thirdly, the learned judge relied on the evidence of Mr Jordan, the first defendant. I must consider these pieces of evidence.

The evidence of Mrs Whitehouse was that when Mr Jordan pulled on the forceps she had 'felt something like a deadened electric shock that lifted my hips off the table'. All the medical evidence was that Mrs Whitehouse was not, and could not have been, lifted up off the table by pulling on the forceps because the traction would have been in a downward direction. The judge rejected Mrs Whitehouse's account of what had occurred as being mistaken. He had already rejected her evidence on several points relating to her treatment in the earlier stages of pregnancy. So far as this matter is concerned, it is not surprising that she was mistaken considering her condition at the time to which she was referring. She had been without sleep, according to her own account, for 40 hours by this time. She had not had any food because she had been vomiting, and as she put it herself 'I was at the end of the line really'. Above all the lower part of her body was under epidural anaesthetic which meant that it was largely without sensation. But the judge, having rejected Mrs Whitehouse's account, went on to accept an interpretation of it suggested by Sir John Stallworthy, one of the medical experts who gave evidence on behalf of the plaintiff. He said that he interpreted Mrs Whithouse's evidence as meaning that she had been pulled down off the bed and then lifted back on to it by the medical staff. That interpretation was never put to Mr Jordan or to the other medical witness who had been present at the time (Dr Skinner) although Dr Skinner was asked about Mrs Whitehouse's original account of being lifted up off the bed and denied that any such thing had occurred. It would be natural for Dr Skinner to feel professional and personal loyalty towards Mr Jordan, who was his superior and also his friend, and who had taken charge of the delivery because Dr Skinner felt that it was beyond his competence. I would therefore have been prepared to discount his evidence to some extent if it had stood alone, but the learned judge does not indicate any doubt about its reliability, and so far as it goes it is entirely consistent with the evidence of the medical experts as to the impossibility of Mrs Whitehouse's account. The learned judge's conclusion about Mrs Whitehouse's evidence on this matter was expressed thus:

> 'Though Mrs Whitehouse's description of what occurred to her when the forceps were applied may not be exact in its clinical detail, I believe her, in so far as her description can be taken to be understood as a pulling of her toward the bottom of the delivery bed in a manner and with such force as to be inconsistent with a trial of forceps properly carried out.'

In my opinion that conclusion contains two serious flaws, either of which would be enough to make it unacceptable. Firstly, I do not consider that it is permissible to accept Mrs Whitehouse's evidence 'in so far as' her description can be taken to mean something different from what she said, and something which was not tested by a cross-examination of the witnesses, including the defendant and Dr Skinner, who could have confirmed or denied it. I agree with Lawton LJ who said ([1980] 1 All ER 650 at 660):

> 'In Lord Sumner's words in the *The Hontestroom* [1927] AC 37 at 47 the trial judge in this case "palpably misused his advantage" in having seen and heard the mother. These advantages could not be used, as the trial judge used them, to turn an account of what had happened which physically could not have taken place, into one which could.'

Secondly, even if the interpretation of Mrs Whitehouse's evidence were correct, it would not by itself indicate that the degree of force used was excessive and inconsistent with a trial of forceps delivery properly carried out.

I come now to Professor McLaren's report. This was written in answer to a request from the hospital administrator for information. It was based partly on the clinical notes and partly on oral discussion with Mr Jordan, and it was shown to Mr Jordan before being sent (by Mr Jordan) to the administrator. It can, therefore, be regarded as having been accepted by Mr Jordan and as having possible evidential value against him. There was one word in the report on which the learned judge particularly relied for drawing an inference unfavourable to Mr Jordan. That was the word 'disimpacted'. It was used, as the judge pointed out, no less than three times in the report. Probably the most significant use was the following sentence which is quoted in the judgment: 'Descent, however did not follow traction and *in the interest of the child* the head was disimpacted

prior to speedy delivery by Caesarian section' (Professor McLaren's emphasis). The
a importance attached to the word by the judge arose in this way. He said: 'For something to be disimpacted it must first have been impacted', and he relied on a definition of the word 'impacted' in relation to a fetus given in Steadman's Medical Dictionary (23rd Edn, 1976) as follows: 'Denoting a fetus that, because of its large size or narrowing of the pelvic canal, has become wedged and incapable of spontaneous advance or recession.' That definition was accepted by several of the medical experts, though not by all of them,
b and the learned judge considered that, if the head was impacted, that indicated that it had become tightly stuck or wedged between parts of the bony structure of the pelvis and that it had been pulled by forceps too long or too hard. I do not think that the latter part of his conclusion was justified. Professor McLaren in his evidence apologised for using the word. He said that it was not a good word but it was one that he was accustomed to use, though he did not intend it to suggest that there had been such wedging and one
c needed a lot of force to push the head up again before embarking on Caesarian section. It seems that Professor McLaren's apologetic evidence made an unfavourable impression on the judge and his finding on the matter was expressed thus: 'It is with regret that I find it difficult to accept Professor McLaren's explanation of his use of the word "impacted".' I have tried to make proper allowance for the importance to be attached to the judge's view on this matter but I have reached the opinion that the Court of Appeal
d was entitled to differ from it for these reasons. Firstly, the conclusion of the professor's report was to the effect that Mrs Whitehouse had received excellent care while in the hospital, and in particular he said that there was no evidence that she had anything but 'first class obstetric care'. That conclusion would have been impossible if the obstetrician concerned, Mr Jordan, had employed forceps with excessive force, and it is therefore very unlikely that the Professor used the word 'disimpacted' in a sense intended to imply that
e such force had been used. It is also unlikely that Mr Jordan would have passed the report, containing that word, without objection if he had understood the word in that sense. Secondly, the medical evidence as a whole showed that the word is used with various shades of meaning, and it does not necessarily mean that the fetus is so firmly wedged or stuck as to require much force to dislodge it. The medical evidence showed also that the exact degree of force which could properly be used was a matter for expert judgment by
f a skilled obstetrician and might vary considerably according to circumstances. Thirdly (and in my opinion of considerable importance), when the two witnesses who gave evidence for the plaintiff were preparing their joint report (or rather approving the joint report which was, rather surprisingly, 'settled' for them by counsel), they did not emphasise Professor McLaren's reference to 'disimpaction'; if it was really so fatal to the defendant's case as the learned judge seems to have thought, one would have expected
g them to fasten on it at once. It seems to me, therefore, that he attached too much importance to it.

Apart from the use of that one word, the learned judge evidently regarded Professor McLaren's report as a whole as indicating that the defendant had pulled too hard and too long. That may have been partly because he treated the expression 'descent did not follow traction' as meaning that the fetus did not descend at all as a result of traction.
h That meaning was urged on us in argument, but I do not accept it because if *no* descent took place, ie if the fetus did not move downwards at all as a result of traction, the impaction (whatever be the exact meaning of the word) could not have been caused by the traction. I read the expression as meaning what Mr Jordan said it meant, that descent did not continue to the extent of delivery. So read, the statement is correct but throws no light on the question we are considering. I think much of the importance attached
j by the learned judge to the report was due to the statement it contained that 'after a reasonable *attempt at delivery* by forceps a Caesarian section was carried out' (my emphasis). The significance of the words emphasised is that a distinction was drawn by the medical witnesses between a *trial* of forceps delivery (generally abbreviated to a trial of forceps) and an *attempted* forceps delivery. The former should be very tentative and gentle. The latter, in which stronger traction is permissible, should never be embarked

on unless the physician's clinical judgment permits him to conclude unequivocally that he can deliver the patient safely per vaginam. Mr Jordan in his evidence was insistent *a* that he never got beyond the trial stage and that the fact of his having used five or six pulls did not indicate the contrary. He did not profess to remember every detail of what he had done, and his evidence was based on the clinical notes and on his usual practice, but he was quite clear about what he must have done. He said that, taking six pulls as the total, he must have made some progress until the fifth pull. The fifth pull made no progress and the sixth pull would have confirmed that no further progress was possible *b* consistent with safety. The learned judge did not in terms reject that evidence nor did he express any reservation about Mr Jordan's evidence as a whole. What he said, in the decisive paragraph of his judgment, was this:

> 'In all these circumstances I am doubtful whether Mr Jordan was in fact undertaking a trial of forceps as opposed to an attempt at vaginal delivery which failed, and in the course of which the baby was wedged, stuck or jammed, and *c* which on anyone's view of the matter would be unjustified. However, in any event if it were a trial of forceps then he pulled too hard and too long so that the fetus became wedged or stuck. In getting it wedged or stuck, or unwedged or unstuck, Mr Jordan caused asphyxia which in turn caused the cerebral palsy. In this respect Mr Jordan fell below the very high standard of professional competence that the law requires of him.' *d*

It seems to me with respect that the learned judge was seeking to draw too sharp a line between a trial of forceps delivery and an attempted forceps delivery. The former, if it makes progress, will merge into the latter, and may be carried on to a complete delivery. Whether Mr Jordan ever moved from the trial stage to the attempted delivery stage is really a question of words; the important issue is whether there was evidence *e* that, in the learned judge's words, 'he pulled too hard and too long so that the fetus became wedged or stuck'. He himself denied that it ever became wedged or stuck, and I have already explained why I do not think that Professor McLaren's use of the word 'impacted' means stuck. The evidence which seems to come nearest to convicting him of negligence in this respect is his own. He explained, what after all is obvious, that the purpose of pulling with forceps is to overcome resistance to the descent of the fetus down *f* the natal canal and that after the fifth pull he would have to make a decision whether to continue, and whether a 'a little extra pressure or traction [would] deliver this head past that bony obstruction or not'. It was argued that that passage in Mr Jordan's evidence, and some other passages to the like effect, showed that he was willing to pull too hard. But the trial judge does not seem to have thought so, and nor do I. The mere fact that he pulled five or six times is no indication of how hard he pulled. After he had finished *g* the trial of forceps he pushed the fetal head upwards to facilitate removal of the fetus by Caesarian section, but that again does not indicate that it had become wedged; it is a normal preliminary to Caesarian section, as Dame Josephine Barnes explained. In these circumstances there was in my opinion no sufficient evidence to justify a finding that he had been negligent.

I would therefore dismiss the appeal. *h*

I respectfully agree with the observations of my noble and learned friend Lord Wilberforce in the final paragraph of his speech about his concern as to the manner in which part of the expert evidence for the plaintiff was organised.

LORD RUSSELL OF KILLOWEN. My Lords, I wish at the outset to emphasise one matter. Some passages in the Court of Appeal might suggest that if a doctor makes an *j* error of judgment he cannot be found guilty of negligence. This must be wrong. An error of judgment is not per se incompatible with negligence, as Donaldson LJ pointed out. I would accept the phrase 'a mere error of judgment' if the impact of the word 'mere' is to indicate that not all errors of judgment show a lapse from the standard of skill and care required to be exercised to avoid a charge of negligence.

The details of this case and the reasons for dismissing this appeal have been so fully canvassed by my noble and learned friends that there is but little that I can add, without tedious repetition, in saying that I agree to that dismissal. As has been pointed out, and as Sir John Stallworthy accepted, there was no indication from the fetal heartbeats that during the trial of forceps delivery the fetus was in any way distressed. They were normal.

The learned judge, in a passage quoted by your Lordships, which came immediately before his conclusion of negligence by Mr Jordan, in that he pulled too long and too hard, inferred from evidence given by the mother that she was physically pulled down the bed. This I think was quite without justification on the basis of her evidence which did not point to that all. It was not permissible to erect a theory of what she might have said but did not say, and base a conclusion of negligence at least in part on that theory. It may be that the judge borrowed the theory from medical evidence given on behalf of the plaintiff; but the medical experts were no more entitled than the judge to read the mother's rejected evidence as intended to mean something totally different. As has been pointed out it was never suggested to Mr Jordan that his activities pulled the mother towards him. As to the report written by Professor McLaren (and shown to Mr Jordan) two points were sought to be made. The first was its statement that descent did not follow traction; I see nothing in this: it means not that no progress at all resulted from the trial of forceps delivery but that there was no delivery by forceps. The second was the reference to disimpaction. Much evidence was given as to the meaning of disimpaction and impaction, and what was involved in 'stuck' and 'wedged'. All these words are words of degree. 'Impacted' may simply mean that the fetus is unable to move either way spontaneously, and some assistance is required. The mere fact that some assisstance was required to 'disimpact' cannot show negligence; if it did, the joint medical report would not merely have mentioned disimpaction but would surely have said that it proved negligence.

My Lords, I also would dismiss this appeal.

LORD BRIDGE OF HARWICH. My Lords, at 25 minutes past midnight on 7th January 1970 the appellant was born at the Birmingham Maternity Hospital. The mother had been in labour since the early hours of the 6th. The possibility of a difficult birth had been anticipated by the medical authorities at the hospital responsible for her case. By 11.30 pm on the 6th, the mother was fully dilated. From that point onwards the first respondent, now a consultant obstetrician, then a senior registrar in Professor McLaren's unit at the hospital, was in charge of the operation of delivering the child. He concluded from his examination of the mother that a normal delivery was out of the question. At 11.45 pm he proceeded to undertake a 'trial of forceps'. In the light of this trial he decided that delivery per vaginam would be too traumatic for the mother and the child. Accordingly he proceeded to effect delivery by Caesarian section. The child was found to have sustained severe brain damage.

Bush J, the trial judge, made a finding, which is not challenged, that the brain damage to the plaintiff was caused by anoxia occurring at some time between the beginning of the trial of forceps and the delivery of the child. This might seem to the layman to suggest some improper use of the forceps, but any such suggestion is emphatically refuted by the evidence. It is common ground that a child may, in the course of an apparently normal birth, suffer anoxia for which no specific cause can be assigned and certainly that the mere fact of anoxia occurring when it did in the course of the plaintiff's birth affords no evidence whatsoever of fault on the part of the first defendant.

The judge's finding of negligence against the first defendant (on which the vicarious liability of the hospital authority in turn depends) is based on a finding that in using the forceps 'he pulled too hard and too long so that the fetus became wedged or stuck' and that 'in getting it wedged or stuck, or unwedged or unstuck' the first defendant caused the anoxia which occasioned the brain damage. In the light of the direction the judge had given himself early in his judgment in defining the criterion to be applied to decide

whether the first defendant was negligent (a direction which I do not criticise) this finding must be understood as implying that the first defendant applied traction to the a
fetus with the forceps which both in strength and duration exceeded what any competent obstetrician of the status of senior registrar would have regarded as the permissible limits in carrying out the procedure of a trial of forceps. The judge's decision in favour of the plaintiff having been reversed by a majority in the Court of Appeal, the sole question, as it seems to me, which your Lordships' House has to decide is whether the judge's finding that the first defendant applied excessive traction to the fetus in the sense indicated above b
can be supported on the evidence.

My Lords, I recognise that this is a question of pure fact and that in the realm of fact, as the authorities repeatedly emphasise, the advantages which the judge derives from seeing and hearing the witnesses must always be respected by an appellate court. At the same time the importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a c
straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision. It has been strongly urged, on behalf of the plaintiff, that in this case the judge's assessment of the reliability of the witnesses, particularly of the first defendant himself and of his superior at the Birmingham Maternity Hospital, d
Professor McLaren, was of such critical importance to his decision as to render it unassailable and this view prevailed with Donaldson LJ, who dissented in the Court of Appeal, even though he in terms rejected one of the judge's subordinate findings on which his ultimate conclusion depended. At first blush I was much attracted to this view of the case but a close scrutiny of the judge's analysis of the evidence and of the particular features of the evidence on which he relied in support of his finding of negligence e
persuades me that that finding was not justified. I will consider in turn the four main aspects of the evidence on which the judge based his conclusion.

1. *The mother's evidence.* The mother gave evidence emphatically that when the forceps were applied she was lifted up from the bed. Everyone accepted that this was impossible. Any pulling on the forceps is downward. The plaintiff's expert witnesses canvassed the possibility that the mother might have been pulled off the end of the bed f
and lifted back on to it. This was denied by Dr Skinner, a witness who was present at the birth, and the suggestion was never even put to the first defendant in cross-examination. The mother's evidence at every other point where it was in controversy had been rejected by the judge. At the time of the trial of forceps she had been in labour for many hours and was under an epidural anaesthetic. Yet the judge said of her:

> 'Though Mrs Whitehouse's description of what occurred to her when the forceps g
> were applied may not be exact in its clinical detail, I believe her, in so far as her description can be taken to be understood as a pulling of her toward the bottom of the delivery bed in a manner and with such force as to be inconsistent with a trial of forceps properly carried out.'

Counsel for the plaintiff has not sought to support this part of the judge's judgment h
and it was rejected by all three members of the Court of Appeal. I agree with them. The mother's evidence could not be understood in the sense suggested and was manifestly incapable of affording any reliable indication of the degree of force applied with the forceps by the first defendant.

2. *Professor McLaren's report.* Following complaints by the plaintiff's parents to the hospital administrator, Professor McLaren, as head of the unit responsible, prepared a j
report on the circumstances of the plaintiff's birth. This was based in part on the hospital records, in part on discussion with the first defendant. In its express terms the report was wholly favourable to the first defendant. In his summary Professor McLaren said:

> 'Finally an expert obstetrician in my team undertook the accepted obstetrical technique of tentative trial of forceps. After a reasonable attempt at delivery by

forceps a Caesarian section was carried out. The baby, alas, was seriously affected by this well conducted trial of labour and forceps.'

In expressing his opinion he added:

> 'My own view is that both Mr and Mrs Whitehouse are naturally very distressed although there is no evidence that she had anything but first class obstetric care. We can appreciate the letter from Mr Whitehouse of 22.1.70 but we accept no criticism or implication that in terms of being humane, or in technical skills, we neglected Mrs Whitehouse.'

Despite these passages the judge described the report as 'perhaps the strongest piece of evidence that something untoward was done'. He based this view on the use more than once in the report of the word 'disimpaction' to describe the action of the first defendant, having decided to abandon the trial of forceps and proceed to Caesarian section, in pushing the head of the fetus upwards with the forceps to facilitate delivery by Caesarian section.

It was common ground that a trial of forceps is a tentative procedure to discover whether the baby's head can pass safely through the mother's pelvis. The obstetrician must proceed gently and not attempt actual delivery unless and until he is satisfied that there is no such bony disproportion between head and pelvis as to present a risk of injury to the baby. Of course, if no significant obstruction is encountered, the trial of forceps will merge into an actual forceps delivery.

Against this background a great deal of evidence was given by the expert witnesses on both sides as to the significance, in relation to the conduct of a trial of forceps, of the fact of the fetus becoming 'stuck' or 'wedged' in the course of it. A definition of 'impacted' from Steadman's Medical Dictionary (23rd Edn, 1976) as 'Denoting a fetus that, because of its large size or narrowing of the pelvic canal, has become wedged and incapable of spontaneous advance or recession' was canvassed with the witnesses.

Now it will be apparent that in any context the words 'stuck' or 'wedged' are imprecise. An object may be lightly or tightly stuck or wedged. The degree of force required to free it may be great or small. I can find nothing in the expert evidence to suggest that in an obstetric context the words as applied to a fetus described as 'stuck' or 'wedged' in the pelvic canal do not suffer from the same imprecision. If 'impacted' is synonymous with 'wedged' the same consideration must apply.

The judge, however, has drawn the inference from Professor McLaren's use of the word 'disimpaction' that the fetus had become so firmly wedged as to indicate that a degree of force must have been used by the first defendant in producing that result which was clearly excessive in a trial of forceps. He rejected Professor McLaren's explanation that he meant no more by 'disimpaction' than what could be achieved by gently pushing the head of the fetus up out of the pelvic cavity with one finger.

If Professor McLaren used the word 'disimpaction' *intending* it to bear the meaning the judge attributed to it, the implications are twofold. First, Professor McLaren must have appreciated from what the first defendant told him that the trial of forceps had been misconducted and had ended in disaster; it would follow from this that the exculpatory passages in the report were a dishonest attempt to whitewash a subordinate. But, secondly, it also reveals Professor McLaren as not only a knave but a fool who attempts a whitewash in one part of his report but gives the game away in another part.

I find it impossible to suppose that the judge appreciated these far-reaching implications of the significance he was attaching to a single word in the professor's report or that, if he had done so, he would have been prepared to stigmatise the witness in such a manner.

3. *The fetal heart rate.* The defendants relied at the trial, in support of their case that the trial of forceps was not the cause of the appellant's anoxia, on readings of the fetal heart rate during the trial of forceps being within normal limits. At 11.35 pm the rate was 140. At 11.45 pm, when the trial of forceps began, it was 130. It was the same five minutes later. At 12.10 am when the trial of forceps concluded it was 120. After the

delivery of the baby at 12.25 am the rate had fallen to 100 or below. After referring to this evidence the judge commented: 'Though all these readings save the one at 100 or below are within normal limits, there is here a steady drop indicating to my mind that something was wrong.' I take this comment to indicate that the judge not only rejected the evidence that the readings during the trial of forceps were inconsistent with anoxia being caused at that stage but also regarded the fall from 140 before the trial began to 120 when it concluded as affording some support for the contrary view. That view, however, was not expressed by any of the expert witnesses and indeed is contrary to all the expert evidence on the subject.

4. *The number of pulls.* The first defendant had recorded in his operation notes: 'After pulling with five or six contractions it was obvious that vaginal delivery would be too traumatic.' He accepted in evidence that he had probably exerted six pulls coincident with the mother's uterine contractions. The effect of his evidence was that, so far as he could remember or reconstruct the occasion, the first pull was extremely tentative and produced no movement. Thereafter, the next three pulls achieved some progress, the last two none. Having encountered difficulty on the fifth pull, he pulled once more to see whether a little extra traction would overcome the resistance he was feeling, but it did not. Sir John Peel, an expert witness called for the plaintiff, had based his criticism of the first defendant in part on the recorded note of five or six pulls but had said that it was 'difficult to be dogmatic' about this.

The judge refers to this issue in the following passage:

> 'Sir John Peel, while conceding that the number of pulls may depend on the progress being made, has said that he cannot understand why it should have needed five or six pulls to test whether delivery per vaginam was possible. Mr Jordan's answer to this is, as I have related above, that until say the fifth pull he was making progress. If, as I have found, the head was engaged it would not have all that far to go before the widest part of the head was at the ischial spines, and I share Sir John Peel's doubt.'

The judge added a reference to two cryptic answers given in re-examination by the first defendant, but I refrain from quoting these because I confess that I do not follow what significance the judge attached to them.

This is perhaps the most difficult part of the case, but I am satisfied that the criticism of the first defendant for exerting six pulls, qualified as it was, could not by itself sustain a finding of negligence against him.

As regards the evidence of the first defendant, the judge records that, according to him, there was nothing unusual that occurred from the commencement of the trial of forceps to the delivery of the child. I appreciate, of course, that the judge's finding involves, by necessary implication, a rejection of this evidence. It is trite to observe, however, that rejection of a defendant's denial provides no material to establish the positive case sought to be made against him. On the other hand, if the judge had construed anything in the first defendant's evidence as amounting to an admission of fault on his own part (which the cryptic answers referred to above certainly did not provide), he would surely have made this abundantly clear and put it in the forefront of his reasons for making a finding of negligence against him.

In the result I can find no sufficient foundation for this finding and would accordingly dismiss the appeal.

Appeal dismissed.

Solicitors: *Keene Marsland & Co*, agents for *Roper & Co*, Birmingham (for the plaintiff); *Hempsons* (for the defendants).

Mary Rose Plummer Barrister.

T-127-86

Joseph John Kindler (*Petitioner*)

v.

M. John Crosbie, Minister of Justice, Attorney General of Canada (*Respondents*)

INDEXED AS: KINDLER v. CANADA (MINISTER OF JUSTICE)

Trial Division, Rouleau J.—Montréal, December 18, 1986; Ottawa, January 21, 1987.

Extradition — Petitioner, American citizen, sentenced to death by U.S. court — Escaped to Canada — Minister declining to seek assurances from U.S. death penalty not executed if petitioner extradited — Petitioner's request for oral hearing to assess credibility denied — No violation of duty to act fairly — Minister's discretion under Art. 6 Canada-U.S. Extradition Treaty not cognizable by courts unless error in law going to jurisdiction — Minister accurately assessing all relevant facts — Taking into account public policy considerations not constituting error in law — Application to review Art. 6 decision dismissed — Extradition Treaty between Canada and the United States of America, Dec. 3, 1971, [1976] Can. T.S. No. 3, Art. 6 — Extradition Act, R.S.C. 1970, c. E-21, s. 18(1)(a) — Immigration Act, 1976, S.C. 1976-77, c. 52 — Criminal Code, R.S.C. 1970, c. C-34 — Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act, 1982, 1982, c. 11 (U.K.), ss. 7, 12.

Judicial review — Prerogative writs — Certiorari — Natural justice — Duty to act fairly — Ministerial decision to surrender petitioner, American citizen, to U.S. authorities without seeking assurances death penalty not executed if petitioner extradited — Petitioner's request to give oral testimony denied — No obligation on decision-maker to give affected party opportunity to be heard orally in cases where function not calling for procedure similar to adjudication — Proper exercise by Minister of discretionary power — Duty to act fairly including duty to give adequate reasons — Accurate assessment of all relevant facts — Unnecessary to list each factor influencing decision — Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 18.

The petitioner, an American citizen, was found guilty of murder and sentenced to death by a United States jury. Prior to the formal sentence being imposed he escaped from custody but was arrested in Canada. Extradition proceedings were initiated and the petitioner was committed to prison to await surrender to the U.S. authorities. The petitioner now applies for a review

T-127-86

Joseph John Kindler (*requérant*)

c.

M. John Crosbie, ministre de la Justice, procureur général du Canada (*intimés*)

RÉPERTORIÉ: KINDLER c. CANADA (MINISTRE DE LA JUSTICE)

Division de première instance, juge Rouleau—Montréal, 18 décembre 1986; Ottawa, 21 janvier 1987.

Extradition — Le requérant, qui est citoyen américain, a été condamné à mort par un tribunal américain — Il s'est enfui au Canada — Le ministre a refusé de demander aux autorités américaines de garantir que la peine de mort ne serait pas appliquée si le requérant était extradé — La demande du requérant visant à obtenir la tenue d'une audience permettant de déterminer s'il était possible de donner foi à ses affirmations a été rejetée — Aucune violation de l'obligation d'agir équitablement — Le pouvoir discrétionnaire conféré au ministre par l'Art. 6 du Traité d'extradition entre le Canada et les É.-U. ne peut faire l'objet d'un contrôle judiciaire à moins d'une erreur de droit quant à la compétence — Le ministre a évalué adéquatement tous les faits pertinents — En se préoccupant de considérations d'intérêt public, le ministre n'a pas commis d'erreur de droit — La demande d'examen de la décision fondée sur l'Art. 6 est rejetée — Traité d'extradition entre le Canada et les États-Unis d'Amérique, 3 déc. 1971, [1976] R.T. Can. nº 3, Art. 6 — Loi sur l'extradition, S.R.C. 1970, chap. E-21, art. 18(1)a) — Loi sur l'immigration de 1976, S.C. 1976-77, chap. 52 — Code criminel, S.R.C. 1970, chap. C-34 — Charte canadienne des droits et libertés, qui constitue la Partie I de la Loi constitutionnelle de 1982, annexe B, Loi de 1982 sur le Canada, 1982, chap. 11 (R.-U.), art. 7, 12.

Contrôle judiciaire — Brefs de prérogative — Certiorari — Justice naturelle — Obligation d'agir équitablement — Décision du ministre de livrer le requérant, qui est citoyen américain, aux autorités américaines sans chercher à obtenir de garanties que la peine de mort ne serait pas appliquée si ledit requérant était extradé — Rejet de la demande du requérant visant à obtenir la tenue d'une audience — Dans les cas où la fonction en cause ne nécessite pas une procédure de nature judiciaire, le décideur n'est pas tenu de donner à la partie concernée l'occasion de se faire entendre — Le ministre a exercé son pouvoir discrétionnaire de la manière appropriée — L'obligation d'agir équitablement comporte l'obligation de fournir des motifs adéquats — Évaluation adéquate de tous les faits pertinents — Il n'est pas nécessaire d'énumérer tous les éléments influençant la décision — Loi sur la Cour fédérale, S.R.C. 1970 (2e Supp.), chap. 10, art. 18.

Le requérant, qui est citoyen américain, a été reconnu coupable de meurtre et condamné à mort par un tribunal américain. Il s'est évadé juste avant que la sentence ne soit officiellement prononcée, mais il a été arrêté au Canada. Des procédures d'extradition ont été engagées et le requérant a été incarcéré en attendant d'être livré aux autorités américaines. Le requérant of the Minister's decision, made pursuant to Article 6 of the *Extradition Treaty between Canada and the United States of America*, that Canada should surrender the petitioner without seeking any assurances from the United States that the death penalty would not be imposed or, if imposed, would not be carried out. Prior to making his decision, the Minister heard submissions by the petitioner's counsel but denied the petitioner's request for an oral hearing. It is argued that the Minister, in refusing the request for oral testimony, violated the principles of natural justice, that he took into account improper considerations and that extradition to face capital punishment constitutes "cruel and unusual punishment".

Held, the application should be dismissed.

The duty to act fairly requires that an individual be given an opportunity to answer the case against him. However, where the function does not call for a procedure similar to adjudication, a court should not impose on a decision-maker the obligation to give the affected party an opportunity to be heard orally, although the deciding body has the duty to give fair consideration to the representations made before it.

The argument that an oral hearing was necessary for the petitioner to have his credibility assessed by the respondent could not be accepted. It is not a function of the Minister in exercising his discretionary power under Article 6 of the Treaty to do so. The case had been properly dealt with by the American criminal justice system and it was not open to respondent to re-try it. Furthermore, there was nothing that the petitioner could have added to the information already provided to the Minister by the petitioner's counsel.

An essential component of the duty to act fairly is the duty to give adequate reasons upon which an adverse decision is made. That requirement, however, does not extend to imposing an obligation on the decision-maker to list every conceivable factor which may have influenced his decision. In the case at bar, the Minister's decision demonstrated a fair and accurate assessment of the relevant facts, including the personal representations made by the petitioner in his letter to the respondent. Balanced against this was the Minister's obligation to take into account the Canadian public interest. As stated in the *Rauca* decision, the Minister's discretion under Article 6 "is exercisable by the executive only and it is not a question cognizable by the courts" except in cases of a blatant error in law going to jurisdiction. By recognizing that the Canadian government wished to discourage fugitives from seeking refuge in Canada, the Minister was doing nothing more than stating a policy decision. That does not constitute an error in law.

The question whether capital punishment constitutes "cruel and unusual punishment" was left open, the instant case not constituting the proper forum to debate that issue.

CASES JUDICIALLY CONSIDERED

APPLIED:

Re Federal Republic of Germany and Rauca (1983), 41 O.R. (2d) 225 (Ont. C.A.).

sollicite maintenant l'examen de la décision dans laquelle le ministre a conclu sur le fondement de l'Article 6 du *Traité d'extradition entre le Canada et les États-Unis d'Amérique* que le Canada devrait extrader le requérant sans chercher à obtenir des États-Unis la garantie que la peine de mort ne serait pas infligée ou, si elle l'était, ne serait pas appliquée. Avant de prendre sa décision, le ministre a entendu les arguments de l'avocat du requérant, mais il a rejeté la demande du requérant visant à obtenir la tenue d'une audience. Il est allégué qu'en refusant d'entendre la déposition du requérant, le ministre a violé les principes de la justice naturelle, qu'il a tenu compte de considérations non appropriées et que l'extradition obligeant le requérant à faire face à la peine capitale constitue une «peine cruelle et inusitée».

Jugement: la demande doit être rejetée.

L'obligation d'agir équitablement exige qu'on donne à un individu l'occasion de réfuter la preuve soulevée contre lui. Toutefois, lorsque la fonction en cause ne nécessite pas une procédure de nature judiciaire, la cour ne devrait pas imposer au décideur l'obligation de donner à la partie concernée l'occasion de se faire entendre, bien que l'organisme décisionnel soit tenu d'examiner équitablement les arguments dont il est saisi.

Il n'était pas possible d'admettre l'argument suivant lequel la tenue d'une audience était nécessaire pour permettre à l'intimé de déterminer s'il pouvait donner foi aux déclarations du requérant. Telle n'est pas la fonction du ministre en exerçant le pouvoir discrétionnaire qui lui est conféré par l'Article 6 du Traité. L'affaire avait été tranchée de la manière appropriée par le système de justice pénale américain et l'intimé ne pouvait pas instruire cette affaire à nouveau. En outre, le requérant n'aurait pu ajouter aux renseignements qui avaient déjà été fournis au ministre par ses avocats.

L'un des éléments essentiels de l'obligation d'agir équitablement est l'obligation de fournir les motifs adéquats pour lesquels une décision défavorable est rendue. Une telle exigence n'impose toutefois pas au décideur l'obligation d'énumérer tous les éléments imaginables qui peuvent avoir influencé sa décision. En l'espèce, la décision du ministre indiquait qu'il avait fait une évaluation juste et adéquate de tous les faits pertinents, notamment des arguments que le requérant a lui-même fait valoir dans la lettre qu'il a adressée à l'intimé. Par ailleurs, le ministre avait l'obligation de tenir compte de l'intérêt public au Canada. Comme la cour l'a statué dans l'affaire *Rauca*, «seul l'exécutif peut exercer ce pouvoir discrétionnaire [conféré au ministre par l'Article 6] qui constitue une question dont ne peuvent connaître les tribunaux», sauf en présence d'une erreur de droit flagrante quant à la compétence. En reconnaissant que le gouvernement canadien souhaitait décourager les fugitifs de chercher refuge au Canada, le ministre n'a rien fait d'autre qu'énoncer une décision de principe. Cela ne constitue pas une erreur de droit.

La Cour ne s'est pas prononcée sur la question de savoir si la peine capitale constitue une «peine cruelle et inusitée», l'espèce ne constituant pas l'occasion appropriée d'un débat sur ce point.

JURISPRUDENCE

DÉCISION APPLIQUÉE:

Re Federal Republic of Germany and Rauca (1983), 41 O.R. (2d) 225 (C.A. Ont.).

CONSIDERED:

Singh et al. v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177; *Cardinal et al. v. Director of Kent Institution*, [1985] 2 S.C.R. 643; 63 N.R. 353; *Howard v. Stony Mountain Institution*, [1984] 2 F.C. 642; (1985), 57 N.R. 280 (C.A.); *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.

COUNSEL:

Julius Grey for petitioner.
D. J. A. Rutherford, Q.C. and *S. Marcoux-Paquette* for respondents.

SOLICITORS:

Grey, Casgrain, Montréal, for petitioner.
Deputy Attorney General of Canada for respondents.

The following are the reasons for order rendered in English by

ROULEAU J.: This is an application by the petitioner under section 18 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10 to review a decision of the respondent, the Minister of Justice, made on January 17, 1986, pursuant to Article 6 of the *Extradition Treaty between Canada and the United States of America* [Dec. 3, 1971, [1976] Can. T.S. No. 3], in which he declined to request assurances from the United States authorities that the death penalty would not be executed if the petitioner were extradited to that country.

On November 15, 1983 in Philadelphia, Pennsylvania the petitioner was found guilty after trial by Judge and jury of first degree murder, conspiracy to commit murder and kidnapping. The offences arose out of a single transaction in which the petitioner beat and drowned a witness who was to testify against him in respect of a charge of burglary.

Pursuant to section 9711 of the Pennsylvania *Sentencing Code* [42 Pa. C.S.A.] a separate sentencing hearing was held before the same Judge and jury in order to determine whether the petitioner should be sentenced to life imprisonment or death in respect of the verdict of murder in the first degree. On November 16, 1983 the jury

DÉCISIONS EXAMINÉES:

Singh et autres c. Ministre de l'Emploi et de l'Immigration, [1985] 1 R.C.S. 177; *Cardinal et autre c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643; 63 N.R. 353; *Howard c. Établissement Stony Mountain*, [1984] 2 C.F. 642; (1985), 57 N.R. 280 (C.A.); *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311.

AVOCATS:

Julius Grey pour le requérant.
D. J. A. Rutherford, c.r. et *S. Marcoux-Paquette* pour les intimés.

PROCUREURS:

Grey, Casgrain, Montréal, pour le requérant.
Le sous-procureur général du Canada pour les intimés.

Ce qui suit est la version française des motifs de l'ordonnance rendus par

LE JUGE ROULEAU: Par sa demande fondée sur l'article 18 de la *Loi sur la Cour fédérale*, S.R.C. 1970 (2ᵉ Supp.), chap. 10, le requérant sollicite l'examen de la décision rendue par l'intimé, le ministre de la Justice, le 17 janvier 1986, sur le fondement de l'Article 6 du *Traité d'extradition entre le Canada et les États-Unis d'Amérique* [3 déc. 1971, [1976] R.T. Can. nº 3], décision par laquelle il a refusé de demander aux autorités américaines de garantir que la peine de mort ne serait pas appliquée si le requérant était extradé dans ce pays.

Après la tenue d'un procès devant juge et jury à Philadelphie (Pennsylvanie), le requérant a été reconnu coupable, le 15 novembre 1983, de meurtre au premier degré, de complot en vue de commettre un meurtre et d'enlèvement. Les infractions ont découlé d'une seule et même affaire, le requérant ayant battu et noyé un témoin qui devait déposer contre lui au sujet d'une accusation de cambriolage.

Comme le prévoit l'article 9711 du *Sentencing Code* de la Pennsylvanie [42 Pa. C.S.A.], les mêmes juge et jury ont tenu une audience distincte afin de décider si le requérant devait être condamné à l'emprisonnement à perpétuité ou condamné à mort relativement au verdict de meurtre au premier degré. Le 16 novembre 1983, le jury a decided that the murder was committed under aggravating circumstances, that it occurred during the commission of a felony (kidnapping), that the deceased had been scheduled to testify against the petitioner and that there were no mitigating circumstances. The jury imposed the sentence of death.

On September 19, 1984, prior to formal sentence being imposed, the petitioner escaped from custody. He was arrested near Ste-Adèle, Quebec, on April 25, 1985 and charged with offences under the *Immigration Act, 1976*, S.C. 1976-77, c. 52, as amended and the *Criminal Code*, R.S.C. 1970, c. C-34, as amended. On May 27, 1985 the petitioner brought an application in this Court to prohibit the holding of an inquiry which had been commenced pursuant to section 28 of the *Immigration Act, 1976* and the application was granted on July 23, 1985 [[1985] 1 F.C. 676 (T.D.)].

On July 3, 1985 a request for the extradition of the petitioner was submitted to the Government of Canada by the United States Government pursuant to the Canada-USA Extradition Treaty, 1976. Proceedings under the *Extradition Act*, R.S.C. 1970, c. E-21 were commenced and on August 26, 1985 an extradition hearing took place before Pinard J. of the Quebec Superior Court. At that time, counsel for the petitioner conceded that a *prima facie* case for extradition had been made out on the evidence and accordingly a warrant for committal of the petitioner to prison to await surrender to the United States was issued pursuant to paragraph 18(1)(*a*) of the *Extradition Act*. The only issue left to be decided was whether Article 6 of the Canada-U.S. Treaty required the extradition judge or the Minister of Justice to seek assurances from the United States that the death penalty would not be executed should the petitioner be surrendered. On August 30, 1985 Pinard J. issued his judgment wherein he held that he had no jurisdiction to request Article 6 assurances from United States authorities and committed the petitioner to custody to await surrender. On the same day Pinard J. sent a report on the case and a copy of his judgment to the respondent Minister of Justice.

conclu que le meurtre avait été commis dans des circonstances aggravantes, qu'il s'était produit pendant la perpétration d'une infraction grave (enlèvement), que le défunt devait témoigner contre le requérant et qu'il n'existait aucune circonstance atténuante. Le jury a imposé la peine de mort.

Le 19 septembre 1984, le requérant s'est évadé juste avant que la sentence ne soit officiellement prononcée. Il a été arrêté près de Ste-Adèle (Québec) le 25 avril 1985 et il a été accusé de diverses infractions prévues par la *Loi sur l'immigration de 1976*, S.C. 1976-77, chap. 52 et ses modifications, et par le *Code criminel*, S.R.C. 1970, chap. C-34 et ses modifications. Le 27 mai 1985, le requérant a présenté devant cette Cour une demande visant à empêcher la tenue d'une enquête commencée en vertu de l'article 28 de la *Loi sur l'immigration de 1976*; sa demande a été accueillie le 23 juillet 1985 [[1985] 1 C.F. 676 (1re inst.)].

Le 3 juillet 1985, le gouvernement américain a présenté au gouvernement canadien une demande d'extradition du requérant fondée sur le Traité d'extradition entre le Canada et les É.-U. de 1976. Des procédures ont été engagées en vertu de la *Loi sur l'extradition*, S.R.C. 1970, chap. E-21, et une audience portant sur l'extradition a été tenue devant le juge Pinard de la Cour supérieure du Québec le 26 août 1985. À ce moment-là, l'avocat du requérant a reconnu qu'on avait établi une preuve *prima facie* justifiant l'extradition et, par conséquent, un mandat visant à faire incarcérer le requérant jusqu'à ce qu'il soit livré aux États-Unis a été lancé conformément à l'alinéa 18(1)*a*) de la *Loi sur l'extradition*. Il ne restait plus qu'à déterminer si l'Article 6 du Traité entre le Canada et les É.-U. obligeait le juge chargé de se prononcer sur la question de l'extradition, ou le ministre de la Justice, à obtenir que les États-Unis lui garantissent que la peine de mort ne serait pas appliquée si le requérant était extradé. Dans son jugement rendu le 30 août 1985, le juge Pinard a statué qu'il n'était pas habilité à demander que les autorités américaines fournissent les garanties dont il est question à l'Article 6 et il a fait incarcérer le requérant en attendant son extradition. Le même jour, le juge Pinard a fait parvenir au ministre de la Justice un rapport sur l'affaire ainsi qu'une copie de son jugement.

Thereafter the petitioner applied for *habeas corpus* with *certiorari* in aid to review the decision of Pinard J. The matter was heard by Greenberg J. of the Quebec Superior Court who upheld the decision of Pinard J. and dismissed the application on September 20, 1985.

On September 23, 1985 the Assistant Deputy Attorney General sent a letter to the petitioner's counsel inviting written submissions to the Minister of Justice prior to the latter making a decision with respect to Article 6 assurances concerning the execution of the death penalty and the surrender of the petitioner. In addition, counsel was asked to consider the possibility of making oral submissions directly to the Minister in order to assist him further in making his decision or to permit the petitioner's position to be better understood.

Correspondence continued to be exchanged between the parties which eventually resulted in written submissions being received by the Minister on December 3, 1985, together with a request for a somewhat elaborate oral hearing during which the petitioner himself would present evidence to the Minister concerning his character, disposition and past. It was proposed that the hearing be one day in length and would follow the ordinary format of quasi-judicial or administrative hearings with witnesses being called by any interested party or the Minister and strict rules of evidence not being applicable. It was suggested by the petitioner's counsel that the purpose of such a hearing would be to allow the Minister to assess the petitioner's credibility and to show the doubt surrounding his conviction in the United States. In addition, evidence was to be submitted at the hearing relating to the injustice and inhumanity of the use of the death penalty.

On December 4, 1985 the Assistant Deputy Attorney General advised the petitioner's counsel that while the Minister was prepared to hear oral representations from the petitioner's counsel there did not appear to be any justifiable basis on which the Minister should entertain hearing oral testimony from the petitioner. The Minister was of the opinion that, in the context of extradition, he could

Par la suite, le requérant a sollicité un bref d'*habeas corpus* ainsi qu'un bref de *certiorari* afin de faire examiner la décision du juge Pinard. L'affaire a été entendue par le juge Greenberg de la Cour supérieure du Québec qui a maintenu la décision du juge Pinard et rejeté la demande du requérant le 20 septembre 1985.

Le 23 septembre 1985, le sous-procureur général adjoint a fait parvenir une lettre à l'avocat du requérant, l'invitant à transmettre ses arguments par écrit au ministre de la Justice avant que celui-ci ne prenne une décision en ce qui concerne les garanties dont il est question à l'Article 6 relativement à l'exécution de la peine de mort et à l'extradition du requérant. Il a en outre demandé à l'avocat s'il lui était possible de se présenter devant le ministre afin de lui faire valoir ses arguments de vive voix dans le but d'aider ce dernier à prendre sa décision ou de lui permettre de mieux comprendre la position du requérant.

Les parties ont continué à s'échanger des lettres jusqu'à ce que le ministre reçoive, le 3 décembre 1985, des arguments écrits ainsi qu'une demande visant à obtenir la tenue d'une assez longue audience au cours de laquelle le requérant lui-même pourrait présenter des éléments de preuve au ministre au sujet de sa moralité, de son caractère et de son passé. On a proposé que l'audience dure une journée et suive la procédure ordinaire des audiences quasi judiciaires ou administratives, des témoins pouvant être cités par toute partie intéressée ou par le ministre et les règles strictes de la preuve n'étant pas applicables. L'avocat du requérant a laissé entendre qu'une telle audience aurait pour but de permettre au ministre de déterminer s'il pouvait donner foi aux affirmations du requérant et de faire ressortir le caractère douteux de la condamnation de ce dernier aux États-Unis. En outre, des éléments de preuve devaient être présentés à l'audience quant à l'injustice et à la cruauté du recours à la peine de mort.

Le 4 décembre 1985, le sous-procureur général adjoint a indiqué à l'avocat du requérant que bien que le ministre fût disposé à entendre ses prétentions, il ne semblait pas exister de raison valable pour laquelle le ministre devait entendre la déposition du requérant. Le ministre était d'avis que, dans le cadre d'une extradition, on ne pouvait pas s'attendre à ce qu'il se prononce une nouvelle fois wished to show the doubt surrounding his conviction and wanted to have his credibility assessed by testifying on his own behalf, it was open to him to do so at the extradition hearing before Pinard J. in August 1985. The petitioner chose not to do so and, in fact, conceded that a *prima facie* case for extradition had been made out on the evidence. Therefore, it was most certainly not open to the respondent to ignore this fact nor that a jury trial had been conducted in the United States whereby the petitioner was convicted of the offences with which he was charged and to re-try a case which has been properly dealt with through the criminal justice system of the United States. As stated by G. V. La Forest in his text *Extradition To and From Canada*, 2nd ed., 1977, at page 23:

> Generally, as Hagarty, J., said in *Re Burley* (1865), 1 C.L.J. 34, at p. 50, "The treaty is based on the assumption that each country should be trusted with the trial of offences committed within its jurisdiction."

The petitioner has failed to satisfy me that any reasons exist which would justify an oral hearing before the respondent. Counsel for the petitioner has not indicated that there is anything relevant which the petitioner himself would be able to add to the information already before the respondent which was not provided by the petitioner's three counsel at the time they appeared before the respondent and were afforded an opportunity to make submissions on the petitioner's behalf. In my opinion, that hearing was virtually the equivalent of the petitioner having an oral hearing in front of the Minister. In addition, the petitioner sent a hand-written letter to the respondent prior to the decision being made. That letter formed part of the information which was before the Minister prior to his making a decision and the Minister's reasons indicate that the statements made by the petitioner in his letter were taken into consideration.

The petitioner's second argument is that the respondent failed to consider all the relevant facts and issues in reaching his decision. The respondent's decision contains, for example, no reference to the letters of the petitioner's parents nor to the

litige dans les procédures d'extradition qui ont été engagées jusqu'à ce jour. Si le requérant souhaitait faire ressortir le caractère douteux de sa condamnation et s'il voulait faire évaluer sa crédibilité en témoignant en son propre nom, il lui était loisible de le faire à l'audience portant sur l'extradition, tenue devant le juge Pinard en août 1985. Il a choisi de ne pas le faire et il a, en fait, reconnu qu'on avait établi une preuve *prima facie* justifiant son extradition. Par conséquent, l'intimé ne pouvait certainement pas ne pas tenir compte de ce fait ni du fait qu'un procès par jury avait été tenu aux États-Unis, au terme duquel le requérant avait été reconnu coupable des infractions dont il avait été accusé; il ne pouvait non plus instruire à nouveau une affaire qui avait été tranchée de la manière appropriée, selon les règles du système de justice pénale existant aux États-Unis. Comme l'a dit G. V. La Forest dans son ouvrage *Extradition To and From Canada*, 2^e éd., 1977, à la page 23:

> [TRADUCTION] En général, comme l'a dit le juge Hagarty dans *Re Burley* (1865), 1 C.L.J. 34, à la p. 50, «Le traité repose sur l'hypothèse qu'il incombe à chaque pays de tenir un procès lorsqu'une infraction est commise à l'intérieur de sa juridiction.»

Le requérant n'a pas réussi à me convaincre qu'il existe des motifs justifiant la tenue d'une audience devant l'intimé. L'avocat du requérant n'a pas indiqué que ce dernier pouvait ajouter aux renseignements déjà en la possession de l'intimé des éléments pertinents qui n'ont pas été fournis par ses trois avocats lorsqu'ils ont comparu devant l'intimé et qu'ils ont eu l'occasion de faire valoir le point de vue du requérant. À mon avis, cette audience équivalait pratiquement à une audience en personne devant le ministre. En outre, le requérant a envoyé une lettre manuscrite à l'intimé avant que ce dernier ne prenne sa décision. Cette lettre faisait partie des renseignements dont le ministre avait été saisi avant de prendre sa décision et les motifs de ce dernier indiquent qu'il a tenu compte des déclarations faites par le requérant dans ladite lettre.

Le requérant soutient comme deuxième argument que l'intimé n'a pas pris en considération tous les faits et points en litige pour arriver à sa décision. Par exemple, il n'est pas fait mention dans cette décision des lettres des parents du they were ignored. The Minister's decision, in my view, represented a fair and accurate assessment of the situation; it demonstrated a consideration of the relevant facts including the petitioner's age, family circumstances, his behavioural, educational and employment background as well as the personal representations of the petitioner in his letter to the respondent, including his allegations of innocence for the crimes with which he was convicted. Balanced against this, however, the Minister took into account that the petitioner had been found guilty of the offences with which he was convicted in a court of law in the United States, that the jury had rendered a death sentence verdict after weighing the aggravating and mitigating circumstances and the remedial avenues open to the petitioner under the laws of Pennsylvania, including the capacity of State authorities to dispense clemency in capital punishment cases. In addition, the Minister was cognizant of his obligation to consider the Canadian public interests. Accordingly, I am satisfied that the reasons given by the respondent for his decision more than adequately meet the requirements of the duty to act fairly.

The petitioner's third argument is that by allowing his decision to be influenced by the fact that the petitioner did not testify at his trial and by taking into account such public policy considerations as discouraging fugitives from seeking refuge in Canada, the respondent took into account irrelevant and illegal considerations which should lead this Court to the conclusion that he erred in law and to quash the decision.

In my opinion, these arguments are not supportable by the evidence. The decision of the Minister, made pursuant to Article 6 of the Canada-U.S. Treaty, is an administrative one involving an exercise of discretion. This discretion is always, of course, subject to the requirements of natural justice and to the control which the judiciary will normally exercise over the executive; that is, in exercising its powers the executive must act lawfully. Whether the executive has so acted is a matter to be determined by looking at the relevant

des parents du requérant signifie que le ministre ne les a pas pris en considération. À mon avis, la décision du ministre constituait une évaluation juste et adéquate de la situation; elle indiquait qu'il avait tenu compte des faits pertinents, notamment l'âge du requérant, ses antécédents familiaux, son comportement, son éducation et ses emplois antérieurs, ainsi que les arguments que le requérant a lui-même fait valoir dans la lettre qu'il a adressée à l'intimé, alors qu'il proclamait son innocence quant aux crimes pour lesquels il a été reconnu coupable. Par ailleurs, le ministre a également tenu compte du fait que le requérant a été reconnu coupable des infractions pour lesquelles il avait été condamné par une cour de justice américaine et que le jury avait prononcé la peine capitale après avoir pesé les circonstances aggravantes et les circonstances atténuantes ainsi que les recours qui s'offraient au requérant en vertu des lois de la Pennsylvanie, notamment le pouvoir des autorités de l'État d'accorder le pardon dans des cas où la peine capitale est imposée. Le ministre savait en outre qu'il devait tenir compte de l'intérêt public du Canada. Par conséquent, je suis convaincu que les motifs donnés par l'intimé lorsqu'il a rendu sa décision satisfaisaient amplement aux exigences de l'obligation d'agir équitablement.

Le troisième argument du requérant porte que, en rendant sa décision, l'intimé s'est laissé influencer par le fait que le requérant n'avait pas témoigné lors de son procès, et que, en accordant de l'importance à des considérations d'ordre public comme celle qui consiste à décourager les fugitifs de chercher refuge au Canada, il a tenu compte de considérations non pertinentes et illégales qui devraient amener cette Cour à conclure que l'intimé a commis une erreur de droit et à annuler sa décision.

J'estime que ces arguments ne trouvent aucun fondement dans la preuve administrée. La décision du ministre prise en vertu de l'Article 6 du Traité Canada-É.-U. est une décision administrative comportant l'exercice d'un pouvoir discrétionnaire. Ledit pouvoir est évidemment toujours assujetti aux exigences de la justice naturelle et au contrôle que le judiciaire exercera normalement sur l'exécutif, c'est-à-dire qu'en exerçant ses pouvoirs, l'exécutif doit agir en se conformant à la loi. Pour déterminer si l'exécutif a agi ainsi, il faut examiner cannot be said to have committed an error in law of such magnitude as to warrant this Court's interference and as would justify quashing the Minister's decision.

Furthermore, the Minister did not take into account illegal considerations when he had regard to Canadian public interests. By recognizing that the Canadian government wished to discourage fugitives from seeking refuge in Canada, the Minister was doing nothing more than stating a policy decision. That does not constitute an error in law. One would in fact be somewhat surprised if such public policy considerations were not taken into account.

I am not prepared to enter into a discourse on the petitioner's fourth argument that capital punishment constitutes "cruel and unusual punishment" contrary to section 12 of the *Canadian Charter of Rights and Freedoms*. Admittedly, this is a question which may find its way before the courts at some point in the future. But the circumstances of this case do not present the proper forum for a debate of the issue. Again, the Court would be exceeding its judicial review function by making a decision one way or another as to whether the use of capital punishment in the State of Pennsylvania constitutes "cruel and unusual punishment". As previously stated, the decision of the Minister in this case is essentially a policy one and the determination of whether assurances should be sought from the United States is a matter wholly within the Minister's discretion.

I am satisfied that the petitioner has been availed of all the fairness to which he is entitled. He well knew the case against him and was afforded every reasonable opportunity to answer to it. The Minister's decision demonstrates clearly that he had before him all the relevant facts necessary in order to reach a rational conclusion, including written submissions from the petitioner's counsel, the petitioner's hand-written letter, psychiatric reports, letters of the petitioner's parents, evidence presented at the extradition hearing and the report of Pinard J. There are no grounds on which to quash the Minister's decision and, accordingly, the petitioner's application is dismissed with costs.

ministre a commis une erreur de droit si importante qu'elle justifie l'intervention de la Cour et qu'elle justifierait l'annulation de la décision du ministre.

Qui plus est, le ministre n'a pas tenu compte de considérations illégales en se préoccupant de l'intérêt public du Canada. En reconnaissant que le gouvernement canadien souhaitait décourager les fugitifs de chercher refuge au Canada, le ministre n'a fait rien d'autre qu'énoncer une décision de principe. Cela ne constitue pas une erreur de droit. Il serait en fait un peu surprenant si l'on ne tenait pas compte de considérations d'intérêt public de ce genre.

Je ne suis pas disposé à discuter du quatrième argument du requérant suivant lequel la peine capitale constitue une «peine cruelle et inusitée» contrevenant à l'article 12 de la *Charte canadienne des droits et libertés*. Il faut reconnaître qu'il s'agit peut-être d'une question sur laquelle les tribunaux auront à se pencher dans le futur. Mais les circonstances de l'espèce ne constituent pas l'occasion appropriée d'un débat sur ce point. Encore une fois, la Cour excéderait son rôle de contrôle judiciaire si elle se prononçait dans un sens ou dans l'autre sur la question de savoir si le recours à la peine capitale dans l'État de Pennsylvanie constitue une «peine cruelle et inusitée». Comme je l'ai déjà dit, la décision du ministre en l'espèce est essentiellement une décision de principe et celui-ci a toute discrétion pour décider s'il faudrait chercher à obtenir des garanties des États-Unis.

Je suis convaincu que le requérant a bénéficié de toute l'équité à laquelle il a droit. Il connaissait bien les arguments soulevés contre lui et on lui a donné toutes les occasions raisonnables de les réfuter. Il ressort de la décision du ministre que celui-ci avait été mis au courant de tous les faits pertinents nécessaires pour qu'il en tire une conclusion logique, s'appuyant notamment sur les arguments écrits de l'avocat du requérant, la lettre manuscrite de ce dernier, les rapports psychiatriques, les lettres des parents du requérant, la preuve administrée lors de l'audience portant sur l'extradition et le rapport du juge Pinard. Il n'existe aucun motif permettant d'annuler la décision du ministre et, par conséquent, la demande du requérant est rejetée avec dépens.

C. A.
1968
Reg. v. Bennett

court below. In our judgment, a hospital order, which is a remedial order designed to treat and cure the appellant, cannot be regarded as more severe than a sentence of imprisonment, even though in certain events the hospital order may involve the detention of the appellant for a longer period of time.

We are accordingly satisfied that no technical obstacle lies in our path and we are happy to allow this appeal, to quash the sentence of three years' imprisonment and to substitute a hospital order under section 60 of the Mental Health Act, 1959, with a restriction under section 65 for an indefinite period, coupled with a direction that he be returned to Broadmoor.

Appeal allowed.

Solicitors: *Argles & Court.*

[COURT OF APPEAL]

C. A.
1968
Feb. 5

LORD DENNING M.R., DANCKWERTS and EDMUND DAVIES L.JJ.

* T. A. MILLER LTD. *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT AND ANOTHER

Town Planning—Appeal to Minister—Inspector's inquiry—Evidence—Letter admitted as evidence—Untested by cross-examination—Whether contrary to natural justice.

Tribunal—Statutory—Control by courts—Procedure—Town planning inquiry—Letter admitted as evidence—Untested by cross-examination—Whether contrary to natural justice.

Natural Justice—Evidence—Town planning inquiry whether technical rules applicable—Sworn and unsworn evidence—Letter admitted as evidence—Untested by cross-examination—Whether contrary to natural justice—Whether inspector's notes should be produced.

On July 18, 1966, a local planning authority served upon the owners of a nursery for producing seeds and plants an enforcement notice calling on them to discontinue using part of their land as a " garden centre " for retail sales. The owners appealed to the Minister. On January 18, 1967, an inquiry was held by an inspector on behalf of the Minister. At the inquiry the planning authority put before the inspector a letter from the managing director of a company who had previously owned the land. Objection was taken on behalf of the owners to the admission of the letter as evidence and the writer was not called as a witness or cross-examined. The inspector admitted the letter and accepted statements therein in his findings of fact. So, too, did the Minister in his letter of decision of June 2, 1967, dismissing the owners' appeal.

On December 5, 1967, the owners' appeal to the Divisional Court, on the grounds, inter alia, that the inspector's admission in evidence of the unsworn letter upon which the Minister based his conclusion contrary to the sworn evidence of witnesses for the owners was in conflict with the rules of natural justice, was dismissed.

On the owners' application to the Court of Appeal for leave to appeal:—

Held, dismissing the application, that a tribunal such as the inspector's inquiry was master of its own procedure subject to the application of the rules of natural justice and it could admit hearsay evidence. Since the owners had a fair opportunity of commenting on and contradicting the contents of the letter there was nothing contrary to natural justice in admitting it and the enforcement notice was good.

Reg. v. *Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 Q.B. 456; [1965] 2 W.L.R. 89; [1965] 1 All E.R. 81, C.A. applied.

Decision of the Divisional Court (1967) 66 L.G.R. 285, D.C. affirmed.

C APPLICATION for leave to appeal from Divisional Court.[1]

On December 5, 1967, the Divisional Court, Lord Parker of Waddington C.J., Widgery J. and Chapman J., dismissed[1] an appeal by landowners, T. A. Miller Ltd., under section 180 of the Town and Country Planning Act, 1962, from a decision of the Minister of Housing and Local Government, given by letter dated
D June 2, 1967, upholding with amendments an enforcement notice served on them on July 18, 1966, by the local planning authority, Guildford Rural District Council, in respect of the use of land, Burnt Common Nurseries, at Send, near Woking, Surrey.

The owners applied to the Court of Appeal for leave to appeal.

E The facts are stated in the judgment of Lord Denning M.R.

George Dobry for the owners.
Nigel Bridge for the Minister.

The following cases, in addition to those referred to in the
F judgments, were cited in argument: *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*[2]; *Local Government Board* v. *Arlidge*[3]; *Reg.* v. *Medical Appeal Tribunal (North Midland Region), Ex parte Hubble*[4]; *Wednesbury Corpn.* v. *Ministry of Housing and Local Government (No. 2)*[5]; *Rex.* v. *Brighton and Area Rent Tribunal, Ex parte Marine Parade Estates (1936) Ltd.*[6];
G and *Rex* v. *Newmarket Assessment Committee, Ex parte Newport Ltd.*[7]

LORD DENNING M.R. We need not trouble you, Mr. Bridge. This case concerns an area of land called Burnt Common Nurseries at Send near Woking. For many years from 1933

H [1] (1967) 66 L.G.R. 285, D.C.
[2] [1957] A.C. 223, 240; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669, (H.L.).
[3] [1915] A.C. 120, 140; 30 T.L.R. 672, H.L.(E.).
[4] [1958] 2 Q.B. 228, 240; [1958] 3 W.L.R. 24; [1958] 2 All E.R. 374 D.C.; [1959] 2 Q.B. 408; [1959] 3 W.L.R. 456; [1959] 3 All E.R. 40 C.A.
[5] [1966] 2 Q.B. 275; [1965] 3 W.L.R. 956; [1965] 3 All E.R. 571; 63 L.G.R. 460, C.A.; (*pet.dis.*) [1965] 1 W.L.R. 1469, H.L.(E.).
[6] [1950] 2 K.B. 410; 66 T.L.R. (Pt. 2) 9; [1950] 1 All E.R. 946, D.C.
[7] [1945] 2 All E.R. 371, D.C.

C. A.
1968
T. A. Miller Ltd. v. Minister of Housing and Local Government
Lord Denning M.R.

onwards this area was occupied by a firm of nurseymen called Fogwills Ltd. They used it as a nursery for producing seeds and plants. They sold their "home produced" seeds and plants. They also sold "imported" seeds and plants and other articles. They bought these "imported' goods from outside suppliers and resold them. From 1946 onwards their sales of "imported" goods diminished so as to be almost non-existent save for packeted seeds. From 1946 onwards sales dropped a lot and the business of Fogwills went down. In 1961 Fogwills sold out to a company, T. A. Miller Ltd. They took over the nurseries. Mr. Miller said that they purchased the nursery in order to expand their wholesale business. They did not sell by retail for several months after they took over the site in 1961. Now it appears that in the last few years they have developed on the premises a "Garden Centre" selling garden ornaments and furniture, garden accessories, tools, fertilisers, and the like.

The local planning authority took the view that this was a "development" of the land: that there was a "material change" of the use of the land: that permission had not been obtained for it: and they thought it was undesirable, especially as it was right on the A.3 trunk road where traffic considerations have to be borne in mind. So on July 18, 1966, the Guildford Rural District Council on behalf of the county council issued an enforcement notice calling on Millers to give up this use of a part of the land as a garden centre. Millers appealed to the Minister. On January 18, 1967, there was an inquiry by an inspector on behalf of the Minister. Evidence was given on oath by four witnesses who were cross-examined and re-examined. In addition, the planning authority put before the inspector a letter from Mr. Fogwill, the managing director of Fogwills, written on November 19, 1964. He wrote that letter to the local council when he was at Guildford in the neighbourhood of the nurseries. It contained very material information about the premises. He said:

> "When we occupied the premises referred to, it was broadly true that only produce produced at those premises was sold there, except that a stock of packeted seeds produced elsewhere was normally kept there. . . . We can assure you that no garden equipment or furniture of any bulk was ever stocked at the premises, or even trans-shipped there, unless there was some very isolated occurrences which may have escaped our attention."

But before the inquiry was held, Mr. Fogwill had moved to Ormskirk in Lancashire and he wrote a letter explaining that he could not attend the inquiry:

> "I regret to have to inform you that owing to the distance involved, I could not consider assisting you by attending at the public inquiry . . . Nevertheless you can continue to take it that the statements made in my letter of November 19, 1964, were accurate."

The solicitor for Millers objected to the letter of November 19, 1964. He submitted that it should not be received in evidence.

C. A.
1968

T. A. Miller Ltd.
v.
Minister of Housing and Local Government

LORD DENNING M.R.

But the inspector admitted it. It was put to the witnesses. They did not accept it as accurate. But the inspector accepted it and it formed an important item in his findings of fact. The inspector found that:

> "Between 1946 and the winter of 1960/61 retail sales of imported goods, except packeted seeds, diminished to an almost non-existent level, as stated by Mr. G. M. Fogwill, managing director of the firm who only some 3½ years previously had vacated the nursery."

So the inspector relied on Mr. Fogwill's letter. So did the Minister in his decision. Mr. Dobry said that they ought not to have relied on it at all. It ought not even to have been admitted because it was hearsay. It was not on oath, no opportunity was given to test it by cross-examination, and it was objected to. Mr. Dobry said that in these circumstances it was contrary to natural justice for it to be admitted.

In my opinion this point is not well founded. A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied. Most of the evidence here was on oath, but that is no reason why hearsay should not be admitted where it can fairly be regarded as reliable. Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law: see *Reg.* v. *Deputy Industrial Injuries Commissioner, Ex parte Moore.*[1] During this very week in Parliament we have had the second reading of the Civil Evidence Bill. It abolishes the rule against hearsay, even in the ordinary courts of the land. It allows first-hand hearsay to be admitted in civil proceedings, subject to safeguards. Hearsay is clearly admissible before a tribunal. No doubt in admitting it, the tribunal must observe the rules of natural justice, but this does not mean that it must be tested by cross-examination. It only means that the tribunal must give the other side a fair opportunity of commenting on it and of contradicting it: see *Board of Education* v. *Rice*[2]; *Reg.* v. *Deputy Industrial Injuries Commissioner, Ex parte Moore.*[3] The inspector here did that. Mr. Fogwill's letter of November 19, 1964, was put to the witnesses and they contradicted it. No application was made for an adjournment to deal further with it. In these circumstances I do not see there was anything contrary to natural justice in admitting it.

The inspector came to these conclusions:—

> (1) "Retail sales at the nursery declined up to May 1961, ceased for some time afterwards, and any sales that took place between May, 1961, and July, 1962, were minimal and purely incidental to the business normally carried on in the nursery." (2) "The current retail sales of fabricated and manufactured goods so exceeds that normally associated with a nursery as to constitute development."

[1] [1965] 1 Q.B. 456; [1965] 2 W.L.R. 89; [1965] 1 All E.R. 81.

[2] [1911] A.C. 179, 182; 27 T.L.R. 378, H.L.(E.).

C. A.
1968
T. A. Miller Ltd.
v.
Minister of Housing and Local Government
Lord Denning M.R.

He concluded that "on the evidence before me, I am of opinion that this development took place within the period of four years prior to July 28, 1966, which is the date of the enforcement notice."

Those conclusions determine this case. They mean that this garden centre was a new development of this site, which started within the four years before the enforcement notice. Millers should have obtained planning permission before it was started. They did not have permission. The enforcement notice is good.

Mr. Dobry, in urging us to give leave to appeal, said that the Minister looked at the wrong unit. I agree, as Widgery L.J. said,[4] the entirety is to be looked at here. Even so, looking at the entirety, there has been new development upon it by changing over to the garden centre.

Mr. Dobry also urged that there was only a temporary suspension of retail sales. But on the facts found, it seems to me quite legitimate to say that the previous retail sales had ceased for so long that there was no existing use that could be revived.

Mr. Dobry also urged that the Minister's decision was ambiguous. But it seems to me there is nothing so ambiguous in it that it cannot be acted upon.

I think the decision of the Divisional Court[5] was right. I do not think a case has been made for leave to appeal to be given.

I would, therefore, refuse leave.

DANCKWERTS L.J. I agree and have nothing to add.

EDMUND DAVIES L.J. For my own part, I should have entertained greater confidence in the correctness of the decision arrived at by the Minister in the light of his inspector's report had Mr. Fogwill, to whose letter the inspector clearly attached considerable importance, been called as a witness and been cross-examined on the assertions in his letter. But that is not the point at issue here. Having regard to such authorities as *Reg.* v. *Deputy Industrial Injuries Commissioner, Ex parte Moore*,[6] it cannot, in my judgment, be said that it was not open to the inspector, and the Minister in turn, to attach such weight to the letter as they thought fit, nor that the rules of natural justice were breached by their so doing.

For that reason I agree with my Lords that this application must be refused.

Application dismissed with costs.

Solicitors: *Bell & Sherrard*, Kingston-upon-Thames; *Solicitor, Ministry of Housing and Local Government.*

A. H. B.

[4] (1967) 66 L.G.R. 285, D.C.

[6] [1965] 1 Q.B. 456.

LAND COMPENSATION REPORTS

KARN et al. v. ONTARIO HYDRO et al.

Ontario Court of Appeal, Estey, C.J.O., Howland and Zuber, JJ.A.
June 14, 1977.

Procedure — Inquiry proceedings — Expropriation for power transmission corridor — Whether inquiry officer bound to hear evidence about alternate routes — Expropriations Act (Ont.), ss. 6(2),(3), and 7(5).

The expropriating authority proposed to take certain lands for a route for electrical power lines. An inquiry into whether the taking is "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority" under s. 7(5) of the *Expropriations Act*, R.S.O. 1970, c. 154, was requested by the owners. Generally, the inquiry officer is under a duty to consider alternative routes or sites raised by the owners. However, in this case, a Commission of Inquiry, specially selected for the purpose, investigated at length and in detail the question of alternative routes.

Held, by the Court of Appeal, reversing the Divisional Court, s. 6(2) of the Act entitles the owners to an inquiry. The fact that there has been a previous investigation into alternative routes does not disentitle the applicants to a hearing under s. 7(5) of the Act. The Lieutenant-Governor in Council under s. 6(3) of the Act may dispense with an inquiry, but this was not done.

now CHA avoid mult. hearings

The authority alternatively argued that the taking of the very lands in question is one of the "objectives" of the authority and, therefore, that alternative routes fall outside the ambit of the inquiry. The Court held that, in this case, the objective of the authority was not simply to acquire the lands in question. That acquisition was the means by which some more fundamental objective (the power transmission corridor) is accomplished. To eliminate the question of alternative routes would, as a practical matter, negate the inquiry.

APPEAL by the owners from the dismissal of an application for judicial review, *infra*, of a ruling by an inquiry officer sitting pursuant to the *Expropriations Act* (Ont.).

The judgment appealed from is as follows

Leon Paroian, Q.C., for Glenna Scott, Walter Scott, Robert Timbers, Thomas Beer and Michael Beer.
Richard T. Howitt, for all other applicants.
T. C. Marshall, for respondent, Ontario Hydro.

Div ct

issue: whether inq. officer must receive evid of alternatives

REID, J:—The question raised by this case is whether an inquiry officer conducting a hearing into the proposed expropriation of a route for electrical power lines must receive evidence of possibly alternate routes. The application is for judicial review of a ruling of Donald F. Meyrick, Q.C., sitting as an inquiry officer pursuant to the *Expropriations Act*, R.S.O. 1970, c. 154, s. 7.

JR of inq. officer
commision enq held hearing so didn't
inq officer sd. not hear re alt
Div ct. dismissed JR
CA allowed appeal

At the outset, I should record that counsel agreed to an amendment to the style of cause adding Thomas Beer and Michael Beer as applicants. That amendment was granted.

The matter involves a proposed expropriation by Ontario Hydro of certain lands owned by a considerable number of persons including the applicants. It is Hydro's desire to expropriate these lands in order to create a corridor about 250 ft. in width that would traverse the applicants' lands. The events leading to this point reach back some distance in time but may be briefly stated.

Ontario Hydro is given the responsibility of producing and distributing hydro-electrical power in Ontario. Increasing demand for electrical power led to consideration of prospective routes for new transmission lines in the vicinity of Metropolitan Toronto. In obvious recognition of the extent of public interest in this prospect, by an Order in Council dated June 21, 1972, Dr. Omond M. Solandt was appointed a Commission of Inquiry under the *Public Inquiries Act*, 1971 (Ont.), c. 49, to make recommendations on the transmission of power between Nanticoke (west of Toronto) and Pickering (east of Toronto) for the information and consideration of the provincial Secretary for Resources Development.

The Commission held a series of public hearings. Ultimately, the Commission reported in March, 1974. The report recommended a particular route.

In December, 1975, by Order in Council, Hydro was authorized to acquire certain lands described in a schedule to the Order in Council. These were the lands that lay along the recommended route.

The Order in Council enabled Hydro to use the provisions of the *Expropriations Act* to acquire the subject lands.

Sections 4, 5 and 6 of the *Expropriations Act* required Hydro to obtain the approval of its "approving authority" (the Minister of Energy and Resources Management). Without that approval it could not expropriate. Upon applying for approval Hydro was obliged to give notice to registered owners of the lands to be expropriated. Those owners were given the right to request a hearing. Where a request for hearing is made, an inquiry officer must be appointed (s. 7, s-ss. (1), (2) and (3)). The procedure for the hearing was set out in s. 7, as follows, after providing that the inquiry officer was to fix a time and place and notify the parties:

> 7(4) At least five days before the date fixed for the hearing, the expropriating authority shall serve upon each party to the inquiry a notice indicating the grounds upon which it intends to rely at the hearing and shall make available for inspection by the parties any documents, including maps and plans, that the expropriating authority intends to use at the hearing.
>
> (5) The hearing shall be by means of an inquiry conducted by the inquiry officer who shall inquire into whether the taking of the lands or any part of the lands of an owner or of more than one owner of the same lands is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.

(6) The inquiry officer shall report to the approving authority a summary of the evidence and arguments advanced by the parties, the inquiry officer's findings of fact, and his opinion on the merits of the application for approval with his reasons therefor.

(7) The inquiry officer may combine two or more related inquiries and conduct them in all respects and for all purposes as one inquiry.

(8) The expropriating authority, each owner who notifies the approving authority that he desires a hearing in respect of the lands intended to be expropriated and any owner added as a party by the inquiry officer are parties to the inquiry.

(9) The inquiry officer,

(*a*) may add any owner whose land would be affected by the expropriation of the lands concerned in the inquiry or any modification thereof as a party to the inquiry;

(*b*) shall give every party to the inquiry an opportunity to present evidence and argument and to examine and cross-examine witnesses, either personally or by his counsel or agent;

(*c*) is not bound by the technical or legal rules of evidence; and

(*d*) may inspect the lands concerned either alone or in the presence of the parties.

(10) The inquiry officer may recommend to the approving authority that a party to the inquiry be paid a fixed amount for his costs of the inquiry not to exceed $200 and the approving authority may in its discretion order the expropriating authority to pay such costs forthwith.

Section 8 is also relevant:

8(1) The approving authority shall consider the report of the inquiry officer and shall approve or not approve the proposed expropriation or approve the proposed expropriation with such modifications as the approving authority considers proper, but an approval with modifications shall not affect the lands of a registered owner who is not or has not been made a party to the hearing.

(2) The approving authority shall give written reasons for its decision and shall cause its decision and the reasons therefor to be served upon all the parties within ninety days after the date upon which the report of the inquiry officer is received by the approving authority.

(3) The approving authority shall certify its approval in the prescribed form.

Mr. Donald F. Meyrick, Q.C., was appointed as the inquiry officer and, pursuant to notices that he caused to be published, the hearing into the expropriation of the subject lands commenced on November 22, 1976.

It should be observed that this hearing did not encompass the entirety of the lands covered by the Order in Council. It dealt with only a part; we are told a 14-mile stretch in the area of Limehouse, Ontario, to the north and west of Metropolitan Toronto.

The hearing that was commenced on Monday, November 22, 1976, continued on a daily basis until Thursday, November 25, 1976, when it was adjourned "to April 4th, 1977, or earlier by either party giving fifteen days' notice": see Mr. Meyrick's reasons.

As required by the *Expropriations Act*, Hydro served upon the property owners a notice of grounds. This was a lengthy document, some 15 pages, that contained a lengthy statement entitled "The

Objective of the Expropriating Authority". In the notice of grounds the following occurs:

> The purpose and objective of the proposed expropriation is the acquiring of sufficient land or interests therein for a right of way for an electrical transmission line (part) extending from Bradley Junction, a defined location in the northern portion of Greenock Township in the County of Bruce (which is connected by a right of way already acquired and in respect of which construction is proceeding linking the Bruce Nuclear Generating Station near Douglas Point on Lake Huron) to the Milton Transformer Station (a location near the Town of Milton) which location is also fixed.

In a statement of "objectives", included in the notice, the following occurs:

> This objective (linking of the Bruce Generation with the major transmission facilities to the south via a transformer station at Milton) must be accepted for the purposes of these hearings. This involves a direct linkage of Bruce with Milton generally through Bruce, Grey, Dufferin, Wellington and Halton Counties. This aspect of the system design was accepted by Dr. Solandt in the course of the extensive inquiries conducted by him between September 13, 1972 and March, 1974. This accepted and recommended design has been approved by the Government of Ontario and is beyond consideration in these hearings.

A list of documents, maps and plans intended to be used at the hearing was included in the notice of grounds. These included the Solandt Commission's report.

Before the first witness was called by the Hydro, counsel for the property owners asked for a ruling. They desired to know whether the inquiry officer would permit cross-examination and hear evidence about alternate routes for the transmission lines. After hearing argument, the inquiry officer reserved his ruling.

The hearing thereupon proceeded. Mr. Arthur Mosher was Hydro's first witness. He was the manager of the land use and environmental planning department, route and site selection division of Ontario Hydro, and had been the project planner responsible for the planning of the route from Nanticoke generating station to Pickering generating station. He gave a general history leading up to the selection of the recommended route.

At the conclusion of his testimony-in-chief, the cross-examination began. During the cross-examination, Mr. Meyrick announced that he was prepared to make a ruling on the question that he had previously reserved. After further argument by counsel, Mr. Meyrick ruled that:

> No evidence should be led or adduced through cross-examination on the initiative of the respondent owners and other interested parties in opposition which would involve an inquiry into the relative merits of alternative routes for the desired power line.

Mr. Meyrick said also:

> It is clear, however, that important public interests emerge on both sides of the equation none of which is served by delay. I accordingly recommend that matters be precipitated and that the appropriate officials within the public sector (Hydro and the Province) be authorized and directed to forthwith enter into di-

alogue with counsel and agents representing the private sector for the purpose of a joint application to Court for an abridgment of time and an early disposition of the ensuing legal contest.

It is the "ruling" that is the subject of this application.

I am unaware of any decision that governs or substantially relates to this question. Mr. Meyrick observed a substantial consensus among commentators on the newly-introduced *Expropriations Act*. This was that the consideration of alternate sites was a proper function of an inquiry officer.

I agree with that view. The duty of an inquiry officer is to consider whether the taking of lands is "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority". It is difficult to invest that language with any real meaning if he does not inquire whether alternative sites (or routes) were considered, or, whether they were or were not, should be. It appears to me that if an inquiry officer concludes that alternatives were not considered by the applicant, or not adequately considered, or, whether they were or not, a preferable alternative exists that could reasonably achieve the objectives of the expropriating authority, this should be reflected in the opinion he must ultimately give.

How this issue should be handled will depend on the circumstances of each case. Some cases may require lengthy investigation, in others the questions of fairness, soundness, and reasonable necessity might be answered with only little effort. How much or how little inquiry is necessary is, in the first instance, for an inquiry officer to decide. It is a matter of discretion.

Here, the inquiry officer has decided not to allow inquiry into alternatives. Usually, in my opinion, that would be a wrong decision, for it would prevent him from making the kind of inquiry that his mandate requires, and would result in an error of jurisdiction. But this is not a "usual" type of case. Indeed, it is an extraordinary case. Here, the question of alternative routes, from Nanticoke to Pickering (and elsewhere) has been investigated at length and in detail, by a Commission especially selected for the purpose. That aspect of the issue before the inquiry officer has thus been dealt with in an exhaustive manner. For the inquiry officer to do this all over again, without the resources of the Solandt Commission would be a great waste of time and money.

In my opinion, in these circumstances, it was open to the inquiry officer to accept the report of the Solandt Commission as settling the question of generally alternate routes. This appears to be the effect of his ruling. His ruling does not prevent or avoid consideration of alternatives to the route in the locale of the recommended route. Rather, it was obviously intended to preserve that prospect. At a later point in his reasons, Mr. Meyrick said:

> The strict application of my ruling although disappointing to the majority of respondents who obviously had come to the hearing prepared to attack the whole process of route studies and selection, would still allow considerable latitude for attack through cross-examination and evidence on the general scheme which could be related to the particular section of the transmission line corridor, Limehouse to Milton which is the subject for detailed examination in this inquiry. Thus it could be demonstrated that the land was not needed in whole or part or that modification was possible. To this I stated that the ruling would not be narrowly construed.

In this interpretation of his own ruling, I think Mr. Meyrick was right as well.

It remains to deal with the Minister's objection to the jurisdiction of the Court. The function of the inquiry officer is said not to be *quasi*-judicial, in that he issues a report and not a decision. The Minister therefore argues that his ruling is not subject to *certiorari*.

I find this a curious position to take when it was apparent to all, and virtually conceded by counsel for the Minister that the question before us was novel, was of general significance to the operation of the *Expropriations Act*, that it dealt with an area of now long-standing controversy, and it was highly desirable that it be set at rest.

However, the objection having been raised, and dealt with at some length in written submissions, we are bound to deal with it.

This is an application for judicial review, not merely *certiorari*. It could be seen as an application for *mandamus*, a remedy subsumed by the *Judicial Review Procedure Act*, 1971 (Ont.), c. 48. In that case, the grant of a remedy would not depend upon the existence of *quasi*-judicial functions. The remedy would lie if the inquiry officer simply failed to do his statutory duty. Seen in this light, there can be no objection to jurisdiction on the ground taken.

Similarly, on an application for judicial review, the Court's power to make a declaration becomes operative. I know of no law that confines the power to make a declaration of rights to the exercise of *quasi*-judicial functions.

The application will be dismissed, but in the circumstances without costs.

KREVER, J.:—I have had the benefit of reading Mr. Justice Reid's reasons. I agree with him that the inquiry officer's ruling is subject to judicial review in the circumstances of this case. I also agree with his conclusion that the consideration of alternate sites is a proper function of an inquiry officer who, under s. 7 (5) of the *Expropriations Act*, R.S.O. 1970, c. 154, must look into the question whether the proposed taking of lands "is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority". I regret, however, that I am unable to share his opinion that because of the history of this matter, particularly the prior investigation of the question of alternative routes by the Solandt Commission, the decision not to allow inquiry into the alternatives in a hearing under s. 7 (5) of the Act (which, in Reid, J.'s language, would "usually ... be a wrong decision") was right. I fail to see why the history of a particular expropriation proceeding should be held to affect the correct interpretation of the *Expropriations Act* which is a statute of general application to all expropriations. Like Mr. Justice Reid, I agree with the consensus among commentators that the consideration of alternate routes is one which is relevant to the principal issue whether the taking of the proposed lands is fair, sound and reasonably necessary. In my appreciation of s. 7 (5) of the Act, how the *Expropriations Act* came to be involved is of no consequence. Given the application of the Act, it must be interpreted correctly, and in the same way, according to its terms in all cases to which it applies. Whether or not it would be a great waste of time and money for the inquiry officer to do what he must do in the absence of any antecedent special inquiry is not, in my opinion, a material consideration when construing s. 7 (5) of the Act which, as I have said, is to be interpreted in the same way in all expropriations.

For these brief reasons, it is my conclusion that Mr. Meyrick was in error in the ruling which the applicant seeks to have judicially reviewed. Accordingly, I would grant the application with costs and declare that every party to the inquiry is permitted to present evidence and argument, to examine and cross-examine witnesses as to the alternate routes as part of the inquiry into the question whether the proposed taking of the lands is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.

RUTHERFORD, J., concurs with REID, J.

Leon Paroian, Q.C., for Glenna Scott, Walter Scott, Robert Timbers, Thomas Beer and Michael Beer.

Ronald J. Rolls, Q.C., and *Richard T. Howitt*, Q.C., for all other applicants.

T. C. Marshall, for respondent, Ontario Hydro.

The judgment of the Court was delivered orally by

ZUBER, J.A.:—This is an appeal by the applicants from an order of the Divisional Court pronounced on March 3, 1977. The question raised on this appeal is whether or not an Inquiry Officer conducting a hearing into a proposed expropriation of a route for the transmission of electric power is obliged to hear evidence with respect to alternative routes.

The respondent, Ontario Hydro, took the position both here and below that evidence is not admissible with respect to alternative routes for two reasons; first, there was a previous general inquiry conducted by Doctor Solandt into the proposed scheme for the distribution of hydro-electric power throughout Ontario and particularly that generated by the nuclear generating stations. Second, it is argued that in any event the alternative routes fall outside the proper ambit of inquiry by the Inquiry Officer in this case.

Turning to the first argument, it appears that previously when a question respecting the transmission of electric power from the nuclear and other generating stations arose in Ontario, the Solandt Commission conducted a lengthy inquiry into the matter and made a report dealing with a proposed transmission route. It is argued that the question of the route for this transmission line was thereby conclusively determined.

However, even if the Solandt Commission dealt with some of the issues that arise in this expropriation, s. 6(2) of the *Expropriations Act*, R.S.O. 1970, c. 154, entitles the applicants to a hearing and an inquiry specifically into this expropriation. The fact that there has been a previous inquiry is not of itself sufficient reason to dispense with or diminish the inquiry into alternate routes under the *Expropriations Act*.

If it could be said that a second inquiry covering the same ground or a part of it was a waste of time, or accomplished nothing more than delay, it is obvious that s. 6(3) permits the Lieutenant-Governor in Council to direct that an expropriation proceed without an inquiry. This has not been done; the expropriation has been allowed to proceed in the normal manner and therefore s. 7(5) must be complied with.

Turning to the second ground raised, s. 7(5) of the *Expropriations Act* reads as follows:

> 7(5) The hearing shall be by means of an inquiry conducted by the inquiry officer who shall inquire into whether the taking of the lands or any part of the lands of an owner or of more than one owner of the same lands is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.

It is argued on behalf of Ontario Hydro that the taking of the lands in question (which form part of the transmission route) is one of the objectives of the expropriating authority and therefore the route and its alternatives fall outside the ambit of inquiry.

It appears to us that whatever the objectives of the respondent, Ontario Hydro may be in this case, they are not simply the acquisition of the lands in question. The acquisition of the land is the means by which some further objective is accomplished. To ascribe any meaning whatever to this section and particularly the words "fair, sound and reasonably necessary", it must follow that the inquiry includes the issue of alternative routes. To eliminate this question from the inquiry would almost negate the inquiry.

We are not here concerned with the logic of the statutory pattern but rather the essential meaning of the statute. If the submissions of Ontario Hydro were accepted, the expropriating authority, by presenting as a schedule to the authorizing order, a description of the precise land (here 250 ft. in width) required from one end of the transmission line to the other, could preclude any discussion of the taking before the Inquiry Officer. In such an instance if the person expropriated could not make submissions as to the route to be followed in connecting point A to point B, then it is difficult to imagine what submissions he would be free to make. It is recognized at once that such an expropriating pattern leaves much to be desired. For example, if the taker proposed in the authorizing order the precise lands required for the long thin transmission strip, the expropriatee in the middle of that line, and presuming hearings had already been heard on either side of him, would have very little to say which could at that stage move the Inquiring Officer in all probability. As a practical matter, the statutory pattern does not seem to sit well with a linear taking as in the case of this transmission line, but such consideration forms no part of the judicial process of discerning and applying the plain meaning in the interpretation of a statute.

In my view both positions taken by Ontario Hydro are untenable and the appeal should be allowed. An order will therefore issue declaring that every party to the inquiry is permitted to present evidence and argument, and to examine and cross-examine witnesses as to alternative routes as a part of the inquiry into the question whether the proposed taking of land is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.

The applicants having succeeded are entitled to their costs of this appeal, the application for leave to appeal, and the application to the Divisional Court.

DAY, WILSON, CAMPBELL v. BRENNAN et al.

Ontario Supreme Court, Taxing Office, Taxing Officer (Saunders).
August 4, 1976.

Costs — Legal — Costs of claimant taxed on solicitor-and-client basis — Claimant generally liable to solicitor for costs incurred which were not necessary to determine compensation — Claim for costs of hearing to correct zoning problem consequent on expropriation — Claimant led to believe that, if successful at arbitration hearing, authority would pay all legal costs — Solicitor's claim against client dismissed — Expropriations Act, R.S.O. 1970, c. 154, s. 33(1), O. Reg. 491/71.

TAXATION of a solicitor-and-client bill of costs.

have submitted this principle many times and Canadian cases abound to the same effect.

Then the Expropriation Tribunal cites the judgments of St-Jacues, J., in the case of *Robitaille v. Cité de Québec*, [1948] Que. K.B. 87 *et seq.*, and in *Lalonde v. Minister of Roads* [unreported], refered to in [1957] Que. K.B. 641. In these two judgments, St-Jacques, ., emphasizes the fact that the owner must, in an expropriation, eceive compensation proportionate to the sacrifice that he makes. Ie adds that it is not only the value of the property expropriated hat is due to him but also compensation for all the damage that he expropriation has caused him. Then the learned Judge emphaizes the fact that the question is not one of price but of indemnity lue to the expropriated party.

It is clear, as revealed by the evidence, that the respondent never ›ut the expropriated service station up for sale and that it never ntended to do so. It did not create a new gas station but merely re›laced an existing one with which it was satisfied. It is for this reaion that the Expropriation Tribunal decided that Shell was enti:led to the real cost of the new lands and not merely to the strict value of the expropriated land.

After studying this case I am of the opinion that the appeal is not well founded.

For these reasons I would dismiss the appeal with costs.

CRETE, J.A. (translation):—I share the opinion of Mr. Justice Turgeon.

RE PARKINS AND THE QUEEN et al.

Ontario Court of Appeal, Arnup, MacKinnon and Lacourciere, JJ.A. April 27, 1978.

Procedure — Inquiry proceedings — Whether taking "fair, sound and reasonably necessary" — Test to be applied — Expropriations Act, R.S.O. 1970, c. 154, s. 7(5).

Under s. 7(5) of the *Expropriations Act*, R.S.O. 1970, c. 154, an inquiry officer shall consider whether the taking of the claimant's land is "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority". It is not necessary that each of the adjectives be treated separately in all cases. The inquiry officer must consider the conflict between private and public interests which exists in every expropriation and give his opinion on the merits of the application.

[*Walters et al. v. Essex County Board of Education*, [1971] 3 O.R. 346, 20 D.L.R. (3d) 386; affd [1974] S.C.R. 481, 38 D.L.R. (3d) 693, 5 L.C.R. 144, dist; *The King v. Lee* (1918), 38 D.L.R. 695, 16 Ex. C.R. 424; affd 59 S.C.R. 692, 52 D.L.R. 689, refd to]

APPEAL from a judgment of Cory, J., 13 L.C.R. 306, dismissing an application by an owner to quash the report of an inquiry officer.

R. G. Chapman, for appellant, plaintiff.
T. H. Wickett, Q.C., for respondents, defendants.

- Div Ct. — for Δ
- OCA - for Δ
NO J.R.

The judgment of the Court was delivered by

MACKINNON, J.A.:—Although there were a number of issues determined by Mr. Justice Cory at the trial, the plaintiff appeals with relation to only one. Counsel for the plaintiff argued at trial that the inquiry officer (appointed under s. 7(3) of the *Expropriations Act*, R.S.O. 1970, c. 154), in holding that the taking of a portion of the plaintiff's lands by the defendant Ministry was "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority", had misinterpreted and, indeed, not applied the words quoted. The learned trial Judge rejected this submission and it is on this issue that the appeal was taken.

The plaintiff owns farm lands, the north-eastern portion of which lies within the city limits of St. Thomas. The Ministry of Transportation and Communications had applied to expropriate a strip of land running through the plaintiff's farm for the purpose of constructing a highway (the St. Thomas Expressway). Pursuant to s. 6(2) of the *Expropriations Act*, the plaintiff gave notice that she wished to have a hearing to review the decision of the Ministry to expropriate her lands.

The matter was referred to the chief inquiry officer who, as authorized and directed by s. 7(3) of the *Expropriations Act*, appointed an inquiry officer, the defendant Charles Longworth McKenzie, to conduct the hearing. Evidence was led before the inquiry officer on January 20 and March 4, 1975, and he made his report to the approving authority on May 10, 1975.

The sections of the *Expropriations Act* which, in part, govern the hearing and the report and which have to be interpreted, are s. 7(5) and (6):

> 7(5) The hearing shall be by means of an inquiry conducted by the inquiry officer who shall inquire into whether the taking of the lands or any part of the lands of an owner or of more than one owner of the same lands is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.
>
> (6) The inquiry officer shall report to the approving authority a summary of the evidence and arguments advanced by the parties, the inquiry officer's findings of fact, and his opinion on the merits of the application for approval with his reasons therefor.

Section 8 establishes what is to follow on receipt of the report:

> 8(1) The approving authority shall consider the report of the inquiry officer and shall approve or not approve the proposed expropriation or approve the proposed expropriation with such modifications as the approving authority considers proper, but an approval with modifications shall not affect the lands of a registered owner who is not or has not been made a party to the hearing.
>
> (2) The approving authority shall give written reasons for its decision and shall cause its decision and the reasons therefor to be served upon all the parties within ninety days after the date upon which the report of the inquiry officer is received by the approving authority.
>
> (3) The approving authority shall certify its approval in the prescribed form.

It can be seen from a plain reading of s. 7(5) that the inquiry officer at the hearing has to inquire into whether the taking is "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority". At the conclusion of the hearing he is to report, among other things, his opinion, and his reasons therefor, "on the merits of the application for approval" of the taking.

In the instant case the inquiry officer, after reciting the background facts, the names of witnesses and giving a summary of the issues and the evidence, commenced his "findings" with the following two paragraphs:

> I must now consider whether the taking of the Parkins' lands in the words of The Expropriations Act is "fair, sound and reasonably necessary".
>
> Others have approached the problem by posing the question, "Is the forceable taking by expropriation 'reasonably defensible'?" I reluctantly concluded that it is. Reluctantly — because I was impressed (although not convinced) by the evidence and arguments made by Mr. Ford on behalf of his wife and sister-in-law.

In his recommendations at the conclusion of his report, the inquiry officer said this:

> I end this report by reluctantly concluding that *the taking is fair, sound and reasonably necessary, having satisfied myself that the Ministry has led evidence that the taking is reasonably defensible*. Were I acting as a Judge in a Court of Law on the balance of probabilities, I would not have so found.

(Emphasis added.)

It is on the basis that the inquiry officer allegedly equated the words "fair, sound and reasonably necessary" with "reasonably defensible" that the plaintiff attacks the report. It is submitted that the inquiry officer failed to apply the plain words of the section, but rather applied a different and lower standard to the burden imposed by the section on the expropriating authority. The plaintiff argues that the use of this unauthorized and different standard renders the report a nullity. It is a statutory requirement that the approving authority consider a report by the inquiry officer before it may take any action on the proposed expropriation. There being no report, the plaintiff argues, for the Minister as approving authority to consider, the statutory pre-condition to his approval was lacking and his approval and its certification under s. 8 were nullities. The trial Judge, in dealing with this submission, pointed out the origin of the phrase "reasonably defensible" and the reasoning behind it [13 L.C.R. 306 at p. 315]:

> In considering the aptness of the test adopted, one must bear in mind the nature of the hearing. It is, as I said, by way of an inquiry with a report to be made by the officer to the expropriating authority. It gives those who may be affected an opportunity to put forward an alternate view as to the fairness, soundness and the necessity of the proposed expropriation.
>
> The inquiry officer adopted the suggestion made by Mr. John W. Morden (as he then was) as set out in his lecture, "New Expropriation Legislation: Powers

and Procedures", and printed in the Law Society of Upper Canada, Special Lectures (1970), at p. 248, where he stated:

> "That it may be more realistic to regard the statutory formula as conveying one broad standard — having regard to the objectives of this authority is this expropriation reasonably defensible?"

Similarly, as to the meaning of "fair" the inquiry officer adopted Mr. Morden's suggestion, "that it involves a balancing of the public interest allegedly being advanced by the expropriation with that of the private interest of the owner".

The plaintiff contends there should be two tests applied: first, is the expropriation reasonably defensible and secondly, is it fair? I think it necessary to refer again to the segment of the lecture of Mr. Morden beginning at a point somewhat earlier than the quotation set out above. At p. 248 of the report of the lecture the following appears:

> "I embark upon an examination of the formula with some diffidence because I am not satisfied that there is anything of a detailed nature on it which I can usefully say. In a sense it seems somewhat unrealistic and pointless to analyze each adjective in the formula separately, either in the abstract or in relation to an actual case, to determine its 'meaning'. Having regard to the political context in which the ultimate expropriation decision is made I suggest that it may be more realistic to regard the statutory formula as conveying one broad standard — 'having regard to the objectives of this authority is this expropriation reasonably defensible?' I refer back to the observation that the issues relating to a decision to expropriate are not justiciable. Therefore any finely-spun elaboration of the meaning of the words would seem to me to be indulging in a form of theoretic exercise having no relevance to realities respecting the exercise of governmental power."

I agree that it is pointless to analyze each adjective. The test suggested by Mr. Morden, that is to say having regard to the objectives of the expropriating authority is this expropriation reasonably defensible, is in my opinion one that can and should be considered and applied by an inquiry officer.

The trial Judge went on to point out that what constitutes fairness, soundness and reasonable necessity will vary with the circumstances of each proposed expropriation.

In *Walters et al. v. Essex County Board of Education*, [1971] 3 O.R. 346, 20 D.L.R. (3d) 386; affirmed [1974] S.C.R. 481, 38 D.L.R. (3d) 693, 5 L.C.R. 144, Stark, J., noted that the inquiry officer there had adopted Mr. Morden's suggestion "that it would be more realistic to regard the formula as conveying the broad standard — having regard to the objectives of the authority is this expropriation reasonably defensible". The inquiry officer had also adopted Mr. Morden's view of the meaning of "fair", namely, the balancing of the public interest as against the private interest of the owner. Although there was no criticism of this approach, it was not relevant to the point argued at any stage of the Court proceedings. The expropriating authority had rejected the report and had requested and acted upon its own solicitor's reasons for that rejection. It was this action which was attacked. That case, accordingly, cannot be said to be authority for the approach taken by the inquiry officer in the instant case.

The plaintiff relies on the principle that where the right of eminent domain is exercised and property rights destroyed, the terms of the statute giving the right to expropriate must be strictly complied with: *The King v. Lee* (1918), 38 D.L.R. 695 at p. 699, 16 Ex. C.R. 424; affirmed 59 S.C.R. 692, 52 D.L.R. 689. This is a salutary principle and is as applicable today as it ever was. In the instant case I am of the opinion that the inquiry officer did comply with the terms of the statute and did not ignore or misapply the plain wording of the section. It is to be remembered that the inquiry is to be *conducted* by the inquiry officer to inquire into whether the taking of the lands was fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority. There was no complaint about the conduct of the inquiry as such. The points which the plaintiff wished to advance were made, met and considered. The alternative route proposed by the plaintiff for the St. Thomas Expressway was considered in relation to the points made on the plaintiff's behalf, namely: that it was less costly, more aesthetically acceptable and that it would promote a higher level of safety for the users of the highway.

It may be that the inquiry officer did not expressly state in his report on the merits that, in assessing the "fairness" of the expropriation, he had weighed the public as against the private interest. However, what is clear is that he adjourned the hearing to allow the plaintiff to approach the Council of the City of St. Thomas to see if it would support the plaintiff's alternative route. The Council, as representative of the public interest in the area, was not prepared to so do, and obviously preferred the Ministry's proposed route. This sequence of events is contained in the inquiry officer's report, and indicates that his mind was directed towards a consideration of the conflict between private and public interests which exists in every expropriation.

The inquiry officer did state in his report that he came to the conclusion that the taking was "reasonably defensible", but that phrase cannot be taken in isolation. While the phrase may be a helpful compendium of the words found in s. 7(5), it does not exist in a vacuum. It must relate to some standards or considerations by which it is established that the taking is "reasonably defensible". Although it is a form of circular reasoning, a taking can only be "reasonably defensible" in the terms of this legislation if it is "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority". "Reasonably defensible" sets no standards by its mere statement and the article by Mr. Morden makes it plain that it is a form of shorthand for the words found in the statute. It is not necessary that each of the words "fair, sound and reasonably necessary" be treated separately in all cases. There are, as the trial Judge pointed out, too many variables, one of them being the point or points which the owner may wish to make. In many cases, as Mr. Morden pointed out, it may be more realistic to regard the statutory formula as setting out one broad standard, always keeping in mind the actual words of the statute.

In the instant case the inquiry officer in the opening paragraph of his "findings" stated clearly that he must find that the taking was "fair, sound and reasonably necessary". He determined that the taking was "reasonably defensible" by reference to the statutory words. The hearing was conducted on that basis. It might have been preferable, if he were going to use the phrase "reasonably defensible", for the inquiry officer to have stated specifically that the taking was reasonably defensible because it was fair, sound and reasonably necessary in the achievement of the objectives of the Ministry, although this would appear to be tautologous. It should also be borne in mind that the inquiry officer's report is not required to contain any special terminology. He is to give his "opinion", and his reasons for it, on the merits of the application for approval, and this he did. I am of the opinion, from a reading of the whole report, that the inquiry officer did apply the proper test in this case and that his report was not a nullity.

very sim to EAA hearing

In the result the appeal must be dismissed, but in the circumstances, it will be dismissed without costs.

Appeal dismissed.

B.A.C.M. DEVELOPMENT CORP. LTD. et al. v. BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

County Court of Westminster, British Columbia. Hinds, Co. Ct. J.
February 10, 1978.

Appeal — Appeal to Judge under British Columbia Hydro and Power Authority Act, 1964 (B.C.), c. 7 — Scope of appeal — Relevance of valuator's finding and report.

Although a hearing by a Judge appointed under the *British Columbia Hydro and Power Authority Act*, 1964 (B.C.), c. 7, to hear an appeal from a valuator's determination of compensation payable for expropriated property is in the nature of a trial *de novo*, technically it is not a trial *de novo* because no trial is required to be held by the valuator. The valuator's finding and report are properly admissible in evidence before the Judge and the valuator's finding should not be reversed unless there is a preponderance of evidence against it or the Judge is satisfied that the valuator proceeded upon a wrong principle.

[*Whittaker et al. v. British Columbia Hydro & Power Authority* (1973), 6 L.C.R. 289, folld]

Market value — Approach — Consideration of land or subdivision residual approach.

Normand Lapointe		
16 lots at $1,066.80		$17,068.80
Business disturbance		$15,000.00
Total (in round figures)		$32,068.80
Dévelopment Amical Inc.		
Lot P-198 evaluated at $450 per acre		12,000.00
Unsubdivided part of Lot P-199 43.5 acres at $1,200	$52,200	
less 2.75 acres included in claim of Normand Lapointe	$ 3,300	
Net allowance		48,900.00
Subdivided portion of Lot P-199 Allowance of witness Mathers for 18 lots	$16,500	
Less proportion of this represented by five lots included in claim of Normand Lapointe	$ 4,455	
Net allowance		12,045.00
	Total	$72,945.00
10% damages for forcible dispossession	(in round figures)	7,295.00
	Total	$80,240.00

Exhibits produced indicate that Normand Lapointe was paid the sum of $12,500 on June 15, 1971, and Développement Amical Inc. was paid $31,000 on June 17, 1970; $15,000 on October 22, 1971, and $8,000 on November 13, 1973, or a total of $54,000.

Judgment will therefore be rendered in favour of plaintiff Normand Lapointe requiring defendant to pay an additional amount of $19,568 with interest of 5% on $32,068 from March 27, 1969, to June 15, 1971, and on $19,568 since June 15, 1971, and costs, and in favour of plaintiff Développement Amical Inc., calling on defendant to pay a balance of $26,240 with interest at 5% from March 27, 1969 to June 17, 1970, on $80,240, from June 17, 1970 to October 22, 1971 on $49,240, interest from October 22, 1971 to November 13, 1973, on $34,240, and interest since November 13, 1973, on the balance of $26,240 and costs.

RE PARKINS AND THE QUEEN

Ontario High Court of Justice, Cory, J. November 25, 1977.

Approval of expropriation — Approval not conditional (and hence void) if approving authority wished to have investigation into certain allegations made before expropriation proceeded with — Expropriations Act, R.S.O. 1970, c. 154, s. 8(1).

Procedure — Inquiry — Report of inquiry officer — Must report findings of fact — General finding of fact concerning proposed expropriation sufficient — Expropriations Act, R.S.O. 1970, c. 154, s. 7(6).

[*Re French and Law Society of Upper Canada (No. 2)* (1973), 41 D.L.R. (3d) 23, 1 O.R. (2d) 514, folld]

Procedure — Inquiry proceedings — Whether taking "fair, sound and reasonably necessary" — Test to be applied — Expropriations Act, R.S.O. 1970, c. 154, s. 7(5).

Under s. 7(5) of the *Expropriations Act*, R.S.O. 1970, c. 154, an inquiry officer shall consider whether the taking of the claimant's land is "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority". It would be pointless to examine each adjective. The test to be applied by the inquiry officer is, having regard to the objectives of the expropriating authority, is this expropriation reasonably defensible?

[*Re Ball et al. and Ontario Hydro et al.* (1974), 8 L.C.R. 217, 53 D.L.R. (3d) 519, 6 O.R. (2d) 613, folld]

Procedure — Inquiry proceedings — Documents that expropriating authority intends to use at inquiry hearing to be made available to other parties at least five days before hearing — Document not available five days before commencement of hearing — Hearing adjourned for six weeks — Inquiry proceedings not void — Expropriations Act, R.S.O. 1970, c. 154, s. 7(4).

APPLICATION by an owner to quash the report of an inquiry officer and the approval of the expropriation.

R. G. Chapman, for plaintiff.
T. H. Wickett, for defendant.

CORY, J. (orally):—At the outset I would like to thank both counsel very much indeed for their assistance in this case.

The plaintiff is the owner of land located in the City of St. Thomas. The Ministry of Transportation and Communications, one of the defendants in this action, determined in the year 1974, that a portion of the plaintiff's property should be expropriated for the construction of the St. Thomas expressway. Miss Parkins was aware of the Ministry's intention in regard to her property by the summer of 1974, as were her sister and brother-in-law Mr. and Mrs. Ford.

Mr. Ford is a professional engineer and long-time employee of the Ministry of Transportation and Communications. The plaintiff's property could not be acquired by negotiations, and the Ministry therefore requested Mr. Charles L. Mackenzie, Q.C., to conduct an inquiry. Notice of the grounds for acquiring the land was prepared by the Ministry in December, 1974, and duly and properly served upon the plaintiff. Mr. Ford requested from the Ministry and was granted by the Ministry a special meeting with Ministry personnel to discuss an alternate alignment of the expressway.

As to the alignment proposed by Mr. Ford, a plan and profile were drawn up indicating the relative positions. The plans and profile were available and present during the discussions at the meeting, which took place on January 9, 1975. Mr. Ford attended on behalf of the plaintiff and Mr. Duckett and Mr. King and one other person attended on behalf of the Ministry. The meeting was held in the boardroom at the Ministry office in Downsview. The duration of the discussion was some two to three hours. During that time alternate alignments were discussed and the plan, which was filed as an exhibit in this action, was before the meeting, as was a profile that was similar to the profile filed as an exhibit at the trial of this action.

It was during the course of the discussions on January 9th that the Ministry first obtained details of Mr. Ford's proposal. Subsequent to the meeting of January 9th, Mr. King, who was in charge of the St. Thomas expressway project, asked Mr. Armstrong, the senior planner then in the Ministry to consider the alternate alignments and the relative environmental impacts they might have.

I am satisfied that Mr. Armstrong was told to be completely objective and to approach the matter with an open mind. On January 13th, Mr. Armstrong attended on the site with Mr. King. The attendance on the site lasted some one and a half hours. Mr. Armstrong then prepared a report comparing the environmental impact of the two alignments. The report is filed as ex. 2 in this action and is dated January 16, 1975. It was received and date stamped by Mr. King on January 20, 1975, the day before the date fixed for the hearing before Mr. Mackenzie, the designated inquiry officer. The report was given to Mr. Hardyal, a solicitor appearing for the Ministry for the inquiry officer.

The hearing on January 21st commenced at 11:00 a.m., and continued until 3:30 p.m. Mr. Ford acted as spokesman for the plaintiff, although there is some indication that the plaintiff had been represented by a solicitor. The hearing was adjourned at 3:30 on January 21st, to March 4, 1975. One of the purposes, if not the prime purpose of the adjournment was to permit the plaintiff to approach the City of St. Thomas to see if it would approve the alignment proposed by Mr. Ford. The city refused to formally meet with Mr. Ford and there is some indication that the city had earlier approved the alignment or route proposed by the Ministry.

It should be noted that the Armstrong report was prepared subsequent to the special meeting of January 9th, when discussions took place with Mr. Ford pertaining to his proposed alternate alignment. The Armstrong report, which is an inter-departmental report, did not come to the attention of Mr. King until January 20th. Mr. King testified that whether or not the report would be used at the hearing would depend on evidence that might be given with regard to environmental aspects of the alignment and the proposed Ford alignment. Environmental factors were discussed and as a result the report of January 16th was referred to and was filed as an exhibit before the hearing officer.

It was one of many exhibits filed at the hearing. A list of such exhibits appears as ex. 10 in this action. The exhibits included reference plans; a photograph mosaic, indicating the location of the subject property; a location plan; construction staging drawing; a composite contract drawing; a drawing of cross sections at certain stations or locations; the St. Thomas expressway plan; an agreement between the Ministry of Transportation and Communications and the City of St. Thomas; major roadway proposals including alternate schemes and "scheme B" chosen by St. Thomas City Council and the design criteria of the project. I refer to the list simply to indicate that a large number of documents were produced and were filed at the hearing.

On March 4th, the hearing resumed before Mr. Mackenzie. It is very clear that there were no restrictions on the evidence to be given on the date of the resumption of the hearings. Mr. Ford indicated that he wished to call evidence with regard to three aspects: first, cost, that is to say comparing the cost of the Ministry's proposal and his alternative alignment. Secondly, the aesthetics including the environmental impact and thirdly safety. Evidence was given and submissions were made by Mr. Ford. Evidence was given by Ministry officials on the three aspects referred to by Mr. Ford. Mr. Armstrong testified with regard to the environment and environmental impact of the proposed routes.

The inquiry officer prepared his report which was dated May 9th, and is ex. 3 in this action. The report was sent to the Ministry. Some portions of the report must be referred to particularly as it relates to some aspects of the plaintiff's submissions. It reads in part as follows:

> The St. Thomas Transportation Planning Study was undertaken by M. M. Dillon Limited and completed in July, 1969. Among other things, this Study identified transportation problems and possible solutions.
>
> It made a careful analysis of four alternative routes for an expressway to serve the City of St. Thomas, and concluded that proposal "B" was the preferred scheme. The Corporation of the City of St. Thomas accepted the recommendation, as did the Ministry of Transportation and Communications.
>
> The Parkins' farm lies in the path of the proposed expressway and, although Mrs. Parkins and Mrs. Ford (they are sisters) have no basic objection to the expressway itself, evidence was led that the Parkins' farm would be adversely affected if the expressway ran through the farm as proposed by the Ministry of Transportation and Communications.
>
> Mr. John Ford (a Professional Engineer employed by the Ministry of Transportation and Communications) acted as spokesman for Mrs. Parkins and Mrs. Ford (his wife).

Mr. Ford proposed an alternative alignment and led evidence that his "proposal" was preferable to the Ministry's alignment, because it was:

(1) less costly;

(2) more aesthetically acceptable; and

(3) would promote a higher level of safety for the users of the highway.

I accept the evidence of the Environment Planner, Mr. J. J. Armstrong, who testified on behalf of the Ministry. Mr. Armstrong concluded that environmental factors favoured the route "B".

I was satisfied on the evidence of Mr. Michael Duckett (who is employed by the Ministry of Transportation and Communications as Project Manager on this project), that the Expropriating Authority had considered the cost of the alignment favoured by Mr. Ford and had compared those costs with the alignment the Ministry preferred.

There was a considerable difference in the cost estimates prepared by Mr. Duckett and Mr. Ford. I am unable to say which is more likely to be closer to actuality.

I can only say with certainty, that the Ministry of Transportation and Communications carefully considered the cost of the alternative route proposed by Mr. Ford, and confirmed its decision that the chosen alignment was preferable, notwithstanding damage to the Parkins' farm.

. . . . .

Mr. Derek King (who is employed by the Ministry as Senior Project Engineer), gave evidence that he had considered Mr. Ford's proposal from a safety point of view, and it was Mr. King's evidence that there was relatively little difference between the alignments that would favour one over the other on the question of safety alone.

Mr. Ford requested an adjournment on January 21, 1975, to permit Mrs. Parkins and Mrs. Ford an opportunity of approaching the Council of the Corporation of the City of St. Thomas to attempt to gain the support of the Council to Mr. Ford's proposal.

When the Inquiry resumed on the 4th day of March, 1975, I was advised that Mrs. Parkins and Mrs. Ford were unable to obtain a hearing before the Council of the Corporation of the City of St. Thomas. Apparently the Council considered the matter closed.

Although there was some evidence that the Ministry of Transportation and Communications had given due consideration to the "Ford" alignment, it was my impression that the witnesses for the Ministry had dug their heels in, and were not about to be persuaded to another point of view.

I must now consider whether the taking of the Parkins' lands in the words of the Expropriations Act is "fair, sound and reasonably necessary".

Others have approached the problem by posing the question, "Is the forceable taking by Expropriation 'reasonably defensible'?" I reluctantly concluded that it is. Reluctantly — because I was impressed (although not convinced) by the evidence and arguments made by Mr. Ford on behalf of his wife and sister-in-law.

. . . . .

I end this report by reluctantly concluding that the taking is fair, sound and reasonably necessary, having satisfied myself that the Ministry has led evidence that the taking is reasonably defensible. Were I acting as a Judge in a Court of Law on the balance of probabilities, I would not have so found.

Mr. Rhodes, who was at the relevant time Minister of Transportation and Communications, testified with commendable candor and complete frankness. He was aware, as he said, as much as a Minister would be aware of the St. Thomas project, the proposed expropriation and of the objections to the proposed expropriation by Mr. Ford. Following the receipt of the report from the inquiry officer action on the proposed expropriation was required no later than August 9th.

On August 7th, Mr. Ford placed a telephone call to the Minister; he spoke first to Mr. Keel and then to Mr. Leach who was waiting in the Minister's office. Mr. Keel was then Executive Assistant to the Minister and Mr. Leach was the Executive Director of the Right-of-Way and Services Division of the Ministry of Transportation and Communications. There is no doubt that Mr. Ford was concerned and upset at the time of his call. He stated to Mr. Keel and to Mr. Leach that he had additional information with regard to costs that would indicate that his proposed alignment would save the Ministry $750,000. He also stated that he had information that the Ministry withheld information. He also alleged that the Ministry withheld information from the hearing officer.

There is here a difference in the evidence of Mr. Ford and the Ministry officials. Mr. Ford very fairly conceded that his memory is not good; it was possible that he said what is alleged by the Ministry officials. Under the circumstances I have no hesitation in accepting the evidence of the Ministry officials where it differs from that of Mr. Ford throughout the trial. When I say that, I do not mean to imply any criticism whatsoever of Mr. Ford. I am completely satisfied that there was no attempt made to mislead the Court. As I have said Mr. Ford in an exemplary manner readily admitted his weakness of memory and that what the Ministry officers said was possibly correct.

Mr. Ford did not recall saying that there had been information withheld from the hearing officer and that did not seem to be in contention in this case. He does say that he had additional information for saving money for the Ministry. He had not recalled giving the figure of $750,000. He said that he thought the figure that he gave the Ministry officials might have been $300,000.

Mr. Mackenzie, the hearing officer, testified that he thought that the cost saving figure put forward by Mr. Ford at the hearing pertaining to his proposed alignment was $50,000. There is some indication Mr. Ford might have said that the saving could be as much as $150,000. Those were the cost saving figures mentioned by Mr. Ford at the time of the hearing.

Mr. Leach advised Mr. Ford that he would place his allegations before the Minister. The Minister must have had a trying day on August 7th. He had been hospitalized at the MacMaster University Hospital in Hamilton. He had come back to Toronto to attend a Cabinet meeting. Mr. Leach was waiting for him in his office to discuss with him the proposed expropriation. At the conclusion of the Cabinet meeting Mr. Leach drove back to Hamilton with the Cabinet Minister who was returning to hospital. During the course of the drive Mr. Leach reviewed with the Minister the memorandum of August 6th, of the Deputy Minister regarding the proposed expropriation and he set forth Mr. Ford's allegations that information had been withheld from the hearing officer by Ministry officials and that the Ford alignment would save the Ministry $750,000.

The Minister discussed with Mr. Leach the options open, namely, to proceed with the expropriation or abandon it or to modify it. I am satisfied that the Minister determined that he would proceed with the expropriation and on August 7th, at the hospital, he executed the authority to proceed, executed the confirming memorandum to the Deputy Minister and the letters to go to Mr. Ford and Mrs. Parkins.

The Minister was quite properly concerned with the allegations of Mr. Ford and the next morning, August 8th, he dictated a further memorandum to his secretary from the hospital in Hamilton. The secretary read back the memorandum and that memorandum is filed as ex. 7 at this trial. It is an inter-office memorandum from the Minister to the Deputy Minister made the day following the date of the execution of the authorization to expropriate. It flows from the Minister at the hospital in Hamilton to the Deputy Minister and should be considered as an inter-office memorandum and not as a document to be scrutinized with the same care as for example a decision of an administrative board or the Court. In the memorandum the Minister expressed his concern about the statement alleged to have been made by Mr. John Ford with regards to the cost of fill for the Ministry of Transportation and Communications' proposed alignment and that the Ministry withheld information at the hearing of necessity. The memorandum continues in a further paragraph as follows:

> Recognizing August 8th, 1975, as the deadline for signing the Expropriation Notice, I have done so with the condition that the above two matters be thoroughly investigated. If one or both of Mr. Ford's allegation are correct, then we will abandon the expropriation. However, should they prove to be in error, then I do not wish to delay the project. As you know, the City of St. Thomas and the Member for the area have both indicated a preference for our selected alignment and are anxious to have the project proceed.

At this stage I should indicate that I am satisfied that the plaintiff was fairly treated by the Ministry and that all principles of natural justice were satisfied. There was a full hearing conducted on January 21st, and on March 4th. Indeed there was a prehearing meeting on January 9th and the telephone call from Mr. Ford was considered by the Minister on August 7th.

The plaintiff had notice, in my opinion, of all essential aspects of the Minister's case, and all the requirements of natural justice were satisfied and fulfilled. The plaintiff contends that the report of the inquiry officer is void and puts forward four grounds for that contention. They are all somewhat technical, and I will leave the two that I consider more difficult for the last.

First, it was contended that the order or the order of the Minister authorizing the expropriation was conditional, that such a conditional order was not authorized by the Act and therefore was void. Section 8 of the *Expropriations Act*, R.S.O. 1970, c. 154, provides as follows:

> 8(1) The approving authority shall consider the report of the inquiry officer and shall approve or not approve the proposed expropriation or approve the proposed expropriation with such modifications as the approving authority considers proper, but an approval with modifications shall not affect the lands of a registered owner who is not or has not been made a party to the hearing.
>
> (2) The approving authority shall give written reasons for its decision and shall cause its decision and the reasons therefor to be served upon all the parties within ninety days after the date upon which the report of the inquiry officer is received by the approving authority.
>
> (3) The approving authority shall certify its approval in the prescribed form.

I am satisfied that the authorization given by the Minister on August 7th was unconditional. The time factor alone, in my opinion, is sufficient to demonstrate the intention of the Minister. The authorization letters to the plaintiff and her sister, the memorandum from the Minister to the Deputy Minister were all executed by the Minister on August 7th. He completed those documents with full realization of approaching deadlines and with the realization of the allegations made by Ford with regard to costs and the withholding of information. It must be remembered that the memorandum dictated from the hospital on August 8th was dictated in part as a result of the allegation of cost saving of $750,000 made by Mr. Ford and the allegation that information had been withheld by Ministry officials from the inquiry officer.

I am quite satisfied that Mr. Rhodes did not use the word conditional in his memorandum of August 8th in a legalistic sense. Rather, he was genuinely concerned with the allegations of Mr. Ford and therefore wished to have an investigation made, and if he found the allegations to be correct he did not wish to proceed with the expropriation. That in no way makes the authorization to expropriate conditional. The first contention of the plaintiff must fail.

Secondly, it was argued that the findings of fact made by the inquiry officer were insufficient to comply with the requirements of s. 7(6) of the *Expropriations Act*, which provides that:

> 7(6) The inquiry officer shall report to the approving authority a summary of the evidence and arguments advanced by the parties, the inquiry officer's findings of fact, and his opinion on the merits of the application for approval with his reasons therefor.

It was contended that the inquiry officer made no specific findings with regard to the comparable costs of the proposed route and the Ford alternative. It is alleged that the inquiry officer was required to make such a specific finding of fact, and that as a result of his failure to do so his report is void and the entire expropriation proceedings are nullified. The plaintiff cited to me and relied upon the minority judgment of Mr. Justice Fraser in *Re French and Law Society of Upper Canada (No. 2)* (1973), 41 D.L.R. (3d) 23, 1 O.R. (2d) 514. However, I am bound by and would in any event prefer to follow the majority judgment given by Mr. Justice R. E. Holland, concurred in by the Chief Justice of the High Court. In the *French* case one of the complaints made by Mr. French was that there had been no finding of fact made as required by s. 33(12) of the *Law Society Act*. Mr. Justice Holland stated at p. 525:

> I am of the opinion in connection with items No. (1) and (3) above that the Discipline Committee is not required to make a finding of credibility and a finding of fact on all of the evidence so long as a general finding of fact is made as was done in this case.

In the case before me I am satisfied that a general finding of fact was made by the inquiry officer. On the issue of environmental impact the inquiry officer appears to have favoured slightly the proposed route or alignment of the Ministry. He concluded that there was no difference in safety and that the Department or Ministry had considered carefully the cost aspect.

In my opinion that was all that he was required to do and that there is a sufficient general finding of fact to satisfy the requirements of s. 7(6) of the *Expropriations Act*.

A Court must be careful in considering a report such as this to remember the nature of the proceeding. The hearing is by way of an inquiry and the document itself is a report. It would I think, be a serious error to scrutinize such documents in the same way a Court would and should scrutinize either an administrative board's decision affecting the rights and liberties of persons appearing before the board or a judgment of the Court.

It is next submitted on behalf of the plaintiff that Mr. Mackenzie, the inquiry officer, did not apply the correct or appropriate test to the function that he had to perform, and therefore that the hearing was void and the expropriation proceedings should be set aside. In his report under the heading "findings" the following appears:

> I must now consider whether the taking of the Parkins' lands in the words of The Expropriations Act is "fair, sound and reasonably necessary".
>
> Others have approached the problem by posing the question, "Is the forceable taking by Expropriation 'reasonably defensible'?" I reluctantly concluded that it is.

Again at p. 11 he states:

> I end this report by reluctantly concluding that the taking is fair, sound and reasonably necessary, having satisfied myself that the Ministry has led evidence that the taking is reasonably defensible.

In considering the aptness of the test adopted, one must bear in mind the nature of the hearing. It is, as I said, by way of an inquiry with a report to be made by the officer to the expropriating authority. It gives those who may be affected an opportunity to put forward an alternate view as to the fairness, soundness and the necessity of the proposed expropriation.

The inquiry officer adopted the suggestion made by Mr. John W. Morden (as he then was) as set out in his lecture, "New Expropriation Legislation: Powers and Procedures", and printed in the Law Society of Upper Canada, Special Lectures (1970), at p. 248, where he stated:

> That it may be more realistic to regard the statutory formula as conveying one broad standard — "having regard to the objectives of this authority is this expropriation reasonably defensible?"

Similarly, as to the meaning of "fair" the inquiry officer adopted Mr. Morden's suggestion, "that it involves a balancing of the public interest allegedly being advanced by the expropriation with that of the private interest of the owner".

The plaintiff contends there should be two tests applied: first, is the expropriation reasonably defensible; and secondly, is it fair? I think it necessary to refer again to the segment of the lecture of Mr. Morden beginning at a point somewhat earlier than the quotation set out above. At p. 248 of the report of the lecture the following appears:

> I embark upon an examination of the formula with some diffidence because I am not satisfied that there is anything of a detailed nature on it which I can usefully say. In a sense it seems somewhat unrealistic and pointless to analyze each adjective in the formula separately, either in the abstract or in relation to an actual case, to determine its "meaning". Having regard to the political context in which the ultimate expropriation decision is made I suggest that it may be more realistic to regard the statutory formula as conveying one broad standard — "having regard to the objectives of this authority is this expropriation reasonably defensible?" I refer back to the observation that the issues relating to a decision to expropriate are not justiciable. Therefore any finely-spun elaboration of the meaning of the words would seem to me to be indulging in a form of theoretic exercise having no relevance to realities respecting the exercise of governmental power.

I agree that it is pointless to analyze each adjective. The test suggested by Mr. Morden, that is to say, having regard to the objectives of the expropriating authority is this expropriation reasonably defensible, is in my opinion one that can and should be considered and applied by an inquiry officer.

Each matter coming before an inquiry officer will vary with regard to the elements and aspect that he will wish to consider. He may want to consider aspects of comparable costs, aesthetics, environmental impact or safety to mention just a few. What constitutes fairness, justness and reasonable necessity will vary with the circumstances of each proposed expropriation. For example the routing of a road around a historic landmark, or stand of giant redwood trees may justify a route that is more expensive than one which requires the destruction of the landmark or redwood trees. In some instances a consideration of the environmental impact may outweigh a consideration of cost. It is impossible to say in every situation which factor may predominate in the application of the test. It should not be necessary for the inquiry officer to discuss in minute detail his consideration of all the factors. Rather it would be sufficient if it appears from his reasons that he did in fact consider the relevant factors, applied the test and came to a conclusion as to whether or not the proposed expropriation was reasonably defensible. The inquiry officer has met that standard in this case. The application of the suggested test by the inquiry officer does not in any way limit his role or function, nor does it limit the citizen whose property is being expropriated from putting forward all aspects of his position including his proposed alternatives.

It must be borne in mind that the hearing before the inquiry officer provides the property owner with an opportunity for putting forward alternatives. The report to the expropriating authority may refer to those alternatives and give an opinion with regard to them. The inquiry officer's report is in no way binding on the expropriating authority and that authority need not follow the advice or opinion set out in the report. Nor does the hearing before the inquiry officer in any way fetter a claim for full compensation for the land expropriated by the property owner.

The suggested test appears to have been approved in the judgment of the Divisional Court given by Madam Justice Van Camp in *Re Ball et al. and Ontario Hydro et al.* (1974), 8 L.C.R. 217 at p. 224, 53 D.L.R. (3d) 519, 6 O. R. (2d) 631 at p. 639, the following appears:

> It may well be inadvisable that it should be required [referring to Hydro] to present all its current studies including those on the drafting board. It is only required to show the taking is reasonably defensible, to show the case the owner must meet. The Act provides an opportunity for those interested to make full representation of their objections and the reasons therefor for the consideration of the Minister before his decision.

In my opinion the third submission of the plaintiff must fail.

I turn now to the last argument of the plaintiff. She contends that the Ministry failed to comply with the notice requirements of s. 7(4) of the *Expropriations Act* and therefore the expropriation proceedings are void. Section 7(4) provides that:

> 7(4) At least five days before the date fixed for the hearing, the expropriating authority shall serve upon each party to the inquiry a notice indicating the grounds upon which it intends to rely at the hearing and shall make available for inspection by the parties any documents, including maps and plans, that the expropriating authority intends to use at the hearing.

It is submitted that the report of Mr. Armstrong was a document that the expropriating authority intended to use at the hearing. Obviously five days' notice was not and could not be given nor could the document be made available for inspection five days before the hearing for it did not exist at that time. It is argued that the requirements of the Act are absolute and a failure to meet these requirements rendered the proceedings void. Reliance was placed upon Challies' *Law of Expropriation*, 2nd ed. (1963), at pp. 13-4, which reads as follows:

> Furthermore, "no principle is better settled than that the power to expropriate must be strictly pursued and exercised subject to the checks and safeguards provided by the Act which authorizes the proceedings ... or, as it is put in the French law, *En matière d'expropriation, tout est de rigueur*." "Where a statute provides for certain formalities to be followed, if it is desired to exercise the right of eminent domain, the statute must be strictly complied with, and a court cannot say that compliance with such conditions precedent can be dispensed with". As McDougall J. said in a case involving the taking of land without compensation under the Colonization Roads Act [*Roberge v. Auger* (1938), 77 S.C. 197 at p. 200; affirmed (1940) 68 K.B. 270] "Clearly in the exercise of so exorbitant a right as the taking of a man's land without indemnity, the taker, even though it be the Crown in the right of a Provincial Government Department, must adhere closely to the provisions of the law under which such exceptional right is to be exercised". The necessity for the strict carrying out of all formalities attendant upon an expropriation has been clearly set forth in a number of cases ...

The history of expropriation is an important consideration to be borne in mind in this aspect of the case. The very earliest authorities referred to considered the situations where there was expropriation without compensation. Clearly, in such a situation, the Courts would be eager to give every protection to the private citizen and to see and ensure that all requirements of the Act were very strictly complied with. It is only in relatively recent years that expropriation statutes have been modified to the state in which we find the present *Expropriations Act* in the Province of Ontario.

It is contended further that the adjournment of the hearing on January 21st, subsequent to the production of the Armstrong report on that date, to March 4th, does not rectify or correct the situation and that the principal enunciated in *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330; affirming 53 D.L.R. (2d) 193, [1966] 1 O.R. 285; affirming 46 D.L.R. (2d) 210, [1964] 2 O.R. 547, is not applicable. It is argued that a statutory requirement set out in the *Expropriations Act* has not been fulfilled and that failure cannot and could not be rectified by the subsequent adjournment and continuation of the hearing.

This is a very technical approach to the matter. It is necessary to bear in mind how the Armstrong report was conceived and brought forth. It has its genesis in the alternative alignment suggested by Mr. Ford. It was ordered subsequent to the special meeting re-throughout the hearing. There is no change in the effect, force or thrust of the evidence to be given by Mr. Ford on March 4th, for it was given in the light of the report of January 16th filed on the hearing date of January 21st.

Any element of unfairness or surprise occasioned by the production of the document, any defect in the hearing itself was in my opinion cured by the production of the document on January 21st, coupled with the adjournment to March 4th.

To give substance to the objection of the plaintiff would in my opinion be taking far too technical an approach. When one looks at the statute as a whole and the place the inquiry occupies in the over-all expropriation proceedings it is apparent that the inquiry should not be a technical proceeding if the expropriated party and the Minister are to obtain the best results from it. I am therefore of the opinion that I cannot accept this last contention of the plaintiff and the action must therefore be dismissed.

RE SOUTHAMPTON CONTRACTORS LTD. AND NEW BRUNSWICK ELECTRIC POWER COMMISSION

New Brunswick Supreme Court, Queen's Bench Division, Barry, J.
November 25, 1977.

Market value — Factors — Claimant with statutory authority to develop hydro-electric power — Expropriating authority took claimant's land for purpose which rendered power development impractical — Valuation of land taken should ignore power development potential and potential for shore lots of remaining land — Electric Power Act, 1961-62 (N.B.), c. 41, s. 29(5), (6), (7).

[*Raja Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer Vizagapatum*, [1939] A.C. 302, refd to]

APPLICATION by the claimant for directions as to how the land taken is to be valued under the *Electric Power Act* (N.B.).

David Hughes and *D. Leslie Smith*, for plaintiff.
Donald M. Gillis, Q.C., for defendant.

BARRY, J.:—The plaintiff is a duly incorporated company which owns a substantial area of land at or near Pokiok, York County, New Brunswick. The defendant is a statutory corporation which operates the principal electric utility in New Brunswick.

The principal officer of the plaintiff is Harry A. Corey. He is also an officer of two other companies affiliated with the plaintiff, Harry A. Corey Limited, which also owned land in the same area, and of Corey Development Limited, a statutory corporation, hereinafter referred to as C.D.L.

fact that he called a portion of the evidence, fully justified the claimant in having the services of a junior counsel, and in claiming such in his bill of costs to be taxed, for the 14½ days that Mr. MacDougall was present at the hearing.

WALTERS et al. v. ESSEX COUNTY BOARD OF EDUCATION

SCC

Supreme Court of Canada, Martland, Judson, Spence, Laskin and Dickson, JJ. June 29, 1973.

Approval of expropriation — Duty of approving authority to consider report of inquiry officer — Expropriations Act (Ont.), s. 8(1).

An inquiry officer reported that, in his opinion of the merits, the proposed ~~expropriation~~ ought not to be approved by the approving authority. The chairman of the approving authority (which was also the expropriating authority) instructed ~~the authority's~~ solicitor to prepare reasons for rejecting the inquiry officer's opinion. The approving authority met in private, in committee of the whole. The authority accepted the solicitor's reasons, and approved the expropriation. The authority then met in public for ten minutes to formalize what it had done in private. The affected landowner contended that the authority had failed to consider the inquiry officer's report as required by s. 8(1) of the *Expropriations Act*, R.S.O. 1970, c. 154.

The Court held that, although the word "consider" imports a time element, a Court should not impose any arbitrary temporal standard. In this case, the approving authority had the inquiry officer's report before it, and considered it for about one hour and one-half in private. There is nothing improper in the authority having before it a pre-packaged opinion prepared by its solicitor. Unless the good faith of the authority is challenged, the fact that it is advised in advance to reject the inquiry officer's report is not a ground for concluding that the report was not considered. The authority does not have an obligation to show that its adverse decision is reasonably founded.

Approval of expropriation — Approving authority considering material other than inquiry officer's report — Whether landowners have right to make representations to the approving authority.

The approving authority had before it a report on soil conditions at the expropriated site and a letter from its architect, as well as the inquiry officer's report when the expropriation was approved.

The Court held that the authority may consider other material so long as it considers the inquiry officer's report. In this situation, the authority is not obligated to afford the landowners an opportunity to make further representations.

[*Franklin et al. v. Minister of Town & Country Planning*, [1948] A.C. 87; *Calgary Power Ltd. and Halmrast v. Copithorne*, 16 D.L.R. (2d) 241, 78 C.R.T.C. 31, [1959] S.C.R. 24; *Padfield et al. v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997, refd to]

APPEAL from a judgment of the Ontario Court of Appeal dismissing without written reasons an appeal from the judgment of Stark, J., 20 D.L.R. (3d) 386, [1971] 3 O.R. 346, dismissing an action to annul an expropriation.

Gordon F. Henderson, Q.C., and *Brian A. Crane*, for appellants.
Douglas K. Laidlaw, Q.C., for respondent.

The judgment of the Court was delivered by

LASKIN, J.:—This case involves a point of first impression under the *Expropriations Act*, 1968-69 (Ont.), c. 36, now R.S.O. 1970, c. 154. Under s. 4(1) of the Act, an expropriating authority must have the sanction of an approving authority to effect an expropriation, and under s. 6, unless the Lieutenant-Governor in Council directs otherwise, an owner whose land is sought to be expropriated has a right to demand a hearing on the intended expropriation before he is deprived of his land. The hearing is before an inquiry officer who is charged by s. 7(5) to inquire whether the taking "is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority". Section 7(4) obliges the expropriating authority to serve upon the parties to the inquiry, at least five days before the hearing date, a notice indicating the grounds upon which it intends to rely at the hearing. Obviously, this notice feeds the inquiry officer's function. He is required by s. 7(6) to report to the approving authority (1) a summary of the evidence and arguments, (2) his findings of fact, and (3) his opinion on the merits of the application for approval with his reasons therefor. The report goes to the approving authority under s. 8, and the main issue in the present appeal is whether the prescriptions of that section were fulfilled by the approving authority, having regard to the manner in which it acted with respect to the inquiry officer's report.

The issue has a special character here because of the anomaly, a conscious expression of the Legislature, that the expropriating authority is also the approving authority. The respondent Board of Education, as an expropriating authority, proposed to take certain land, part of a highly productive farm owned by the appellants, for a new secondary school in a rural area. By virtue of s. 5(1) (*b*) of the *Expropriations Act*, it was put in the position of applying under s. 6(1) for its own approval for its intended expropriation. The same anomaly exists in the case of a municipal expropriation, in which case the approving authority is the council of the expropriating municipality. The scheme of s. 5, under which approving authorities are specified, is that in general the approving authority is the Minister responsible for the administration of the Act in which the expropriating power is given, and in any unprovided-for case the approving authority is the Minister of Justice and Attorney-General.

Section 8 reads as follows:

> 8(1) The approving authority shall consider the report of the inquiry officer and shall approve or not approve the proposed expropriation or approve the proposed expropriation with such modifications as the approving authority considers proper, but an approval with modifications shall not affect the lands of a registered owner who is not or has not been made a party to the hearing.
>
> (2) The approving authority shall give written reasons for its decision and shall cause its decision and the reasons therefor to be served upon all the parties within ninety days after the date upon which the report of the inquiry officer is received by the approving authority.
>
> (3) The approving authority shall certify its approval in the prescribed form.

The report that came to the respondent board as approving authority was a comprehensive document in which the inquiry officer faithfully carried out the duties laid upon him by s. 7(6). He found that the proposed expropriation was indefensible, that it was neither fair nor sound and that on the merits it should not be approved. When the chairman of the respondent board received, on or about September 17, 1970, a copy of the report, which was dated September 8, 1970, he conferred with one Wood, director of education for the board, who had been its chief witness at the hearing, and with the solicitor for the board who had represented it at the hearing. The chairman instructed the solicitor to prepare reasons for rejecting the inquiry officer's opinion on the proposed expropriation. This was done, and the reasons were before the board when it met on September 21, 1970, in private in committee of the whole to consider the expropriation as approving authority. Both Wood and the solicitor were present. The meeting lasted about one hour and one-half, and it culminated in acceptance of the solicitor's reasons and in the approval of the expropriation. The only change in the reasons was substitution of the word "majority" for the word "unanimous" because two members of the sixteen who were present dissented. Following the private meeting the board met in public for some ten minutes to formalize what it had done in committee of the whole. The appellants were not at the public meeting and the evidence does not show whether they had any notice thereof.

Shortly afterwards the appellants brought a declaratory action to annul the expropriation and also sought damages. Stark, J. [20 D.L.R. (3d) 386, [1971] 3 O.R. 346], dismissed the action and his judgment of dismissal was affirmed on appeal without written reasons. In this Court, counsel for the appellants contended that the board had failed to "consider" the inquiry officer's report as required by s. 8(1); that it was also obliged to act on the report at a public meeting and failed to do so; that because of certain new material and representations that were before it, beyond what was in the report, it was under a duty to give notice to the appellants before approving the expropriation; and that, in any event, the proposed expropriation was contrary to the Official Plan which was in effect for the township in which the land in question lay, and hence in violation of s. 15 of the *Planning Act*, R.S.O. 1960, c. 296 [later R.S.O. 1970, c. 349, s. 19], which forbids any public work (allegedly including a school) not in conformity with an effective Official Plan.

The Court did not find it necessary to hear counsel for the respondent board on the legality of the expropriation under the Official Plan. It was satisfied at the hearing that since use of rural areas for schools was a permitted use, although qualified by a provision that they not detract from the maintenance of the rural environment, there was, in the circumstances, no contravention of the Official Plan, especially when by its very terms its provisions were to be flexibly interpreted.

I am also of the opinion that the respondent board as an approving authority was not under any statutory or other obligation to consider approval of an expropriation at a public meeting. Section 47(1) of the *Schools Administration Act*, R.S.O. 1970, c. 424, requiring meetings of a school board, except meetings of committees including a committee of the whole, to be open to the public, cannot be read into the *Expropriations Act* to govern the school board's proceedings thereunder. That Act does not expressly say so, nor do any of its provisions import a duty upon a school board not resting upon the generality of approving authorities, to carry out its approving function in public. It is fallacy to say that the respondent board sitting as an approving authority sits as a school board; rather, being a school board with expropriating powers, it has been legislatively designated as an approving authority.

The remaining two points raised by appellants' counsel are more formidable. They are based on a reference to the grounds upon which the inquiry officer disapproved of the proposed expropriation, a reference to the contrary reasons of the board's solicitor which became the statutorily-required reasons of the board in giving its approval to its expropriation, and a reference to the material that was before the board when in committee of the whole; and they involve too an appeal to aspects of what is conveniently and compendiously called natural justice, a duty of procedural fairness to persons in the course of lawful interference with various of their interests, including interests in property.

The approving authority does not sit under s. 8 as an appeal tribunal nor as a tribunal of review of the inquiry officer's report. It has an independent power to approve or disapprove the proposed expropriation, or to approve it with modifications, subject only to a duty to "consider" the inquiry officer's report. It is not bound by either the findings of fact nor by any interpretation of law in that report. That is plain from s. 8 in its relation to the scheme of the Act as a whole.

What, then, is involved in its duty to "consider" the report? Certainly, the board must have the report before it, and the evidence shows that each member had a copy at least three days before the approval meeting. Although the word "consider" imports a time element, I do not think a Court can or should impose any arbitrary temporal standard any more than it can or should monitor the degree of required concentration upon the contents of the report. In the present case, the board was in session on the report in committee of the whole for about one hour and one-half, and had before it a critical set of opposing reasons which it ultimately accepted. I see nothing improper, in view of the independent power of the board as an approving authority, in its having a pre-packaged opinion before it prepared by its solicitor. Unless the good faith, indeed the honesty, of the members of the board is called in question, the fact that they are briefed or counselled in advance to a rejection of the report is not a ground for concluding that they did not "consider" it. I do not read the duty to "consider" as imposing upon an approving authority an obligation, if its decision is adverse to the opinion expressed in the report, to show by its written reasons that its adverse decision is reasonably founded and hence run the risk of review by the Courts if they should conclude that it is not.

Counsel for the appellants did not impugn the good faith of the board. Objectively, the record in this case indicates that the chairman of the board, its solicitor and the director of education had strong opinions before the board met as an approving authority that the expropriation should proceed. If there is an appearance of unfairness from the course of the approval proceedings, it lies in the ambivalent position into which the board was put by the terms of the *Expropriations Act*. The Legislature has, in my opinion, left little room for judicial supervision of an approving authority's discharge of its duty to approve or disapprove an expropriation; and, short of an attack upon good faith, I see no ground for enlargement of the scope of judicial supervision merely because the Legislature has seen fit to make the respondent board "judge in its own cause". It is not for this Court in such a case, and in respect of such a function in relation to expropriation, to revise legislative policy. The Court is given no role to review the merits of an expropriation proposal, and, for reasons which follow, the board's function as an approving authority is not one which, on the facts of the present case, is subject to *audi alteram partem* principles.

Counsel for the appellants did not contend that the respondent board was, as a general rule, obliged to hold a hearing in connection with its consideration of the inquiry officer's report, or obliged to give notice to owners about to be expropriated to enable them to make further representations. (If, in fact, such representations should be made, it would be for the board to decide on the weight, if any, that they should receive.) In the present case, in addition to the inquiry officer's report, the board had before it an interim report on soil conditions at the site of the proposed new school, a letter from the architects and a petition of a considerable number of local residents opposing the expropriation. Because of the first two of these matters, counsel for the appellants contended that his clients should have had an opportunity to appear to make further representations, especially when the staff protagonists for expropriation, its solicitor and the director of education, were on hand to lend persuasion to the approval of the expropriation.

Whether a narrow or a broad view be taken of a duty arising in an approving authority in certain circumstances to hear or accept representations from about-to-be expropriated owners, the matter comes down to the question whether the approving authority is strictly limited in its function to the report of the inquiry officer if it would avoid a further hearing or a duty to receive further representations. I do not think that there can be any such limitation but rather that the answer depends on what is before the approving authority in addition to the inquiry officer's report. On the narrow view, as advanced by counsel for the appellants, namely, that what was before the respondent board in addition to the report imposed upon it a duty to give the appellants an opportunity to make further representations, I must disagree. I do not regard either the material as to soil conditions or the architect's letter or both, as giving rise to an obligation to afford the appellants an opportunity to make further representations.

On the broad view, the governing statute does not limit the approving authority in what it may consider so long as it considers the inquiry officer's report, and I would not read any limitation into s. 8. To use case-honoured terminology, the board as an approving authority is neither a judicial nor a *quasi*-judicial body, but is invested with the widest discretionary power to determine, subject only to considering the inquiry officer's report, whether an expropriation should proceed. The sanction for a wrong-headed decision (absent bad faith), having regard to its duty to give reasons, is public obloquy not judicial reproof. I do not say, however, that in no circumstances would it be appropriate to fix an approving authority with a duty to hear or accept representations from owners whose lands are in danger of being expropriated. Such instances are likely to be rare but I would not exclude them. The present case is not in that category.

approving auth — not jud/ nor quasi discretionary

Function and role in which a statutory body is cast, relative to the legislation under which it operates, and in some cases the manner in which it discharges its function and role, govern the procedural duties to which it may be required to conform by the Courts, in the absence of express stipulation in the statute. This is what emerges from *Franklin et al. v. Minister of Town & Country Planning*, [1948] A.C. 87; from *Calgary Power Ltd. and Halmrast v. Copithorne*, 16 D.L.R. (2d) 241, 78 C.R.T.C. 31, [1959] S.C.R. 24, and from *Padfield et al. v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997, which were among the authorities upon which the parties relied. Of course, assessment of function and role involves judgment, and I have made mine evident in these reasons.

I would dismiss the appeal but, in view of the novelty of the issue and the dispositions below as to the merits and as to costs, I would make no order as to costs in this Court.

Appeal dismissed.

ZAICHUK v. ONTARIO WATER RESOURCES COMMISSION

Ontario Court of Appeal, McGillivray, Jessup and Brooke, JJ.A.
December 21, 1972.

Approval of expropriation — Approving authority discharges administrative function — Decision to approve expropriation not reviewable by way of certiorari.

EDITORIAL NOTE: This decision only recently came to our attention, but was thought to be of sufficient importance to report at this time.

APPEAL from an order of Galligan, J., dismissing an application to quash a plan of expropriation and certificate of approval.

John C. Pallett, Q.C., and *W. Kerr*, for appellant, applicant.
S. George J. Lane, Q.C., for respondent.

The judgment of the Court was delivered orally by

JESSUP, J.A.:—This is an appeal from an order of Mr. Justice Galligan dismissing an application made to him by way of *certiorari* to quash a plan of expropriation and the certificate of approval thereof signed by James C. Auld, Minister of the Environment.

Despite the able argument of Mr. Pallett, I am of the opinion that the appeal must be dismissed with costs for the reasons given by the learned Judge of first instance.

In my opinion, an approving authority which gives a decision under s. 8 of the *Expropriations Act*, R.S.O. 1970, c. 154, is discharging an administrative function and not a judicial or *quasi*-judicial function. As such the authority is answerable to the electorate but its action or its decision is not reviewable in this Court in a proceedings by way of *certiorari*.

In the result, as I have said, the appeal must be dismissed with costs.

I might just add this — that in his reasons for judgment Galligan, J., found that the Minister of the Environment was affected by bias. In that respect it is clear from the record that no bad faith can be ascribed to the Minister and the bias found against him is bias in the legal and technical sense strictly.

Appeal dismissed.

(vi)	Trees destroyed: 72 silver maples @ $15 each		1,080.00
(vii)	Replacement cost of topsoil: $8,600 per acre x 3.43 acres		29,498.00
		Total award	$32,538.13

(D) COSTS AND INTEREST

Interest will be allowed on the claims at 6%, pursuant to s. 162(3) of the *Railway Act*, from the respective dates of taking of possession, namely, November 1, 1975, for the Lunn claim and December 1, 1975, for the Lewington and O'Neil claims. The claimants will have their costs of the arbitration, including the costs of the hearing before McCart, Co. Ct. J., on the Supreme Court party-and-party scale: the claimants, Lewington and O'-Neil, will be limited to one set of costs because they were represented by the same counsel; Mr. Lunn, being without counsel, shall only be entitled to his taxable disbursements.

RE BUTTERY CONSTRUCTION LTD. et al. AND CITY OF WINDSOR

Ontario High Court of Justice, Divisional Court, Pennell, Cromarty and Anderson, JJ. *December 22, 1978.*

Approval of expropriation — Report of inquiry officer unfavourable to expropriation — Expropriation nevertheless approved — Bad faith — Expropriations Act, R.S.O. 1970, c. 154, s. 8.

The approving authority, which was the same body as the expropriating authority, approved an expropriation where the inquiry officer had reported that the expropriation was not fair, sound and reasonably necessary for the purposes of the expropriating authority. The inquiry officer's report was considered by the approving authority, but no comments were made on the objections raised in the report. An allegation of bad faith on the part of the approving authority was rejected. The authority need not show in its written reasons for approving the expropriation that its decision is reasonably founded. The wisdom of the purposes of the authority and the expropriation is not for a Court to appraise.

[*Walters et al. v. Essex County Board of Education* (1973), 5 L.C.R. 144, 38 D.L.R. (3d) 363, [1974] S.C.R. 481, apld]

Approval of expropriation — Expropriation for resale to private company — Whether expropriation for public purposes.

Once the power to expropriate is conferred on an authority, it would seem, subject to the enabling legislation, to be inconsequential whether or not the expropriation was for a public purpose.

Approval of expropriation — No obligation on approving authority to afford parties affected by an expropriation an opportunity to be heard on consideration of report of inquiry officer — Once authority volunteers opportunity to be heard, hearing must meet fundamentals of fairness.

APPLICATION by the claimants for an order quashing a resolution approving a proposed expropriation.

Leon Paroian, Q.C., and *Robert Dumont*, for applicants.
Gordon S. Nesbet, Q.C., and *Michael D. Hurst*, for respondent.

The judgment of the Court was delivered by

PENNELL, J.:—On June 12, 1978, the Council of the Municipal Corporation of the City of Windsor (the "Council") passed a resolution approving a proposed expropriation for the purpose of assembling land for a housing project. At a meeting of the Council held June 19, 1978, the approval of the proposed expropriation was certified in the prescribed form pursuant to By-law 6012/78 and s. 8(3) of the *Expropriations Act*, R.S.O. 1970, c. 154.

We now have before us an application for an order quashing the said resolution, certificate of approval and By-law 6012/78.

Adequate appreciation of the facts presently to be summarized require that they be set in their legislative framework. In its essentials the *Expropriations Act* confers wide powers on a municipal council as the approving authority. Section 4 of the Act provides:

> 4(1) An expropriating authority shall not expropriate land without the approval of the approving authority as determined under section 5.

Then s. 5 [am. 1971, Vol. 2, c. 12, s. 1] of the same Act provides:

> 5(1) . . . the approving authority in respect of an expropriation shall be the Minister responsible for the administration of the Act in which the power to expropriate is granted except that,
>
> (*a*) where a municipality . . . expropriates lands for municipal purposes, the approving authority shall be the council of the municipality . . .

Section 6 of the Act provides for the giving of due notice of the intention to expropriate and further provides that:

> 6(2) Any owner of lands in respect of which notice is given under subsection 1 who desires a hearing shall so notify the approving authority in writing,
>
> (*a*) in the case of a registered owner, served personally or by registered mail within thirty days after he is served with the notice, or, where he is being served with the notice by publication, within thirty days after the first publication of the notice;

The applicants did desire such a hearing and, as a result, an inquiry officer was appointed pursuant to the provisions of s. 7 of the Act, a Mr. Richard R. Walker, Q.C., who duly fixed a time and place for hearing and caused notice of the hearing to be served on the parties to the inquiry.

The provisions which govern the duties of the inquiry officer with respect to the hearing are set out mainly in s-ss. (5), (6) and (9) of s. 7 of the Act. These subsections are as follows:

> 7(5) The hearing shall be by means of an inquiry conducted by the inquiry officer who shall inquire into whether the taking of the lands or any part of the lands of an owner or of more than one owner of the same lands is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.
>
> (6) The inquiry officer shall report to the approving authority a summary of the evidence and arguments advanced by the parties, the inquiry officer's findings of fact, and his opinion on the merits of the application for approval with his reasons therefor.
>
> . . . . .
>
> (9) The inquiry officer,
>
> (*a*) may add any owner whose lands would be affected by the expropriation of the lands concerned in the inquiry or any modification thereof as a party to the inquiry;
>
> (*b*) shall give every party to the inquiry an opportunity to present evidence and argument and to examine and cross-examine witnesses, either personally or by his counsel or agent;
>
> (*c*) is not bound by the technical or legal rules of evidence; and
>
> (*d*) may inspect the lands concerned either alone or in the presence of the parties.

The report of the inquiry officer is then presented to the approving authority, in this case, the municipal council. Section 8 of the Act sets out the powers and duties of the approving authority. This section reads as follows:

> 8(1) The approving authority shall consider the report of the inquiry officer and shall approve or not approve the proposed expropriation or approve the proposed expropriation with such modifications as the approving authority considers proper, but an approval with modifications shall not affect the lands of a registered owner who is not or has not been made a party to the hearing.
>
> (2) The approving authority shall give written reasons for its decision and shall cause its decision and the reasons therefor to be served upon all the parties within ninety days after the date upon which the report of the inquiry officer is received by the approving authority.
>
> (3) The approving authority shall certify its approval in the prescribed form [if approval is given].

Against this background the facts of the present case fall into proper perspective. They are spread at large upon the record and are not in controversy except as to what happened when the applicants made representation to the City Council with respect to the proposed expropriation and it will be necessary at a later stage to refer to this contingency with particularity.

It is convenient to begin with a brief historical survey. In 1975 the Council of the Corporation of the City of Windsor (hereafter referred to as the "City Council") authorized the engagement of Project Planning Associates Limited as consultants to carry out the development of a housing policy statement. A housing policy statement is a condition precedent for a municipality to qualify for assistance under the Municipal Land Assembly Program. A Municipal Land Assembly Program is one which will qualify for financial assistance under s. 42 [rep. & sub. 1973, c. 18, s. 17] of the *National Housing Act*, R.S.C. 1970, c. N-10 (administered by Central Mortgage and Housing Corporation) where a housing policy statement has been adopted by a municipality and approved by the Minister of Housing of Ontario under the *Housing Development Act*, R.S.O. 1970, c. 213.

The housing policy statement was prepared and presented to City Council in October, 1975, and was subsequently adopted by Resolution 1004/75.

On May 25, 1976, the Minister of Housing approved the statement pursuant to s. 16 [rep. & sub. 1974, c. 31, s. 7] of the *Housing Development Act.*

In October, 1976, City Council authorized an application to the Ontario Municipal Board for approval to undertake the expenditure of $2,780,000 for the acquisition and partial cost of surveying the Bellewood Planning area (of which more in a moment) and for the borrowing from Central Mortgage and Housing Corporation of $2,500,000 under the land assembly programme. Subsequently, on December 6, 1976, Central Mortgage and Housing Corporation issued a commitment for a loan of $2,500,000 and, thereafter, an agreement for that purpose dated December 6, 1976, was entered into between Central Mortgage and Housing Corporation and the City Council, appropriately approved by By-law 5744, enacted June 27, 1977.

The housing policy statement sets out the housing objective of the City Council for the 10-year period from 1976 to 1986, a target of 1,600 new housing units per year is proposed. The housing policy statement recommends that a Municipal Land Assembly Program be commenced immediately, and that assembly should proceed first in the south Windsor planning district. It goes on to state:

> ... much of this land consists of relatively small lots that were sold speculatively about sixty years ago and our research indicates that it would be too costly and time consuming for private entrepreneurs to assemble these lands. We believe that it would be in the public interest to begin to make these

lands available for housing within the next ten years by means of public land assembly.

The City Council considered two areas of land within the south Windsor region for the purposes of the proposed land assembly programme, the Bellewood Land Assembly Area and the Oakwood Land Assembly Area. The former was selected because of its better accessibility to existing services and amenities.

The Bellewood Land Assembly Area consists of 81 acres situate in the south central region of the City of Windsor. Prior to the proposed expropriation, it was subject to fragmented ownership, that is, there were a significant number of privately owned lots (generally of 30 ft. and 40 ft. in width) on an old but subsisting registered plan which had been created in the 1920's. From the inception of the land assembly programme, the City acquired 14.5 acres in the area by purchase. A substantial number of the privately owned lots remaining belonged to the applicants Buttery Construction Limited (hereafter referred to as "Buttery") and John George Buttery as trustee for Buttery. It should be noted that Mr. Buttery has been engaged in residential land development in the south Windsor area for approximately 30 years and Buttery had already developed two streets in Bellewood. The remaining lands which Mr. Buttery had assembled in the Bellewood Land Assembly Area constituted the full land inventory available to Buttery for the purpose of residential housing development. The company is well known in the south Windsor area and considered a reputable construction company.

It appears that, in November, 1976, the housing co-ordinator of the City of Windsor had invited the Greater Windsor Home Builders Land Development Corporation (hereafter referred to as the "Land Development Corporation") to discuss the development of the lands in the Bellewood Land Assembly Area. On November 10, 1976, a solicitor representing the Land Development Corporation wrote a letter to the housing co-ordinator accepting the invitation. In that letter occurs this sentence:

> We confirm that our client wishes to enter into an agreement with the Corporation of the City of Windsor to provide for its exclusive participation with the City in the assembly development and sale of the land in this assembly area.

I shall have to return to the relationship between the Land Development Corporation and the City of Windsor; but for the present I need say no more than that the evidence as to the identity of the Land Development Corporation is scanty. So far as the record discloses, the shares have never been issued, the number of shareholders and potential shareholders is uncertain and its financial capability is unknown.

On November 29, 1976, the City Council passed Resolution 1082/76 declaring,

> . . . that approval be given to the selection of the Greater Windsor Home Builders Land Development Corporation to work with the City administration towards the development and sale of the lands to be assembled in the Bellewood Planning Area for housing development purposes . . . it being understood that the City shall have the right to retain ownership of any parcel in this area if it so chooses and to dispose of such property as it sees fit; and also that the City Solicitor be instructed to immediately proceed with the initiation of the various procedures under The Expropriation Act towards the ultimate expropriation of the lands . . .

I pause there to mention one point. Mr. Paroiane advanced an argument of bad faith based on an allegation that the City Council had entered into a commitment for sale of the subject lands to the Land Development Corporation. Resolution 1082/76, I may say, merely authorizes the city administrator to work with the Land Development Corporation. The City Council expressly reserved the right to do with the land as it saw fit. It is clear that at that stage there was no commitment that the Land Development Corporation be engaged as the marketing agency. In fact, there was nothing of significance done pursuant to Resolution 1082/76 until June, 1978.

The intentions of City Council are summed up at p. 5 of the inquiry officer's report as follows:

> 11. The evidence indicated that it was the City's intention
>
> (a) to acquire lands for the Bellewood Land Assembly Project by purchase or by expropriation.
>
> (b) to service the lands for sale.
>
> (c) to finance the costs of acquisition and servicing through a loan from Central Mortgage and Housing Corporation pursuant to the National Housing Act.
>
> (d) to market the lands through the utilization of the Land Development Corporation.

City Council commenced expropriation proceedings by giving notice of its intent in accordance with the *Expropriations Act*. As already mentioned, the applicants, being the owners of lots in the expropriated area, requested a hearing before an inquiry officer.

It has already been pointed out that the inquiry officer is charged by s. 7(5) of the Act to inquire whether the taking is "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority". The reports of the inquiry officer were delivered to City Council on April 11, 1978. In his opinion the proposed taking of the Bellewood's lands was *not* fair, sound and reasonably necessary. In his first report which deals with "the other applicants" he questions whether municipal land assembly is necessary to meet the housing policy objective of 1,600 units per year in light of his finding that for the previous two years, building permits had been taken out for more than 1,600 units annually. He concludes thus:

> Balancing the public and the private interest, I do not consider it *fair* in light of the current evidence and information for the Expropriating Authority to expropriate the lands of the objectors, particularly for the purpose of taking those lands from one group of private citizens to deliver the serviced inventory of lands to another private group whose identity and financial capability has not in fact been established. These unanswered questions indicate to me that presently it is also not reasonably necessary for the City to acquire lands by expropriation for the purposes of meeting the Housing Policy objectives. In all the circumstances, I do not find the proposed taking from the Bellewood objectors to be fair, sound and reasonably necessary for the purposes of the Expropriating Authority and I hereby so respectfully report to the Approving Authority.

In the report with respect to the Buttery lands, he states as follows:

> As I indicated in my report on the Bellewood objectors, it is necessary for me to balance the public interest as represented by the Expropriating Authority in relation to the private interest of the owners of the lands under expropriation. Recognizing the City's objectives as identified by the adoption of the Housing Policy Statement, the same questions came to mind in relation to the Buttery lands as did with respect to the Bellewood objectors. I do not restate them here, but simply incorporate those same questions in this report by reference.
>
> In addition, however, I note that Buttery has been engaged in land development in a smaller way in the South Windsor Planning Area for about 30 years. There was some suggestion that if Buttery had been permitted to develop the Betts Avenue property, the mushrooming effect of development would have brought about the servicing and development of all the Bellewood land area. The development did not occur because of the City's desire to modify the planning even though the service capability existed. Additional questions that occurred related to the Buttery lands. Based on this planning modification should the City take all of the Buttery inventory? In particular, is it fair to Buttery to take its land inventory and turn it over to another private corporation, the Land Development Corporation? Why should those lands not be turned over to Buttery instead of the Land Development Corporation? Is it fair to Buttery to take all of its inventory giving an opportunity to re-acquire only one building lot? Is there any evidence that the City will be able to control profit on re-sale of the lands through the Land Development Corporation that it could not do through Buttery Construction? Both are undoubtedly private corporations, but Buttery has at least two arguments that the Land Development Corporation — at least at this point — does not. Buttery can argue that its principals are identifiable where the Land Development Corporation's principals are not — Buttery can argue that it has a record of house building in the area for 30 years where the Land Development Corporation is neither structured nor operational...

> In balancing the public and private interest, I do not consider it fair in light of current evidence for the Expropriating Authority to expropriate the Buttery lands. It seems to me that this would largely consist of taking lands of Buttery (who, by the City's own admission, is not a speculator) and delivering the serviced inventory of those lands to another private corporation formed for a profit whose principals and financial capability have not yet been established.

On some date which was not fixed exactly except that it was prior to April 5, 1978, the Land Development Corporation submitted a "preliminary draft proposal" to the City of Windsor Legal Department. On April 21, 1978, the solicitor for the applicants wrote a letter to the City Solicitor requesting a copy of that preliminary draft proposal in order to prepare and present to the City Council a like agreement on behalf of the applicants. Not surprisingly, the request was denied. Thereupon the solicitor for the applicants had prepared agreements, duly executed on the part of the applicants, and presented them to the City Solicitor as evidence of the applicants *bona fides* with respect to then proposed modification of the proposed expropriation.

On May 24, 1978, the City Clerk forwarded to legal counsel who had appeared at the hearing held before the inquiry officer a copy of the city administration reports with respect to the proposed expropriation.

In accordance with standard practice a true copy of the agenda and supporting reports of the administration which included the reports of the inquiry officer were delivered to all members of the City Council at their homes by messenger on Thursday previous to the City Council meeting to be held the following Monday evening, that is to say, on June 12, 1978.

The agenda for the regular meeting of City Council held on June 12, 1978, listed item 19 (the procedure by-law which governs the procedures applying to all delegations making representation to Council with reference to any particular item on an agenda), item 20 (the inquiry officer's reports) and item 21 (the city administrator's reports regarding the Bellewood Land Assembly Development alternatives).

Counsel for Buttery and the other applicants respectively presented themselves on June 12, 1978, before the City Council and made representations with respect to the proposed expropriation. The accounts given of what took place are contradictory. According to the affidavits filed on behalf of the applicants counsel were subjected to a ruling by the mayor of the respondent City Council that limited them to a period of 10 minutes (pursuant to the provisions of the procedure by-law, item 19) and further that Council would not hear any representations with respect to the applicants modification of the proposed expropriation. According to the affidavit filed on behalf of the respondent City of Windsor, counsel for Buttery did not use up the allotted time of 10 minutes and counsel for the other applicants requested and was granted an extension of his allotted time until his submissions were fully completed.

The deponents to these conflicting affidavits were not cross-examined. I find no proper basis upon which to found a choice between these two versions.

At a larger stage in the Council meeting held on June 12, 1978, according to the affidavit made by the Clerk of the City of Windsor, counsel for the applicants made representations with respect to item 21, of the agenda, being the administration report regarding the land assembly development alternatives. It appears that the third alternative of this report is somewhat akin to the modified expropriation project suggested by the applicants.

Having heard the representations that were made by all parties, City Council enacted Resolution 650/78 which approved the expropriation and further enacted Resolution 651/78 which gave preliminary approval in principle to the policy relating to the disposition of the lands in the Bellewood Land Assembly Area. Resolution 651/78 provided that the proposed policy be referred back to the city administration for a further report to City Council as regards, *inter alia,* whether Resolution 1082/76 (approving the selection of the Land Development Corporation to work with the city administration) toward the development and sale of lands to be assembled and to acquire 75% of all lands that are to be marketed should be rescinded.

On June 19, 1978, City Council enacted By-law 6012 in terms of Resolution 650/78 and a certificate of approval was issued. In the City Council's "Reasons for Decision", the only reference to the report of the inquiry officer appears in para. 3 as follows:

> "3. A study of the Report indicates that the Inquiry Officer afforded an opportunity for all parties to be heard and to lead evidence and to cross-examine witnesses."

Paragraph 4 reads as follows:

> "4. The Council of the Corporation of the City of Windsor, in its capacity as Approving Authority, has concluded that the proposed expropriation is fair, sound and reasonably necessary in the achievement of the objectives of the Expropriating Authority in that
>
> (a) the proposed expropriation is necessary to the assembling of lands for housing purposes;

(b) there exists a need within the City of Windsor to bring additional lands on stream for residential development purposes;

(c) the lands are suitable for residential development purposes in view of its location and the proximity and availability of necessary services;

(d) the proposed expropriation is fair in that (in achieving a balance between the public interest and the private interests of the individual owners) there exists in the City of Windsor a real need to bring additional lands on stream for residential development purposes."

The validity of the expropriating by-law has undergone the closest scrutiny in extended argument. The grounds of attack have been twofold.

First it is said that there was a denial of natural justice because the applicants were not given a fair hearing before City Council; secondly, it is said that the exercise of the power of expropriation was not in good faith since it flew in the face of the inquiry officer's report and no sufficient reason was given for rejecting the report. The latter ground may be taken first.

What is bad faith is an issue of fact to be determined by the facts of each case. The burden of showing bad faith rests on the applicants. The argument of the applicants, as I understand it, runs briefly as follows: bad faith is manifest from the fact that lands were taken from Buttery to allow a competitor, the Development Land Corporation, to develop and sell the lands which is something that Buttery could have done itself; that City Council approved the selection of the Land Development Corporation to work with the city administration towards the development and sale of the lands to be assembled rather than through the owners whose lands were being expropriated, that City Council expropriated from private interests (the owners) in order to sell to another private interest (the Land Development Corporation) lands which would not be used for public purposes; that the city's refusal to provide the applicants with a copy of the preliminary draft proposal submitted by the Land Development Corporation, and that the City Council refused to consider a firm alternative proposal under seal from the applicants for the development of the subject lands which proposal was closely akin to an alternative proposal submitted by the administration to City Council. In a word, the argument reduces itself to this: City Council approved the arrangement with the Land Development Corporation whereby the latter would acquire 75% of the lands to be marketed before the inquiry officer, made his report and shut its mind to the proposals of the applicants.

In my opinion, the record will not support in all aspects the contention of the applicants. The task of reaching a judgment on the mode of acquiring and marketing lands for a housing project is beset with difficulties and speculation. City Council had to make an appraisal of elements having delusive certainty. No doubt it held a tentative opinion favourable to the selection of the Land Development Corporation as the marketing agent prior to the inquiry officer's report. That much is established by Resolution 1082/76 passed November 27, 1976. However, Resolution 651/78 makes it plain enough that City Council had not made a prejudgment in the matter. That resolution, of which I have before spoken, expressly calls for a report as to whether that part of Resolution 1082/76 referring to the Land Development Corporation should be rescinded. One would not suppose City Council would consider rescinding a resolution unless it had left open for determination the mode of marketing the subject lands pending the exercise of its expropriatory powers. I find nothing in the record to disturb such an assumption.

In this connection it is perhaps useful to recall, however shortly, what had transpired before City Council approved the expropriation. Early in 1975, City Council had commissioned a housing policy statement under the provisions of the *National Housing Act*. The statement was delivered in October, 1976. The Ministry of Housing approved the statement and, thus, opened the way for City Council to expropriate lands for the purpose of a housing project pursuant to s. 16 of the *Housing Development Act*. Section 16, so far as relevant, reads as follows:

> 16. ... if the Council of a municipality has adopted a policy statement containing provisions relating to the provision of housing which statement has been approved by the Minister, the council of the municipality may,
>
> (*a*) acquire and hold land, with or without buildings thereon, within the municipality for the purpose of a housing project;
>
> (*b*) survey, clear, grade, subdivide, service and otherwise prepare such land for the purpose of the project; and
>
> (*c*) sell, lease or otherwise dispose of such land for a nominal or other consideration for housing purposes.

It would appear, therefore, that even if City Council had appointed the Land Development Corporation as its exclusive agent to market the subject lands it would have been within its power under s. 16.

Section 5 of the *Municipal Act*, R.S.O. 1970, c. 284, confers power on a municipality to acquire lands by expropriation. Section 5 reads as follows:

> 5. Where power to acquire land is conferred upon a municipal corporation by this or any other Act, unless otherwise expressly provided, it includes the power to acquire by purchase or otherwise and to enter on and expropriate.

Much was made in argument that the lands in question were not expropriated for public purposes. The short answer is that once the power to expropriate is conferred it would seem inconsequential whether or not it was for a public purpose.

The inquiry officer found, as we have seen, that the proposed expropriation was neither fair nor sound and that on the merits it should not be approved. His report came to city administration on April 11, 1978. The report was placed on the agenda of City Council for June 12, 1978. City Council went to great pains to see that all the proprieties were complied with. As I have already stated, copies of the report and the agenda were sent to all interested parties. Each member of City Council had a copy of the report at least four days before the approval meeting. Interested parties were permitted a hearing before City Council and it will be necessary at a later stage to refer to the hearing in more particularity.

The argument is made that an inference of bad faith arises from the summary reference to the inquiry officer's report in City Council's "Reasons for Decision". True it is that City Council makes no comments on the questions propounded in the inquiry officer's report.

> I do not read the duty to "consider" [the inquiry officer's report] as imposing upon an approving authority an obligation, if its decision is adverse to the opinion expressed in the report, to show by its written reasons that its adverse decision is reasonably founded and hence run the risk of review by the Courts if they should conclude that it is not.

So wrote the Chief Justice in delivering the judgment of the Court in *Walters et al. v. Essex County Board of Education* (1973), 5 L.C.R. 144 at p. 148, 38 D.L.R. (3d) 363, [1974] S.C.R. 481. As the approving authority, the respondent was invested with the widest discretionary power to determine, subject only to considering the inquiry officer's report, whether an expropriation should proceed. Whether the housing policy and an expropriation is wise or unwise is not for the Court to appraise. It is not for us to try to penetrate the precise cause of the City Council's reasoning. Our duty is at an end when we deal with the points of law raised before us and determine whether City Council have so erred in law that the expropriation should be set aside.

It is easy, especially for those who conceive themselves sufferers by it, to suspect and even to argue with some plausibility that there was bad faith in the *modus operandi* of the expropriation, but judging it, as I must judge it, upon a judicial survey of the whole record, I am not persuaded that the applicants have shown bad faith or impropriety on the part of the respondent.

It remains for me to consider the remaining ground of attack, namely, the allegation of a failure to grant the applicants a fair and adequate hearing resulting in a denial of natural justice. Generally speaking, there exists no obligation on the approving authority to afford the applicants or other parties affected by the proposed expropriation an opportunity to be heard. Once the City Council volunteered to the applicants an opportunity to be heard, then the hearing had to meet the fundamentals of fairness though the Council was free to fashion the rules of procedure.

Reading the present record there can be no doubt that City Council gave adequate notice of the meeting at which the inquiry officer's report would be considered and provided copies of the administration report with respect to the inquiry officer's report to the applicants. The controversy arising out of the hearing concerns the right of the applicants to make full representation. As I have already noted, there is an acute conflict of fact. The applicants, on the one hand, allege that representations on their behalf were limited to a total of 10 minutes and that there was a refusal to hear representation as to modification of the proposed expropriation. The respondent, on the other hand, asserts that it did not inhibit, or throttle the capacity of the applicants to make such representations as they considered adequate. So assertion is met by counter-assertion.

Unhappily I do not have the intellectual weights and measures by which judicial judgment can determine whether or not the applicants were denied a fair hearing. Unfortunately the deponents of the competing affidavits, as already noted, were not cross-examined. The record is most unsatisfactory on this point but such as it is we must accept it.

Accordingly, I feel bound to hold that the record would not justify a finding of denial of natural justice. However, it may not be amiss to state that it became clear during the course of argument at bar that the inquiry officer's report contained substantially the representations which counsel for the applicants (it is said) was denied an oportunity to present. To that extent the applicants' representations were considered by City Council. I hasten to add, however, that a consideration of the inquiry officer's report is irrelevant to the question of whether or not the applicants were afforded an opportunity to make adequate representations.

For the reasons above given, I conclude that the application should be dismissed.

THE QUEEN v. HUI et al.

Alberta Supreme Court, Appellate Division, McGillivray, C.J.A., Clement and Haddad, JJ.A. *November 22, 1978.*

Lease — Tenants' entitlement to compensation — Lease terminable on three months' notice — Expropriation Act, 1974 (Alta.), 27, ss. 39, 40, 41, 48, 49, 51.

At the date of the expropriation, the claimants were leasing the expropriated property for a term of three years, commencing May 15, 1974, subject to the lessor's right to terminate the lease on three months' notice, subsequent to January 1, 1975. The land was expropriated on December 31, 1975, and the claimants commenced proceedings for compensation. On a preliminary motion, the arbitral tribunal held that the length of the claimants' term remaining at the date of expropriation was the remainder of the three-year term, not the three-month notice period as suggested by the authority.

Held, on an appeal by the authority, the claim should be referred back to the arbitral tribunal to consider (a) the reasonable prospects of the claimants remaining in possession during some or all of the unexpired term, having regard to the three-month notice provision, and (b) the extent to which the accelerated loss of possession has, in fact, caused disturbance damage to the claimants.

[*Re Frankel Steel Construction Ltd. and Metro. Toronto* (1966), 58 D.L.R. (2d) 578, [1966] 2 O.R. 817, affd 11 D.L.R. (3d) 195, [1970] S.C.R. 726; *Diggon-Hibben Ltd. v. The King*, [1949] 4 D.L.R. 785, [1949] S.C.R. 712, 64 C.R.T.C. 295, consd]

Lease — Disturbance damages — Method of valuation — Expropriation Act, 1974 (Alta.), c. 27, ss. 48, 49.

The *Expropriation Act*, 1974 (Alta.), c. 27, s. 49, requires the Land Compensation Board, Alberta, to come to a judgment on how much of the costs referred to in s. 48 are appropriate to the case of a tenant having regard to the length of the term of the lease, the portion remaining after the expropriation, and any rights or reasonable prospects of renewal as well as the nature of the business being carried on and the extent of the tenants' investment in the land. There is no room under the statute for the application of a formula determining the present value of the acceleration of future inevitable moving costs. The statute prescribes the exercise of judgment by the Board having regard to specific factors.

[*Re Frankel Steel Construction Ltd. and Metro. Toronto* (1966), 58 D.L.R. (2d) 578, [1966] 2 O.R. 817; affd 11 D.L.R. (3d) 195, [1970] S.C.R. 726, distd]

APPEAL by the authority from a decision of the Land Compensation Board, Alberta, 15 L.C.R. 90, holding that the lessees of expropriated premises are entitled to compensation.

BLACK'S LAW DICTIONARY

Definitions of the Terms and Phrases of
American and English Jurisprudence,
Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.
Author of Treatises on Judgments, Tax Titles, Intoxicating Liquors,
Bankruptcy, Mortgages, Constitutional Law, Interpretation
of Laws, Rescission and Cancellation of Contracts, Etc.

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Contributione facienda /kòntrəbyùwshiyówniy fæshiyéndə/. In old English law, a writ that lay where tenants in common were bound to do some act, and one of them was put to the whole burthen, to compel the rest to make contribution.

Contribution to capital. A fund or property contributed by shareowners as financial basis for operation of corporation's business, and signifies resources whose dedication to users of the corporation is made the foundation for issuance of capital stock and which became irrevocably devoted to satisfaction of all obligations of corporation. See also **Capital.**

Contributory, *n.* A person liable to contribute to the assets of a company which is being wound up, as being a member or (in some cases) a past member thereof.

Contributory, *adj.* Joining in the promotion of a given purpose; lending assistance to the production of a given result. Said of a pension plan where employees, as well as employers, make payments to a pension fund.

As to contributory "Infringement" and "Negligence," see those titles.

Contributory cause. See **Cause; Contributing cause; Negligence** *(Contributory negligence).*

Contributory negligence. See **Negligence.**

Contrivance. Any device which has been arranged generally to deceive. An instrument or article designed to accomplish a specific objective and made by use of measure of ingenuity.

Control, *v.* To exercise restraining or directing influence over. To regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern.

Control, *n.* Power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. The "control" involved in determining whether "principal and agent relationship" or "master and servant relationship" is involved must be accompanied by power or right to order or direct. Mid-Continent Petroleum Corporation v. Vicars, 221 Ind. 387, 47 N.E.2d 972.

"Control," as used in statute making it unlawful for any person to possess or control any narcotic drug, is given its ordinary meaning, namely, to exercise restraining or directing influence over, and also has been defined to relate to authority over what is not in one's physical possession. Speaks v. State, 3 Md.App. 371, 239 A.2d 600, 604.

Rule that driver must at all times have automobile under control, means having it under such control that it can be stopped before doing injury to any person in any situation that is reasonably likely to arise under the circumstances. Kindt v. Reading Co., 352 Pa. 419, 43 A.2d 145, 147.

See also **Exclusive control; Immediate control.**

Controlled company. A company, a majority of whose voting stock is held by an individual or corporation. Effective control can sometimes be exercised when less than 50 percent of the stock is owned.

Controlled substance. Any narcotic drug so designated by law; *i.e.* so designated by federal or state Controlled Substances Acts *(q.v.).*

Controlled Substance Acts. Federal and state acts (the latter modeled on the Uniform Controlled Substances Act) the purpose of which is to control the distribution, classification, sale, and use of drugs. The majority of states have such acts.

Controller. See **Comptroller.**

Controlment /kəntrólmənt/. In old English law, the controlling or checking of another officer's account; the keeping of a counter-roll.

Controver /kəntrówvər/. In old English law, an inventor or deviser of false news.

Controversy. A litigated question; adversary proceeding in a court of law; a civil action or suit, either at law or in equity; a justiciable dispute. To be a "controversy" under federal constitutional provision limiting exercise of judicial power of United States to cases and controversies there must be a concrete case admitting of an immediate and definitive determination of legal rights of parties in an adversary proceeding upon facts alleged, and claims based merely upon assumed potential invasions of rights are not enough to warrant judicial intervention. Southern Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen, D.C.Ga., 223 F.Supp. 296, 303. This term is important in that judicial power of the courts extends *only* to cases and "controversies." See **Case; Cause of action; Justiciable controversy.**

Controvert. To dispute; to deny; to oppose or contest; to take issue on. done by X

Contubernium /kòntəbə́rniyəm/. In Roman law, the marriage of slaves; a permitted cohabitation.

Contumace capiendo /kòntəméysiy kæpiyéndow/. In English law, excommunication in all cases of contempt in the spiritual courts is discontinued by 53 Geo. III, c. 127, § 2, and in lieu thereof, where a lawful citation or sentence has not been obeyed, the judge shall have power, after a certain period, to pronounce such person contumacious and in contempt, and to signify the same to the court of chancery, whereupon a writ *de contumace capiendo* shall issue from that court, which shall have the same force and effect as formerly belonged, in case of contempt, to a writ *de excommunicato capiendo.* See **Excommunication.**

Contumacious conduct. Wilfully stubborn and disobedient conduct, commonly punishable as contempt of court. See **Contempt.**

Contumacy /kónt(y)əməsiy/. The refusal or intentional omission of a person who has been duly cited before a court to appear and defend the charge laid against him, or, if he is duly before the court, to obey some lawful order or direction made in the cause. In the former case it is called "presumed" contumacy; in the latter, "actual."

Contumax /kóntəmæ̀ks/. One accused of a crime who refuses to appear and answer to the charge. An outlaw.

THE CONCISE OXFORD DICTIONARY

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unquestionably. [ME, f. L *controversia* (as foll.; see -Y^1)]

cŏ'ntrovĕrt (*or* -vĕ'rt) *v.t.* Dispute about, discuss; dispute, deny; hence ~IBLE *a.* [orig. p.p. for earlier *controversed* (cf. *converse, convert*) f. F *controvers(e)* f. L *controversus* (CONTRA-, *vertere vers-* turn)]

cŏntŭmā'cious (-shus) *a.* Insubordinate, disobedient, esp. to order of court; hence or cogn. ~LY^2 *adv.*, ~NESS, **cŏ'ntŭm**ACY, *ns.* [f. L *contumax* (perh. rel. to *tumēre* swell); see -ACIOUS]

cŏntŭmē'lious *a.* Insolent; reproachful; hence ~LY^2 *adv.* [ME, f. OF *contumelieus* f. L *contumeliosus* (as foll.; see -OUS)]

cŏ'ntŭmely (*or* kontū'mĭlĭ) *n.* Insolent or reproachful language or treatment; disgrace. [ME, f. OF *contumelie* f. L *contumelia* (as CON-, *tumēre* swell)]

contū'se (-z) *v.t.* Injure by blow without breaking skin, bruise; so **contū'**SION (-zhon) *n.* [f. L CON(*tundere tus-* thump)]

conŭ'ndrum *n.* Riddle; hard question. [16th c.; orig. unkn.]

cŏnûrbā'tion *n.* Aggregation of contiguous towns forming single community in some respects. [f. CON- + L *urbs urbis* city + -ATION]

cŏ'nūre *n.* Amer. parrot of genus *Aratinga* etc., resembling macaw. [f. mod. L *conurus* f. Gk *kōnos* cone + *oura* tail]

cŏnvalĕ'sce *v.i.* Regain health after illness. [ME, f. L CON(*valescere* incept. of *valēre* be well)]

cŏnvalĕ'sc|ent *a.* & *n.* (Person) recovering from illness; **~ent home** or **hospital** (for convalescents); so ~ENCE *n.* [f. prec. + -ENT]

convĕ'ct|ion *n.* Transport of heat by movement of heated substance; (Meteorol.) vertical movement of air; hence ~OR *n.*, heating appliance for circulating warm air, **~ion**AL, ~IVE, *adjs.* [f. LL *convectio* f. L CON(*vehere vect-* carry); see -ION]

convenance (kaw'ṅvenahṅs) *n.* (usu. in *pl.*) Conventional propriety. [F (*convenir* be fitting, f. as foll.; see -ANCE)]

convē'n|e *v.t.* & *i.* Assemble; convoke (assembly); summon (person *before* tribunal); hence ~ABLE *a.*, ~ER^1, ~OR, *ns.*, (esp.) person who arranges meetings of committee etc. [ME, f. L CON(*venire vent-* come) assemble, agree, fit]

convē'nience *n.* **1.** Suitableness; material advantage (FLAG^4 *of convenience*; **marriage of ~**, not primarily a love-match); personal pleasure (**at your ~**, in a way, at a time, convenient to you; **at your earliest ~**, as soon as you can); advantage (*a great convenience*; **make a ~ of** person, utilize his services without considering his feelings); **~ food** etc. (needing very little preparation and used whenever one wishes). **2.** Useful thing, esp. equipment or installation; water-closet; public lavatory. [ME, f. L *convenientia* (as prec.; see -ENCE)]

convē'nient *a.* Suitable; easily accessible; not troublesome (*if it is convenient to* or *for you*); available or occurring at a suitable moment (*went out and hailed a convenient taxi*); (colloq.) well situated as regards access (*convenient for station and shops*); hence ~LY^2 *adv.* [ME, f. as CONVENE; see -ENT]

cŏ'nvent *n.* Religious community (usu. of women; cf. MONASTERY) living together under discipline; building occupied by this; **~ school** (conducted by members of convent). [ME f. AF *covent*, OF *convent* f. L *conventus* assembly (as CONVENE)]

convĕ'ntĭcle *n.* Clandestine religious meeting, esp. ‖(Hist.) of Nonconformists or Dissenters; building used for this. [ME, f. L *conventiculum* (place of) assembly, dim. of *conventus* (as CONVENE)]

convĕ'ntion *n.* **1.** Act of convening; formal assembly, whence *~EER' *n.*; (Hist.) meeting of Parliament without summons from sovereign. **2.** Agreement between parties; agreement between States, less formal than treaty; general (often implicit) consent; practice based on this, accepted social behaviour esp. if artificial or formal; (Cards) accepted method of play (in leading, bidding, etc.) used to convey information. [ME f. OF, f. L *conventio -onis* (as CONVENE; see -ION)]

convĕ'ntional *a.* Depending on convention(s); not natural, not spontaneous; following tradition; (of bomb, power source, etc.) other than nuclear; hence ~ISM (3), ~IST (2), ~ITY (-ă'l-), *ns.*, ~IZE (3) *v.t.*, ~LY^2 *adv.* [f. F *conventionnel* or f. LL *conventionalis* (as prec.; see -AL)]

convĕ'ntūal *a.* & *n.* (Member or inmate) of a convent; (member) of the less strict branch of Franciscans, living in large convents. [ME, f. med. L *conventualis* (as CONVENT; see -AL)]

convêr'ge *v.i.* (Of lines) tend to meet in a point; come together as if to meet or join; (Math., of series) approximate in the sum of its terms towards a definite limit. [f. LL CON(*vergere* incline)]

convêr'g|ent *a.* Converging; (Biol.) having tendency to become similar in same environment; (Psych., of thought) tending to reach only the most rational result; hence ~ENCE, ~ENCY, *ns.* [f. as prec.; see -ENT]

convêr's|ant (*or* kŏ'nver-) *a.* Having frequent dealings, well acquainted, (*with* person, subject, etc.); hence ~ANCE, ~ANCY, *ns.* [ME f. OF, part. of *converser* CONVERSE^1; see -ANT]

cŏnversā'tion *n.* Informal exchange of ideas by spoken words, whence ~IST (1) *n.*; instance of this; **~ piece**, (1) kind of genre painting of group of figures, (2) thing that serves as topic of conversation owing to its unusualness etc. [ME f. OF, f. L *conversatio -onis* (as CONVERSE^1; see -ATION)]

cŏnversā'tional *a.* Fond of, good at, pertaining to, conversation; hence ~IST (1) *n.*, ~LY^2 *adv.* [f. prec. + -AL]

cŏnversăziō'n|ē (-ăts-) *n.* (*pl.* **~es**, *or* **~i** *pr.* -ē). Social gathering held by learned or art society. [It., f. L (as CONVERSATION)]

convêr'se^1 *v.i.* Engage in conversation (*with* person, *on* or *about* subject). [ME, f. OF *converser* f. L *conversari* keep company (with), frequent. of *convertere* (CONVERT^1)]

cŏ'nvêrse^2 *n.* (arch.) Conversation. [f. prec.]

cŏ'nvêrse^3 *a.* & *n.* **1.** *a.* Opposite, contrary; hence **convêr'se**LY^2 (-slĭ) *adv.* **2.** *n.* Form of words produced by transposition of some terms of another (*he had learning without wealth* is the converse of *he had wealth without learning*); (Math.) proposition whose premiss and conclusion are the conclusion and premiss of another. [f. L *conversus*, p.p. of *convertere* (CONVERT^1)]

convêr'sion (-shon) *n.* **1.** Converting or being converted (see foll.). **2.** Transposition, inversion; (Theol.) change from sinfulness to holiness; (Psych.) change of unconscious conflict into physical disorder or disease; adaptation of building for new purposes, building so modified; transformation of fertile into fissile material in nuclear reactor. [ME f. OF, f. L *conversio -onis* (as foll.; see -ION)]

convêr't^1 *v.* **1.** *v.t.* Change (*into*); change in character or function; (Logic) interchange terms of (proposition); cause to turn, bring over, (*to* opinion, party, faith, etc.), change (moneys, stocks, etc.) into others of different kind;

For other words in *co-* see CO-.

THE SHORTER OXFORD ENGLISH DICTIONARY

ON HISTORICAL PRINCIPLES

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AND ADDENDA

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to oppose an argument

levied upon a district for the support of an army in the field ME. *transf.* and *fig.* 1648. **3.** *Law.* The payment by each of the parties interested of his share in any common loss or liability 1641. Also *attrib.*

1. To make a certaine c. for the poore Saints which are at Hierusalem *Rom.* 15:26. Phr. *To lay under c.*: to force to contribute. **2.** The smallest c. thankfully received 1893. *transf.* A letter.. apparently..a c. from a fresh hand 1882. Hence **Contribu·tional** *a.* of or pertaining to a c.

Contributor (kǫntri·biutəɹ). 1530. [– AFr. *contributour* (mod.Fr. *-eur*), f. as prec.; see -OUR, -OR 2.] **1.** One that contributes; *spec.* one who contributes literary articles to a journal, magazine, etc. †**2.** One who pays tribute –1630.

Contributory (kǫntri·biutəri). 1467. [– med.L. *contributorius*, f. as prec.; see -ORY².]

A. *adj.* **1.** That contributes; †tributary –1601. **2.** Of the nature of contribution 1836.

1. C. allies GROTE. C. to our own destruction CLARENDON. *C. negligence*: negligence on the part of a person injured, which has conduced to the injury.

B. *sb.* **1.** One who, or that which, contributes 1467. **2.** *Eng. Law.* One who is bound, on the winding up of a joint stock company, to contribute toward the payment of its debts.

† **Contri·st,** *v.* 1490. [– (O)Fr. *contrister* – L. *contristare* sadden, f. *com* CON- + *tristis* sad.] *trans.* To make sad –1818. var. † **Contri·state;** whence † **Constrista·tion.**

Contrite (kǫ·ntrəit), *a.* (and *sb.*) ME. [– (O)Fr. *contrit*, *-ite* – L. *contritus*, pa. pple. of *conterere*, f. *com* CON- + *terere* rub, grind (see TRITE).] †**1.** *lit.* Bruised, crushed (*rare*) –1755. **2.** *fig.* Crushed or broken in spirit by a sense of sin; reduced to contrition ME.

1. A c. reed JER. TAYLOR. **2.** A broken and a c. heart, O God, thou wilt not despise *Ps.* 51:17. In very c. and earnest words 1868. So † **Contri·ted** *ppl. a.* Hence **Co·ntrite-ly** *adv.*, **-ness** (*rare*).

Contrition (kǫntri·ʃən). ME. [– (O)Fr. *contrition* – late L. *contritio*, f. *contrit-* pa. ppl. stem of *conterere*; see prec., -ION.] †**1.** *lit.* The action of rubbing together; grinding, pounding, or bruising (so as to pulverize) –1684. **2.** *fig.* The condition of being bruised in heart; affliction of mind for some fault or injury done; *spec.* penitence for sin. Cf. ATTRITION. ME.

1. Triturable, and reduceable to powder, by c. SIR T. BROWNE. **2.** In the tyme of thy repentaunce and contrycyon 1530.

Contriturate (kǫntri·tiūreˡt), *v. rare.* 1822. [f. CON- + TRITURATE.] To triturate thoroughly, pulverize.

Contrivance (kǫntrəi·vǎns). 1627. [f. CONTRIVE *v.*¹ + -ANCE.] **1.** The action of contriving; inventing, plotting, or planning 1646. **2.** Adaptation of means to an end; design 1695. **3.** The faculty of contriving; inventive capacity 1659. †**4.** The way in which a thing has been contrived –1834. **5.** Something contrived for a purpose; a plan, an artifice 1627; a mechanical device 1667. Also *fig.*

1. The preparations..yet are.. in c. and agitation MAY. **2.** Proofs of C. in the Structure of the Globe WOODWARD. **5.** The grand Scheme and C. for our Redemption 1754. *fig.* The contrivances by which Orchids are fertilized DARWIN. vars. † **Contri·val. Contri·vancy** (in sense 3).

Contrive (kǫntrəi·v), *v.*¹ [ME. *controve*, *contreve* – OFr. *controver* (with suffix stress), *contreuve* (with stem-stress), mod.Fr. *controuver* invent, †imagine – med.L. *contropare* compare, prob. f. *com* CON- + *tropus* TROPE. For the ME. *contreve* cf. †*meve*, MOVE, †*preve*, PROVE. The form *contrive* is unexplained.] **1.** *trans.* To invent, devise, excogitate with ingenuity and cleverness. †**2.** *intr.* To form devices; to plot, conspire –1641. **3.** *trans.* To devise, design ME. †**4.** To find out –1600. †**5.** To concoct, fabricate. [Cf. Fr. *controuver*.] –1468. **6.** To bring to pass 1530. †**7.** To bring by ingenuity or skill *into* a place, position, or form –1701.

1. I will..sodainely contriue the meanes of meeting betweene him, and my daughter *Haml.* II. ii. 216. **2.** The Fates with Traitors do c. *Jul. C.* II. iii. 16. **3.** To c. a tubular bridge 1856. **6.** Prophecies when once they get abroad.. C. their own fulfilment SHELLEY.

Hence **Contri·vable** *a.* that can be contrived † **Contri·vement,** = CONTRIVANCE 1, 4, 5. **Contri·ver.**

† **Contri·ve,** *v.*² ME. [app. irreg. f. L. *contrivi*, pret. of *conterere*.] *trans.* To wear down; to pass (time) –1596. *Tam. Shr.* I. ii. 276.

Control (kǫntrōᵘ·l), *sb.* 1590. [– next, or Fr. *contrôle*, f. the verb.] **1.** The fact of controlling, or of checking and directing action; domination, command, sway. **2.** Restraint, check 1594. **3.** A method or means of restraint; a check 1752. **4.** A person who acts as a check; a controller 1786.

1. Quenching my familiar smile with an austere regard of controll *Twel. N.* II. v. 74. **2.** Speak what thou know'st, and speak without controul POPE. **3.** The..checks and controuls provided by the constitution HUME. *C.-experiment*: a test experiment devised to check the inferences deduced from an experiment, by application of the Method of Difference. **4. b.** The apparatus for controlling an aeroplane or motor vehicle 1908. **c.** A section of the road over which speed is controlled, or where contesting machines are allowed time to stop for overhauling, etc. 1900.

Control (kǫntrōᵘ·l), *v.* 1475. [– AFr. *contreroller*, Fr. †*conteroller* (now *contrôler*) – med.L. *contrarotulare*, f. *contrarotulus*, f. *contra* opposite + *rotulus* ROLL *sb.*¹] **1.** *trans.* To check or verify, and hence to regulate (payments, etc.): *orig.* by comparison with a duplicate register. Also *transf.* †**2.** Hence: To call to account, reprove (a person) –1692; to reprehend, object to (a thing) –1738. **3.** To exercise restraint or direction upon the free action of; to dominate, command 1495. Also *refl.* **4.** †To overpower –1755; in *Law*, to overrule 1724.

1. To controlle the receytes & all the yssues of the Thesaurers office 1475. *transf.* To c. statements 1878. **3.** But (oh vaine boast) Who can controll his Fate *Oth.* V. ii. 265. Hence **Contro·llable** *a.*

Controller (kǫntrōᵘ·ləɹ). [ME. *counterrollour*, *-er* – AFr. *contrerollour*, f. *contreroller*; see prec., -OUR, -ER². See COMPTROLLER.] **1.** One who keeps a counter-roll so as to check a treasurer or person in charge of accounts. †**2.** A censorious critic –1614. **3.** One who or that which controls: *Naut.* an apparatus for regulating or checking the motion of a chain-cable as it runs towards the hawse-holes 1867.

1. Comptroller of the houshold SWIFT, of the Navy SIR J. ROSS. **3.** It makes the great controwler of the world, a bare spectator PRYNNE. **C.-general:** an officer entrusted with the supreme control. Hence **Contro·llership,** the office of c.

Controlment (kǫntrōᵘ·lmĕnt). *arch.* 1494. [f. CONTROL *v.* + -MENT.] †**1.** The controlling of accounts –1565. **2.** = CONTROL *sb.* 1. 1494. **3.** = CONTROL *sb.* 2. 1525. †**4.** Censure –1646.

3. Heere haue we war for war, & bloud for bloud, Controlement for controlement *John* I. i. 20.

† **Controve·rsal,** *a.* 1612. [– late L. *controversalis*, irreg. var. of *controversialis*; see CONTROVERSIAL.] **1.** Turned or looking in opposite directions 1644. **2.** = CONTROVERSIAL –1697.

1. The Temple of Janus with his two c. faces MILTON.

† **Co·ntroverse,** *sb.* 15.. [– (O)Fr. *controverse* – L. *controversia* CONTROVERSY.] = CONTROVERSY –1636.

The c. of beauties soveraine grace SPENSER.

† **Co·ntroverse,** *v.* 1601. [Deduced from CONTROVERSED.] **1.** *trans.* To discuss, debate –1755. **2.** *intr.* To dispute *with* 1699.

† **Co·ntroversed,** *ppl. a.* 1575. [– Fr. *controversé*, for earlier *controvers* – L. *controversus* disputed, questionable, f. *contro-*, var. of CONTRA- + *versus*, pa. pple. of *vertere* turn.] Made the subject of controversy; controverted –1663. So † **Co·ntroverser, -or.**

Controversial (kǫntrǒvə̄·ɹʃăl), *a.* 1583. [– late L. *controversialis*, f. *controversia*; see CONTROVERSY, -AL¹.] **1.** Subject to controversy; questionable; disputed. **2.** Of, pertaining to, or of the nature of controversy; polemical 1659. **3.** Disputatious 1659.

1. As c. a point as the authorship of Junius J. WILSON. **2.** Polemical or c. divinity BP. BULL. **3.** The c. pen CRABBE. var. † **Controve·rsary, -ory.** Hence **Controve·rsialist,** one who is skilful in controversy; a disputant. **Controve·rsially** *adv.*

Controversion (kǫntrǒvə̄·ɹʃən). 1677. [– OFr. *controversion* controversy – late L. *controversio*, f. L. *controversus*; see next, -ION.] †**1.** A controversy –1762. **2.** The action of controverting 1762. **3.** = CONTRAVERSION, q.v. 1684.

Controversy (kǫ·ntrǒvə̄ɹsi), *sb.* ME. [– L. *controversia*, f. *controversus* disputed; see -Y³. Cf. Fr. †*controversie* (mod. *controverse* – CONTROVERSE *sb.*).] **1.** Dispute, contention (*esp.* when carried on in writing); contention as to rights, claims, and the like, or on a matter of opinion. **2.** (with *a* and *pl.*) A dispute, contention; *esp.* a discussion of contrary opinions 1573.

1. He..made hym a Iudge in causes of controuersie EDEN. Tossed..with their unballasted wits in fathomless and unquiet deeps of c. MILTON. Phr. *Without, beyond c.* [L. *sine controversia*]: without or beyond question or doubt. **2.** The great c. respecting the 'Origin of Evil' 1852. Hence † **Co·ntroversy** *v.* = CONTROVERSE *v.*

Controvert (kǫ·ntrǒvə̄ɹt, kǫntrǒvə̄·ɹt), *v.* 1609. [As pa. pple. and ppl. a. replacing CONTROVERSED, on the formal analogy of *converse*, *convert*, etc.] †**1.** *trans.* To dispute or contest (a title, etc.) –1682. **2.** To make the subject of controversy; to dispute about 1612. **3.** To oppose in argument; to dispute, deny 1613. **4.** *intr.* To engage in a controversy 1616.

2. Why melancholy men are witty..is a problem much controverted BURTON. **3.** The existence hereof men do not c. SIR T. BROWNE.

Hence **Controverted** *ppl. a.* subjected to controversy. **Controverter,** one who controverts. **Controve·rtible** *a.* capable of being controverted; disputable. **Controvertist,** a controversialist.

† **Contru·de,** *v.* 1609. [– L. *contrudere*, f. *com* CON- + *trudere* thrust, shove.] *trans.* To thrust or crowd together –1651. Hence † **Contru·sion** (*rare*).

Contubernal (kǫntiū·bəɹnăl). 1842. [– L. *contubernalis* tent-companion, f. *com* CON- + *taberna* hut, tent; see -AL¹.] *sb.* One who occupies the same tent. *adj.* Of or relating to occupation of the same tent 1873. So † **Contube·rnial** *a.* sharing the same tent CHAUCER.

Contumacious (kǫntiumēˡ·ʃəs), *a.* 1600. [f. as next; see -ACIOUS.] **1.** Exhibiting contumacy; stubbornly perverse, insubordinate, rebellious 1603. **2.** *Law.* Wilfully disobedient to the summons or order of a court 1600.

1. To reduce the c. monks to obedience 1772. Hence **Contuma·cious-ly** *adv.*, **-ness.**

Contumacy (kǫ·ntiŭmăsi). ME. [– L. *contumacia*, f. *contumax*, *-ac-*, perh. f. *com* CON- + *tumēre* swell; see -Y³.] **1.** Perverse and obstinate resistance to authority. †**2.** Of diseases, etc.: Reluctance to yield to treatment –1661. **3.** *Law.* Wilful disobedience to the summons or order of a court ME.

1. Such acts Of contumacie will provoke the highest MILT. *P.L.* X. 1027. var. **Contuma·city** (*rare*).

† **Co·ntumax,** *a.* ME. [– L. *contumax* insolent, obstinate; see prec.] = CONTUMACIOUS –1587.

Contumelious (kǫntiumī·liəs), *a.* 1483. [– OFr. *contumelieus* (mod. *-eux*) – L. *contumeliosus*, f. *contumelia*; see next, -OUS.] **1.** Exhibiting CONTUMELY; despiteful; superciliously insolent 1548. †**2.** Reproachful, disgraceful –1663.

1. With scoffes and scornes, and c. taunts SHAKS. Curving a c. lip TENNYSON. **2.** In so base and c. a condition COWLEY. Hence **Contume·lious-ly** *adv.*, **-ness.**

Contumely (kǫ·ntiumīli). ME. [– OFr. *contumelie* – L. *contumelia*, f. *com* CON- + *tumēre* swell.] **1.** Insolent reproach or abuse; insulting or contemptuous language or treatment; despite; scornful rudeness; now *esp.* such as tends to dishonour or humiliate. (Also with *a* and *pl.*) **2.** Disgrace, reproach 1555.

1. The Oppressors wrong, the poore mans C. *Haml.* III. i. 71. **2.** It..casteth a kind of c. upon the author of it PEARSON.

Contund (kǫntʊ·nd), *v. rare.* 1599. [– L. *contundere*, f. *com* CON- + *tundere* beat, thump, etc.] †**1.** *trans.* To pound, beat small –1656. **2.** To affect with contusions; to pound (adversaries). *joc.* or *affected.* 1654.

† **Contu·ne,** *v.* Var. of CONTINUE.

† **Conturba·tion.** 1470. [– L. *conturbatio*, f. *conturbat-*, pa. ppl. stem of *conturbare* disturb greatly, f. *com* CON- + *turbare* disturb; see -ION.] Disturbance (physical or mental) –1816.

Contuse (kǫntiū·z), *v.* 1541. [– *contus-*, pa. ppl. stem of *contundere*; see CONTUND; cf.

1. *absol.* The u. will know no other law, but their profit, their pleasure 1623. 2. b. He had been, he said, a most u. time dying MACAULAY. Hence **Unco·nscionably** *adv.* in an u. manner; to an u. extent or degree.

Unco·nscious, *a.* 1712. [UN-^{1} 1.] **1.** Unaware (*of*); not realizing the existence, occurrence, etc., of something. **2.** Not endowed with the faculty of consciousness 1712. **b.** Temporarily insensible 1860. **c.** Not present to or affecting the conscious mind; of the mind: of which the workings are not present to consciousness 1909. Also as *sb.* in *the u.* 1920. **3.** Of qualities: Of which the possessor is unaware 1800. **4.** Done, used, etc., without conscious action 1820.

1. He was u. of exercising any ascendancy KINGLAKE. The u. model, i.e. one taken unawares with a detective camera 1889. 2. Brute, u. matter 1744. b. The patient..was u. 1890. 3. [She] rode..with an u. grace 1890. 4. It is wrong to punish an u. act 1866. Hence **Unco·nscious-ly** *adv.*, **-ness.**

Unco·nsecrate *v.* [UN-^{2} 1] 1598. **Unco·nsecrate** *ppl. a.* [UN-^{1} 2] 1529. **Unco·nsecrated** *ppl. a.* [UN-^{1} 2] 1579. **Unconseque·ntial** *a.* [UN-^{1} 1] 1769. **Unconsi·dered** *ppl. a.* [UN-^{1} 2] 1587. **Unconsi·dering** *ppl. a.* (now *rare*) [UN-^{1} 4] 1660. **Unconso·led** *ppl. a.* [UN-^{1} 2] 1814. **Unconso·lidated** *ppl. a.* [UN-^{1} 2] 1802. **Unco·nsonant** *a.* [UN-^{1} 1] 1535. **Unconspi·cuous** *a.* [UN-^{1} 1] 1802. †**Unco·nstant** *a.* [UN-^{1} 1] –1757.

Unconstitu·tional, *a.* 1765. [UN-^{1} 1.] Infringing the political constitution; contrary to the recognized principles of the state. Hence **Unconstitu·tionally** *adv.* **Unconstitutiona·lity.**

Unconstrai·ned, *ppl. a.* late ME. [UN-^{1} 2.] **1.** Not acting under constraint or compulsion. **2.** Not done, made, etc., under compulsion; spontaneous 1535. **3.** Free from constraint or embarrassment; natural 1704. **4.** Not subject to restraint; unrestrained 1796. Hence **Unconstrai·nedly** *adv.*

Unconstrai·nt [UN-^{1} 6] 1711. **Unconsu·lted** *ppl. a.* [UN-^{1} 2] 1567. **Unconsu·mable** *a.* [UN-^{1} 1] 1571. **Unconsu·med** *ppl. a.* [UN-^{1} 2] 1549.

Unconsu·ming, *ppl. a.* [UN-^{1} 4.] 1628. **1.** That does not waste away or suffer diminution. **2.** Of fire, etc.: That does not consume 1836.

2. God of the u. fire, On Horeb seen of old KEBLE.

Unconsu·mmate 1609, **Unco·nsummated** 1813, *ppl. adjs.* [UN-^{1} 2.] **Unconta·minate** 1675, **Unconta·minated** 1611, *ppl. adjs.* [UN-^{1} 2.] **Unconte·mned** *ppl. a.* [UN-^{1} 2] SHAKS. **Unco·ntemplated** *ppl. a.* [UN-^{1} 2] 1709. **Unconte·nted** *ppl. a.* [UN-^{1} 2] 1568. **Unconte·ntious** *a.* [UN-^{1} 1] 1828. **Unconte·stable** *a.* [UN-^{1} 1] 1681. **Unconte·sted** *ppl. a.* [UN-^{1} 2] 1678, **-ly** *adv.* **Uncontra·cted** *ppl. a.* [UN-^{1} 2] 1527. **Uncontradi·cted** *ppl. a.* [UN-^{1} 2] 1606.

Uncontro·llable, *a.* 1577. [UN-^{1} 1.] †**1.** Irrefutable –1738. **2.** Not subject to control from a higher authority; absolute 1593. **3.** That cannot be controlled or restrained 1648.

1. Those, who think it an u. maxim, that power is always safer lodged in many hands than in one SWIFT. 2. His sentence in matters of Law and Religion is u. 1630. 3. His..fierce and uncontroulable temper RICHARDSON. Hence **Uncontro·llableness. Uncontro·llably** *adv.*

Uncontro·lled, *ppl. a.* 1513. [UN-^{1} 2.] **1.** Not restrained or subjected to control; ungoverned. †**2.** Not tested by comparison with facts –1584. †**3.** Undisputed –1731. Hence **Uncontro·lledly** *adv.*

Uncontrove·rsial *a.* [UN-^{1} 1] 1861. **Uncontrove·rtible** *a.* [UN-^{1} 1] 1664, **-bly** *adv.*

Unconve·ntional, *a.* 1839. [UN-^{1} 1.] Disregarding or not according with convention. Hence **Unconventiona·lity. Unconve·ntional-ly** *adv.*, **-ness.**

Unconve·rsable, -ible, *a.* [UN-^{1} 1] 1593. **Unco·nversant** *a.* [UN-^{1} 1] 1674. **Unconve·rt** *v.* [UN-^{2} 1] 1825. **Unconve·rted** *ppl. a.* [UN-^{1} 2] 1648. **Unconve·rtible** *a.* [UN-^{1} 1] 1695. **Unconvi·cted** *ppl. a.* [UN-^{1} 2] 1675.

Unconvi·nced, *ppl. a.* 1643. [UN-^{1} 2.] †**1.** Not disproved or refuted MILT. **2.** Not convinced or persuaded 1675.

Unconvi·ncing *ppl. a.* [UN-^{1} 4] MILT., **-ly** *adv.* **Uncoo·ked** *ppl. a.* [UN-^{1} 2] 1846. **Uncoo·led** *ppl. a.* [UN-^{1} 2] 1513. **Unco-o·rdinated** *ppl. a.* [UN-^{1} 2] 1892. **Unco·rd** *v.* [UN-^{2} 2 b] late ME. **Unco·rdial** *a.* [UN-^{1}] 1470, **-ly** *adv.* **Unco·rk** *v.* [UN-^{2} 1] POPE. **Unco·rked** *ppl. a.* [UN-^{1} 2] 1791. **Uncorre·cted** *ppl. a.* [UN-^{1} 2] late ME. **Uncorru·pt** *a.* [UN-^{1} 1] late ME., **-ly** *adv.*, **-ness. Uncorru·pted** *ppl. a.* [UN-^{1} 2] late ME., **-ly** *adv.*, **-ness. Uncorru·ptible** *a.* (now *rare*) [UN-^{1} 1] late ME. **Uncorru·ption** [UN-^{1} 6] late ME. **Unco·rseted** *ppl. a.* [UN-^{1} 2] 1856. **Unco·stly** *a.* [UN-^{1} 1] 1638. **Uncou·nselled** *ppl. a.* [UN-^{1} 2] late ME.

Uncou·ntable, *a.* 1582. [UN-^{1} 1.] **1.** Too numerous to be counted. **b.** Of the pulse, etc.: Too rapid to be counted 1823. **2.** Beyond estimating; immense 1858.

Uncou·nted *ppl. a.* [UN-^{1} 2] 1500. **Uncou·nterfeit** *a.* [UN-^{1} 1] 1542. **Uncou·nterfeited** *ppl. a.* [UN-^{1} 2] 1571.

Uncou·ple, *v.* ME. [UN-^{2} 2 b.] **1.** *trans.* To release (dogs) from being fastened together in couples; to set free for the chase. **b.** *absol.* late ME. **2.** *trans.* To disconnect, detach, sever 1533.

1. b. My Loue shall heare the musicke of my hounds. Vncouple in the Westerne valley. SHAKS.

Uncou·rsed, *a.* 1825. [UN-^{1} 3.] Of masonry: Not laid or set in courses.

Uncou·rted *ppl. a.* [UN-^{1} 2] 1595. **Uncou·rteous** *a.* [UN-^{1} 1] ME., **-ly** *adv.*, **-ness. Uncou·rtly** *a.* [UN-^{1} 1] 1598, **-liness.**

Uncouth (ʊnkū·þ), *a.* and *sb.* [OE. *uncūþ*, f. UN-^{1} + *cūþ* COUTH *a.* See also UNCO.] **A.** *adj.* †**1.** Unknown; uncertainly known –1650. **2.** With which one is not acquainted; unfamiliar, unaccustomed. *arch.* OE. **3.** Of an unknown or unfamiliar character; unusual, strange. Now *rare.* OE. †**4.** Unseemly, shocking, repellent –1797. **5.** Of places: Unfrequented, desolate, wild 1542. **b.** Of life, surroundings, etc.: Unattractive, unpleasant, comfortless. *Obs.* or *arch.* 1611. **6.** Of strange appearance; *spec.* awkward or clumsy in shape or bearing 1513. **b.** Uncultured; of rough or uneasy manners 1732. **c.** Of language, style, etc.: Awkward; pedantic; unpolished 1694.

2. The..stranger in an u. country 1632. 3. It is no u. thing To see fresh buildings from old ruines spring B. JONSON. 4. Þis unkouþe discencioun þat is bitwixe þes popes WYCLIF. 5. b. 'Tis so u. Living i' th' country, now I'm us'd to th' city MIDDLETON. 6. c. The scholastic and u. words homogeneity, proportionateness COLERIDGE.

B. *sb.* †**1.** A stranger. –late ME. **2.** *pl.* News. Now *dial.* 1529. Hence **Uncou·th-ly** *adv.*, **-ness.**

Unco·venanted, *ppl. a.* 1648. [UN-^{1} 2.] **1.** Not promised or secured by (*spec.* a Divine) covenant. **2.** Not sanctioned by, not in accordance with, a covenant 1727. **3.** Not bound by a covenant 1790. **b.** Not having subscribed the Covenant 1818.

1. I will cast me on his free u. mercy 1806. 3. b. To disclaim all allegiance to an u. Sovereign MACAULAY.

Unco·ver, *v.* ME. [UN-^{2} 1, 3, 5.] **1.** *trans. fig.* To disclose, make known. **2.** To lay open by removing some covering. late ME. **b.** To strip of clothing; to expose unclothed or unveiled 1530. **3.** To bare (the head) as a mark of respect or courtesy 1530. **b.** *absol.* 1627. **4.** *Mil.* To expose, leave unprotected (troops, positions, etc.), by the moving or manœuvring of men 1796.

3. b. The House of Commons which uncovered and stood up to receive him MACAULAY.

Unco·vered, *ppl. a.* late ME. [UN-^{1} 2.] **1.** Not roofed or closed in overhead. **2.** Unclothed, naked. late ME. **b.** Bare-headed 1570. **c.** Of women: Unveiled 1585. **3.** Left open or exposed; not covered *by* or *with* something 1530. **4.** Nor protected or screened 1795. **5.** Not covered by insurance 1892.

Unco·veted *ppl. a.* [UN-^{1} 2] 1760. **Unco·vetous** *a.* [UN-^{1} 1] 1500. **Uncow·l** *v.* [UN-^{2} 2] 1611. **Uncra·cked** *ppl. a.* [UN-^{1} 2] 1581. **Uncra·mped** *ppl. a.* [UN-^{1} 2] 1797. **Uncra·nnied** *ppl. a.* [UN-^{1} 2] –1649. **Uncrea·te** *ppl. a.* [UN-^{1} 2] 1548. **Uncrea·te** *v.* [UN-^{2} 1] 1633.

Uncrea·ted, *ppl. a.* 1548. [UN-^{1} 2.] **1.** Not brought into existence by a special act of creation; existent without being created. **2.** Not created 1607. Hence **Uncrea·tedness.**

†**Uncre·dible** *a.* [UN-^{1} 1] –1680. **Uncre·ditable** *a.* [UN-^{1} 1] 1643. **Uncre·dited** *ppl. a.* [UN-^{1} 2] 1586. **Uncre·sted** *ppl. a.* [UN-^{1} 2] 1611. **Uncri·ppled** *ppl. a.* [UN-^{1} 2] 1800.

Uncri·tical *a.* 1659. [UN-^{1} 1.] **1.** Lacking in judgement or discrimination; not addicted to criticism. **2.** Not in accordance with critical canons or methods 1846.

1. An u. retailer of anecdotes 1854. *absol.* The u. who believe all they see in print 1874. 2. It is u. to judge an age by its greatest men 1874. Hence **Uncri·tically** *adv.*

Uncri·ticized *ppl. a.* [UN-^{1} 2] 1846.

Uncro·pped, *ppl. a.* 1601. [UN-^{1} 2.] **1.** Of flowers, etc. Not cropped, e.g. by cattle. Also *fig.* Not deflowered, virgin. **2.** Not docked or cut short 1802. **3.** Left fallow 1857.

Uncro·ss *v.* [UN-^{2} 1] 1599. **Uncro·ssed** *ppl. a.* [UN-^{1} 2] 1560. **Uncrow·ded** *ppl. a.* [UN-^{1} 2] 1701. **Uncrow·n** *v.* [UN-^{2} 2] ME. **Uncrow·ned** *ppl. a.* [UN-^{1} 2] 1634. **Uncru·mple** *v.* [UN-^{2} 1] 1611. **Uncru·mpled** *ppl. a.* [UN-^{1} 2] 1854. **Uncru·shable** *a.* [UN-^{1} 1] 1873. **Uncru·shed** *ppl. a.* [UN-^{1} 2] 1626. **Uncry·stallizable** *a.* [UN-^{1} 1] 1791. **Uncry·stallized** *ppl. a.* [UN-^{1} 2] 1759.

Unction (ʊ·ŋkʃən). late ME. [– L. *unctio, unction-*, f. *unct-*, pa. ppl. stem of *ung(u)ere* smear; see -ION.] **1.** The action of anointing with oil as a religious rite or symbol. **b.** *Extreme unction*: see EXTREME *a.* 3. 1513. **2.** The action of anointing as a symbol of investing with an office, esp. that of kingship. late ME. **3.** *fig.* **a.** Of the Holy Ghost: chiefly in renderings and echoes of 1 John 2:20 and of the hymn *Veni, Creator Spiritus* 8. late ME. **b.** Deep spiritual feeling, or the manifestation of this in speech; a manner suggestive of religious earnestness 1692. **c.** *transf.* A manner, etc., showing appreciation or enjoyment of a subject or situation; gusto 1815. **4.** The action of anointing or rubbing with ointment or oil 1580. **5.** An unguent or ointment 1580. **b.** *fig.* A soothing influence or reflection 1602.

1. Vnctions, sacrafices, and rites Ceremoniall 1500. 2. Leo III gave Alfred the royal u. HUME. 3. Thy blessed vnction from aboue 1627. b. There is a great decay of devotional u. COLERIDGE. c. He delivered the haughty speech..with u. C. BRONTË. 5. I bought an Vnction of a Mountebanke SHAKS. b. Lay not a flattering Vnction to your soule, That..my madnesse speakes SHAKS. Hence **U·nctional** *a.* full of spiritual u.

†**U·nctious,** *a.* 1477. [var. (common *c*1600–1725) of UNCTUOUS, by substitution of -IOUS, prob. after UNCTION.] = UNCTUOUS *a.* 1. –1764.

Unctuosity (ʊŋktiuǫ·sĭti). late ME. [– med.L. *unctuositas*, f. *unctuosus*; see next, -ITY. Cf. OFr. *unctuosité* (mod. *onct-*).] Unctuousness; oiliness, greasiness.

Unctuous (ʊ·ŋktiuəs), *a.* late ME. [– med.L. *unctuosus*, f. *unctus*, f. *unct-*; see UNCTION, -UOUS. Cf. OFr. *unctueus* (mod. *onctueux*).] **1.** Of the nature or quality of an unguent or ointment; oily, greasy. **b.** Of meat: Greasy, fat, rich. *arch.* 1495. **c.** Characterized by the presence of oil or fat 1641. **2.** Of ground or soil: Soft and adhesive, rich 1555. **3.** Of vapours, etc.: Laden with oily matter; of the nature of oil or grease 1606. **4.** Having an oily or greasy feel or appearance. Also of feel, touch, etc. 1668. **5.** Characterized by spiritual unction (now *esp.* of an assumed or superficial kind); complacently agreeable or self-satisfied 1742.

1. Gummes..and other vnctuous frutes and trees 1555. c. Their u. and epicurean paunches MILT. 4. Oak, now black with time and u. with kitchen smoke HAWTHORNE. 5. Laying an u. emphasis upon the words DICKENS. Hence **U·nctuous-ly** *adv.*, **-ness.**

Uncu·lled *ppl. a.* [UN-^{1} 2] MILTON. †**Uncu·lpable** *a.* [UN-^{1} 1] –1748. **Uncu·ltivable** *a.* [UN-^{1} 1] 1663. **Uncu·ltivate** *ppl. a.* (*arch.*) [UN-^{1} 2] 1659.

Uncu·ltivated, *ppl. a.* 1646. [UN-^{1} 2.] **1.** *fig.* Not improved by education or training; uncultured. **2.** Untilled 1683. **b.** Of plants: Wild, not cultivated 1697. **3.** Not attended to or practised; not properly trained or developed 1684.

1. Such, the furniture of the u. soul! 1746. 3. Swift indeed has left..no branch of satyr u. 1751.

Uncultiva·tion [UN-^{1} 6] 1796. **Uncu·lture** [UN-^{1} 6] 1624.

Uncu·ltured, *ppl. a.* 1555. [UN-^{1} 2.] **1.** = UNCULTIVATED 2, 2 b. **2.** *fig.* Unrefined; lacking culture 1777.

2. A rough soldier, u. as Marius and hardly less cruel 1878.

Uncu·nning *a.* (*arch.*) [UN-^{1} 4] ME., **-ly** *adv.*, **-ness.** †**Uncu·rable** *a.* [UN-^{1} 1] –1676. **Uncu·rb** *v.* [UN-^{2} 2 b] 1580. **Uncu·rbable** [UN-^{1} 1] SHAKS. **Uncu·rbed** *ppl. a.* [UN-^{1} 2] 1599. **Uncu·rdled** *ppl. a.* [UN-^{1} 2] 1823. **Uncu·red** *ppl. a.* [UN-^{1} 2] 1548.

Webster's Third New International Dictionary

OF THE ENGLISH LANGUAGE

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fr. *contro-* (akin to L *contra-*) + *-versia* (fr. *versus*, past part. of *vertere* to turn) — more at WORTH] **1 a :** the act of disputing or contending **b** (1) **:** a cause, occasion, or instance of disagreement or contention **:** a difference marked esp. by the expression of opposing views **:** DISCUSSION, DISPUTE, DEBATE ⟨engaged in a long ~ with university officials and had denounced evolutionary teachings —*Amer. Guide Series: Minn.*⟩ (2) **:** QUARREL, STRIFE **2 :** a suit in law or equity — distinguished from *case* as not including criminal actions or proceedings ⟨the judicial power shall extend . . . to *controversies* to which the U.S. shall be a party; to *controversies* between two or more States —*U.S. Constitution*⟩ — **in controversy :** to be decided by factual evidence rather than by legal decision

con·tro·vert \ˈkän-trə,vərt, -vət,-vəit, ¦==¦=, *usu* -d· +V\ *vb* -ED/-ING/-S [fr. *controversy*, after such pairs as E *conversion: convert*] *vt* **1** *obs* **:** to oppose or contest by action or argument (as possession of a property) **2 :** to dispute or oppose by reasoning **:** DENY, CONTRADICT ⟨~ a point in a discussion⟩ ~ *vi* **:** to engage in controversy **syn** see DISPROVE

controverted election *n*, *Brit* **:** CONTESTED ELECTION

con·tro·vert·ible \¦==¦=təbəl\ *adj* **:** capable of being controverted — **con·tro·vert·ibly** \-blē, -i\ *adv*

con·tro·vert·ist \-təst\ *n* -S **:** CONTROVERSIALIST

con·tu·ber·nal \kən-ˈt(y)übə(r)nᵊl\ *adj* [L *contubernalis* tentmate, fr. *com-* + *-tubernalis* (fr. *taberna* hut, booth + *-alis* -al) — more at TAVERN] **:** living together **:** INTIMATE

con·tu·ma·cious \¦käntə¦māshəs, -n-tyə¦-,-n-tyü¦-,-nchə¦-\ *adj* [*contumacy* + *-ous*] **:** perverse in resisting authority **:** stubbornly disobedient **:** REBELLIOUS, IRRECONCILABLE ⟨to refer the case of a ~ witness to the court for punishment —H.A. Schweinhaut⟩ **syn** see INSUBORDINATE

con·tu·ma·cious·ly *adv* **:** PERVERSELY, REBELLIOUSLY, STUBBORNLY

con·tu·ma·cy \kən-ˈt(y)üməsē, (ˈ)kän¦t-, -si; ˈkäntəm-, -n-tyə-,-nchə-\ *n* -ES [ME *contumacie*, fr. L *contumacia*, fr. *contumac-*, *contumax* insubordinate (fr. *com-* + *-tumax*, fr. *tumēre* to swell, be proud) + *-ia* -y — more at THUMB] **1 :** stubborn resistance to authority; *specif* **:** willful contempt of court **2 :** refusal to comply ⟨the ~ of Frenchmen in stolidly remaining French —G.W.Johnson⟩

con·tu·me·li·ous \¦käntə¦mēlēəs, -n-tyə¦-,-n-tyü¦-,-nchə¦-\ *adj* [MF *contumelieus*, fr. L *contumeliosus*, fr. *contumelia* + *-osus* -ous] **:** exhibiting contumely **:** insolently abusive and humiliating **:** DESPITEFUL, DISDAINFUL ⟨~ taunts⟩ ⟨a ~ critic⟩ — **con·tu·me·li·ous·ly** *adv*

con·tu·me·ly \kən-ˈt(y)üməlē, (ˈ)kän¦t-, -li; ˈkäntə,mēlē, -n-tyə-,-nchə-, -,məl-; *in the Hamlet soliloquy often* ˈkänchəml- *or* -n-tyəml- *or* -n-,tyüml-\ *n* -ES [ME *contumelie*, fr. MF, fr. L *contumelia*, perh. fr. *com-* + *-tumelia* (akin to *tumēre* to swell); fr. its assumed earlier meaning of "puffed-up, arrogant speech" — more at THUMB] **1 :** rude language or treatment arising from haughtiness and contempt ⟨the book bristles with ~ and wrath —*New Yorker*⟩ **2 :** an instance or exhibition of contumely **:** INSULT ⟨their tracts got burnt or treated with even worse ~ —Samuel Butler †1902⟩ **3 :** the suffering of contumely **:** HUMILIATION ⟨a capacity for bearing ~ —Herman Wouk⟩

con·tund \kən-ˈtənd\ *vt* -ED/-ING/-S [L *contundere* — more at CONTUSE] *archaic* **:** POUND, BRUISE

con·tur·ba·tion \,kän-tə(r)ˈbāshən\ *n* -S [ME, fr. L *conturbation-*, *conturbatio*, fr. *conturbatus* (past part. of *conturbare* to disturb, fr. *com-* + *turbare* to disturb, fr. *turba* disorder) + *-ion-*, *-io* -ion — more at TURBID] *archaic* **:** DISTURBANCE

con·tuse \kən-ˈt(y)üz\ *vt* -ED/-ING/-S [MF *contuser*, fr. L *contusus*, past part. of *contundere* to beat, crush, fr. *com-* + *tundere* to beat — more at STUTTER] **1 :** to beat or pound together (as in a mortar) **2 :** to injure or disorganize (superficial or deeper tissues) with or without breaking the skin **:** BRUISE

con·tu·sion \kən-ˈt(y)üzhən\ *n* -S [ME *conteschown*, fr. MF *contusion*, fr. L *contusion-*, *contusio*, fr. *contusus* + *-ion-*, *-io* -ion] **1 :** the act of contusing or the state of being contused **2 :** a bruise caused by external violence and characterized by hemorrhage into and swelling of the superficial or deeper-lying tissues with or without a break in the covering skin or membrane **syn** see WOUND

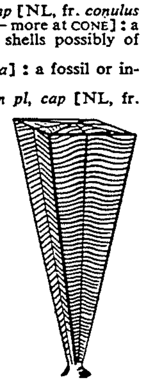
con·tu·sioned \-zhənd\ *adj* **:** CONTUSED, BRUISED

conubium *var of* CONNUBIUM

con·u·lar·ia \,känᵊlˈa(a)rēə, -nyəˈla-\ *n*, *cap* [NL, fr. *conulus* small cone (dim. of L *conus* cone) + *-aria* — more at CONE] **:** a genus of Paleozoic and Mesozoic tapering shells possibly of worms of uncertain relationships

con·u·lar·i·id \-ēəd\ *n* -S [NL *Conulariida*] **:** a fossil or individual of the group Conulariida

con·u·la·ri·i·da \,känᵊləˈrīədə, -nyələˈ-\ *n pl*, *cap* [NL, fr. *Conularia* + *-ida*] **:** a phylum or other group of extinct invertebrate animals of uncertain relationships known from pyramidal usu. 4-sided chitinophosphatic tests widely distributed in Devonian, Pennsylvanian, and Permian rocks



restoration of an individual conulariid

con·ule \ˈkänᵊl, -nyəl\ *n* -S [NL *conulus*, dim. of L *conus* cone] **:** one of the somewhat conical void elevations of the body surface of certain sponges — **con·u·lose** \-nᵊ,lōs, -nyə,lōs\ *adj*

co·nun·drum \kəˈnəndrəm\ *n* -S [origin unknown] **1** *obs* **a :** CONCEIT, WHIM, FANCY **b :** PUN, QUIBBLE **2 :** a riddle based on some fanciful or fantastic resemblance between things quite unlike and forming a puzzling question whose answer is or involves a pun (as in "Why didn't the children of Israel starve in the desert? Because of the *sand which is* there") **3 a :** a question or problem to which only a conjectural answer can be made ⟨the political ~*s*, particularly the problem of how the richer areas . . . can be made to subsidize the poorer —Douglass Cater⟩ **b :** a puzzle or problem that is usu. intricate and difficult of solution ⟨it's been a chronic ~ where they were to pay taxes and vote; some have paid taxes to both states, some to neither —*N.Y. Times*⟩ **syn** see MYSTERY

con·ur·ba·tion \,känə(r)ˈbāshən\ *n* -S [*com-* + L *urb-*, *urbs* town + E *-ation* — more at URBAN] **:** a great aggregation or continuous network of urban communities ⟨the Paris ~ covers the whole of the Department of the Seine and also parts of Seine-et-Oise and Seine-et-Marne —Brian Chapman⟩

con·ure \ˈkänyə(r)\ *n* -S [NL *Conurus* (in some classifications, a genus of parrots), fr. ²*con-* + *-urus*] **:** any of several tropical American parrots (of *Aratinga* and related genera) closely related to and resembling in their brilliant coloration the macaws

con·u·rop·sis \,kän(y)əˈräpsəs\ *n*, *cap* [NL, fr. *Conurus* + *-opsis*] **:** a genus of small American parrots including among recent forms only the extinct Carolina parakeet

co·nus \ˈkōnəs\ *n* [NL, fr. L, cone — more at CONE] **1** *cap* **:** a very large genus (the type of the family Conidae) of pectinibranchiate tropical marine snails comprising the cones and including many beautiful and harmless forms and a few chiefly in the southwest Pacific that are highly dangerous by biting with the radula and injecting a paralytic venom that has been known to cause death in man — see GEOGRAPHER CONE, TEXTILE CONE **2** *pl* **co·ni** \-,nī,-(,)nē\ [NL, by shortening] *com-* + *valescere* to grow strong, fr. *valēre* to be strong, be well — more at WIELD] **:** to gather strength **:** recover health and strength gradually after sickness or weakness **:** RECOVER

con·va·les·cence \-sᵊn(t)s\ *n* -S [MF, fr. LL *convalescentia*, fr. L *convalescent-*, *convalescens* (pres. part. of *convalescere*) + *-ia*] **1 :** gradual recovery of health and strength after disease ⟨a patient well advanced in ~⟩ **2 :** the time between the subsidence of a disease and complete restoration to health ⟨quiet and rest during ~⟩

con·va·les·cen·cy \-ənsē\ *n* -ES [LL *convalescentia*] *archaic* **:** CONVALESCENCE

¹**con·va·les·cent** \¦känvə¦lesənt\ *adj* [L *convalescent-*, *convalescens*, pres. part. of *convalescere*] **1 :** recovering from sickness or debility **:** partially restored to health or strength ⟨~ children nearly ready to leave the hospital⟩ **2 :** of, for, or relating to convalescence or convalescents ⟨a patient in a ~ ward⟩ — **con·va·les·cent·ly** *adv*

²**convalescent** \"\ *n* -S **:** one recovering from sickness

convalescent home *n* **:** an institution for the care of convalescing patients

convalescent serum *n* **:** serum obtained from one who has recovered from an infectious disease and considered to be esp. rich in antibodies against the infectious agent of the disease

con·val·la·mar·in \kən,valəˈma(a)rən, ,känvəˈlamər-\ *n* -S [ISV *convall-* (fr. NL *Convallaria*) + *amar-* (fr. L *amarus* bitter) + *-in* — more at AMAROID] **:** a bitter poisonous glycoside extracted from the lily of the valley

con·val·lar·ia \,känvəˈla(a)rēə\ *n* -S [NL *Convallaria*, genus of plants having as its only species the lily of the valley, fr. L *convallis* enclosed valley (fr. *com-* + *vallis* valley) + NL *-aria* — more at VALE] **:** the dried rhizome and roots of the lily of the valley

con·val·lar·in \,känvəˈla(a)rən, kənˈvalər-\ *n* -S [ISV *convallar-* (fr. NL *Convallaria*) + *-in*; orig. formed as G *konvallarin*] **:** a poisonous glycoside extracted from the lily of the valley

con·val·la·tox·in \¦kän,valə¦täksən, -nvələ¦-\ *n* -S [NL *Convallaria* + E *toxin*] **:** a crystalline glycoside $C_{29}H_{42}O_{10}$ obtained from the flowers of the lily of the valley that acts on the heart and that on hydrolysis yields strophanthidin and rhamnose

con va·ri·a·zio·ni \¦kän,värē,ätsē¦ō(,)nē, ¦kōn-\ *adv* [It] **:** with variations — used as a direction in music

con·variety \¦kän+\ *n* -ES [*com-* + *variety*] **:** a group of cultivated varieties within a species or an interspecific hybrid ⟨the Darwin tulips constitute a ~⟩

con·vect \kənˈvekt\ *vb* -ED/-ING/-S [back-formation fr. *convection*] *vi* **:** to transfer heat by convection ~ *vt* **:** to circulate (warm air) by convection **:** transfer (heat) by convection

con·vec·tion \-kshən\ *n* -S [LL *convection-*, *convectio*, fr. L *convectus* (past part. of *convehere* to bring together, fr. *com-* + *vehere* to carry) + *-ion-*, *-io* -ion — more at WAY] **1 :** the action or process of conveying or transmitting **2 :** a mechanically or thermally produced upward or downward movement of a limited part of the atmosphere that is essential to the formation of many clouds (as cumulus clouds) and is used in certain heating systems **3 a :** the circulatory motion that occurs in a fluid at a nonuniform temperature owing to the variation of its density and the action of gravity **b :** the transfer of heat by this automatic circulation of a fluid — compare CONDUCTION 5a **c :** the transfer of electricity in the form of a surface charge on a moving body (as an electrostatic-generator belt)

con·vec·tion·al \-shənᵊl, -shnəl\ *adj* **:** of, relating to, or produced by convection

convection current *n* **1 a :** a stream of fluid propelled by thermal convection **b :** thermally produced vertical air flow **2 :** a surface charge of electricity on a moving body — compare CONVECTION 3c

con·vec·tive \kənˈvektiv\ *adj* [*convection* + *-ive*] **1 :** having the property or power of conveying **:** TRANSPORTING ⟨the ~ force of water⟩ **2 :** of or relating to convection

con·vec·tor \-tə(r)\ *n* -S **:** something that convects; *specif* **:** a room-heating unit in which air heated by contact with a heating device (as a radiator or finned tube) in a casing having openings at top and bottom circulates by convection

¹**convenable** *adj* [ME, fr. MF, fr. *convenir* to be suitable, convenient + *-able*] *archaic* **:** in accord with circumstances **:** PROPER

²**con·ven·able** \kənˈvēnəbəl\ *adj* [*convene* + *-able*] **:** capable of being convened or assembled

con·ve·nance \kōⁿv(ə)näⁿs; ˈkänvənən(t)s, -,nän(t)s\ *n*, *pl* **convenances** \kōⁿv(ə)näⁿs; ˈkänvənən(t)səz, -,nän(t)-\ [F, fr. *convenant*, pres. part. of *convenir* to be suitable] **1 :** conventional usage **2** *convenances pl* **:** the things established by custom as proper to social intercourse **:** CONVENTIONS ⟨a forthright man with little regard for the ~*s*⟩ **syn** see FORM

con·vene \kənˈvēn\ *vb* -ED/-ING/-S [ME *convenen*, fr. MF *convenir* to agree, be suitable, meet, fr. L *convenire*, fr. *com-* + *venire* to come — more at COME] *vi* **1** *of persons* **:** to come together, meet, or assemble in a group or body (as in a formal meeting for some specific purpose) ⟨the executive directors *convened* once a week⟩ **2** *of things* **:** to come, be brought, or occur together at one place or time ⟨large stars *convening* for nativity eve —Genevieve Taggard⟩ **3** *of a body of persons* **:** to meet in formal session ⟨the Seventy-Fifth Congress *convened* in January⟩ ⟨a special committee of jurists *convened* in Washington —Vera M. Dean⟩ ~ *vt* **1 :** to summon to appear before a tribunal or authority ⟨Tom was . . . *convened* before Mr. Allworthy —Henry Fielding⟩ **2 :** to cause (persons) to assemble in a group or body **:** call or gather together ⟨Mlle. Boulanger, who *convened* her bright young composers . . . in Paris —H.W. Wind⟩ **:** CONVOKE ⟨*convened* the assembly⟩ ⟨the court-martial . . . was never *convened* —Anthony Powell⟩ ⟨a world conference was *convened* in Paris⟩

con·ven·er \-nə(r)\ *or* **con·ve·nor** \", -,nō(ə)r,-,nȯ(ə)\ *n* -S *chiefly Brit* **:** one that convenes; *esp* **:** the chairman of a committee or other organized body of persons

con·ven·er·ship \-(r),ship\ *n* -S *chiefly Brit* **:** the office of official convener

¹**con·ve·nience** \kənˈvēnyən(t)s, -nēən-\ *n* -S [ME, fr. MF, fr. L *convenientia*, fr. *convenient-*, *conveniens* + *-ia*] **1** *obs* **:** AGREEMENT, HARMONY, CONGRUITY, APTITUDE **2 :** fitness or suitability for performing some action or fulfilling some requirement ⟨the ~ of the new alphabet for transcribing spoken English⟩ **3 :** a favorable or advantageous condition, state, or circumstance **:** ADVANTAGE ⟨it becomes something of a virtue as well as a ~ to be domesticated —Walter de la Mare⟩ **4 :** something that provides comfort or advantage **:** something suited to one's material wants: **a :** an arrangement, appliance, device, material, or service conducive to personal ease or comfort ⟨a landscaped corner lot, handy to all ~*s*⟩ ⟨carry camping ~*s* and . . . supplies on packhorses —H.E.Scudder⟩ **b :** TOILET 5 **5 :** a convenient condition or time **:** OPPORTUNITY ⟨answer at your earliest ~⟩ **6 :** freedom from difficulty, discomfort, or trouble ⟨chairs arranged for his own ~⟩ **:** EASE, COMFORT, EFFICIENCY ⟨impressed by the greater ~ and cheapness of canal transportation⟩ ⟨buildings are not grouped like that by pure accident, though ~ probably had much to do with it —Willa Cather⟩

²**convenience** \"\ *vt* -ED/-ING/-S **:** to afford convenience to **:** ACCOMMODATE ⟨the new system of collection *convenienced* the taxpayer⟩

tone of casual ~ —E.T.Thurston⟩ **2** : lack of anxiety ⟨flinging itself with confidence and ~ over wide spaces in the trees —Weston LaBarre⟩

un·concerned \"+\ *adj* [¹*un-* + *concerned*] **1** : lacking care, interest, or feeling ⟨convincing the ~, the apathetic, and the downright hostile —Benjamin Fine⟩ ⟨~ if his girl deserts him —K.F.Read⟩ **2** : not occupied or engaged ⟨readers ~ with style and philosophical illumination —R.A.Cordell⟩ **3** : not anxious or solicitous : easy in mind : not worried ⟨the prisoner seems entirely ~ as to the outcome of the examination —D.D. Martin⟩ **syn** see INDIFFERENT

un·concernedly \"+\ *adv* : in an unconcerned manner

un·concernedness \"+\ *n* : the quality or state of being unconcerned

un·concernment \"+\ *n* [¹*un-* + *concernment*] : UNCONCERN

un·conditional \"+\ *adj* : not limited in any way : not bound or restricted by conditions or qualifications : ABSOLUTE, UNRESERVED ⟨~ surrender⟩ ⟨an ~ offer⟩ ⟨an ~ admirer⟩ — **un·conditionally** \"+\ *adv* — **un·con·di·tion·al·ness** *n* -ES

un·conditionality \"+\ *n* [*unconditional* + *-ity*] : the quality or state of being unconditional

un·conditioned \ˌən+\ *adj* **1 a** : not subject to limitations or conditions : ABSOLUTE, INFINITE ⟨it is a consciousness of the ~ and universal that makes people religious —Clive Bell⟩ **b** : INCONCEIVABLE, UNKNOWABLE **2** : not dependent on conditioning or learning : NATURAL ⟨an ~ response⟩ — **un·con·di·tioned·ness** *n* -ES

unconditioned reflex *n* : a reflex that is inborn or dependent on physiological maturation rather than on learning

un·condoned \ˌən+\ *adj* [¹*un-* + *condoned*, past part. of *condone*] : not condoned

un·confessed \"+\ *adj* [¹*un-* + *confessed*, past part. of *confess*] : not confessed

un·confident \"+\ *adj* : lacking in confidence : UNSURE — **un·con·fi·dent·ly** *adv*

un·confiding \"+\ *adj* : not confiding : UNCOMMUNICATIVE ⟨had been singularly glum and ~ during the last week of preparation —Gerald Beaumont⟩

un·confine \"+\ *vt* [back-formation fr. *unconfined*] : to release from confinement or restraint

un·confined \"+\ *adj* [¹*un-* + *confined*] **1** : not kept within limits : UNBOUNDED, UNCONTROLLED ⟨on with the dance! let joy be ~ —Lord Byron⟩ **2** : not secured or kept confined ⟨her ~ hair fell to her shoulders⟩

un·confirmed \"+\ *adj* **1** *obs* : not instructed : IGNORANT **2** : not finally established or authorized : not settled : TENTATIVE ⟨an ~ letter of credit⟩ **3** : not corroborated or supported by evidence ⟨~ rumors⟩

un·conformability \"+\ *n* : the quality or state of being unconformable

un·conformable \"+\ *adj* **1** : not correspondent ⟨a description ~ to previous accounts⟩ **2** : not conforming; *specif* : not conforming to the practices and teachings of the Church of England esp. as prescribed by the Acts of Uniformity **3** : exhibiting geological unconformity — **un·conformably** \"+\ *adv*

un·conformist \"+\ *n* : NONCONFORMIST

un·conformity \ˌən+\ *n* **1** *archaic* : lack of conformity **2 a** : lack of continuity in deposition between rock strata in contact corresponding to a period of nondeposition, weathering, or erosion either subaerial or subaqueous prior to the deposition of the younger beds and consequently to a gap in the stratigraphic record **b** : the surface of contact between unconformable strata — compare DISCONFORMITY, NONCONFORMITY

un·congeal \"+\ *vi* [²*un-* + *congeal*] : THAW

un·congenial \"+\ *adj* **1 a** : not sympathetic ⟨the ~ roommates were always fighting⟩ **b** : not compatible — used of a plant stock or scions **2 a** : not fitted : UNSUITABLE ⟨their work had been ~ to the social structure and traditions of the land —G.M.Trevelyan⟩ ⟨an ~ soil⟩ **b** : not to one's taste : DISAGREEABLE ⟨the task was ~ to one sensitive to rebuffs —H.K. Rowe⟩ ⟨found the pursuit ~ and resolved to abandon it —U.B.Phillips⟩ — **un·congenially** \"+\ *adv*

un·congeniality \"+\ *n* : the quality or state of being uncongenial

un·connected \"+\ *adj* **1 a** : not joined or grouped together : SEPARATE ⟨the supreme agent by which disparate and hitherto ~ things are brought together in poetry —I.A.Richards⟩ **b** : not coherent : DISJOINTED ⟨spoke in ~ phrases⟩ ⟨an ~ argument⟩ **2** : having no family or other personal ties ⟨a lonely ~ person⟩ — **un·con·nect·ed·ly** *adv* — **un·con·nect·ed·ness** *n*

un·con·quer·able \ˌənˈkäŋkərəbəl *sometimes* -ˈkȯŋ-\ *adj* [¹*un-* + *conquer* + *-able*] **1** : incapable of being conquered : INDOMITABLE ⟨a tribute to his courage, his sagacity, and his ~ will —R.E.Danielson⟩ **2** : incapable of being surmounted : INSUPERABLE ⟨seems to create ~ difficulties in man's life —H.E.Salisbury⟩ — **un·con·quer·able·ness** *n* -ES — **un·con·quer·ably** \-blē\ *adv*

un·conquered \ˌən+\ *adj* [¹*un-* + *conquered*, past part. of *conquer*] : not conquered ⟨this stark, ~ land —Guy Priest⟩

un·conscient \"+\ *adj* : lacking consciousness

un·conscientious \"+\ *adj* : not conscientious — **un·con·sci·en·tious·ly** *adv* — **un·con·sci·en·tious·ness** *n*

¹**un·con·scio·na·ble** \ˌənˈkänch(ə)nəbəl\ *adj* **1** : not guided or controlled by conscience : UNSCRUPULOUS ⟨an ~ villain⟩ **2 a** : EXCESSIVE, EXORBITANT ⟨advertising and promotion costs an ~ amount —G.P.Brockway⟩ ⟨was staying up there an ~ time —Joseph Conrad⟩ **b** : lying outside the limits of what is reasonable or acceptable : shockingly unfair, harsh, or unjust : OUTRAGEOUS ⟨the grinding poverty, the ~ death rate, and the appalling illiteracy —*Commonweal*⟩

²**unconscionable** \"\ *adv* : UNCONSCIONABLY

un·constant \ˌən+\ *adj* [ME, fr. ¹*un-* + *constant*] *archaic* : INCONSTANT

un·constellated \"+\ *adj* [¹*un-* + *constellated*, past part. of *constellate*] : not forming part of a constellation ⟨a star in exile, ~ at the south —Hugh McCrae⟩

un·constitutional \"+\ *adj* : not according to or consistent with the constitution of a state or society; *specif* : contrary to the U. S. Constitution — **un·constitutionality** \"+\ *n* — **un·constitutionally** \"+\ *adv*

un·constrained \"+\ *adj* [ME *unconstreynd*, fr. ¹*un-* + *constreynd*, past part. of *constreynen*, *constrainen* to constrain] : not constrained : not acting or done under constraint — **un·constrainedly** \"+\ *adv*

un·constraint \"+\ *n* : freedom from constraint : EASE ⟨there was a perfect ~, and they all seemed to feel like one enormous family —Bernard Pares⟩

un·consumed \"+\ *adj* [¹*un-* + *consumed*, past part. of *consume*] : not consumed

un·con·tain·able \ˌənkən-ˈtānəbəl\ *adj* [¹*un-* + *contain* + *-able*] : not containable : IRREPRESSIBLE ⟨felt ~ indignation —N.M.Pusey⟩

un·contaminated \ˌən+\ *adj* [¹*un-* + *contaminated*, past part. of *contaminate*] : not contaminated ⟨~ primitive societies still going their own way —A.L.Kroeber⟩

un·content \"+\ *adj* [¹*un-* + *content*, adj.] : UNCONTENTED

un·contented \"+\ *adj* : not contented : DISCONTENTED

un·contestable \"+\ *adj* [by alter.] : INCONTESTABLE — **un·contestably** \"+\ *adv*

un·contested \"+\ *adj* [¹*un-* + *contested*, past part. of *contest*] : not contested : UNCHALLENGED ⟨~ superiority⟩

un·continuous \"+\ *adj* : DISCONTINUOUS

un·contradicted \"+\ *adj* [¹*un-* + *contradicted*, past part. of *contradict*] : not contradicted

un·control \"+\ *n* : lack of control ⟨the keen, grey eyes, with their dash of wildness and ~ —H.W.Nevinson⟩

un·controllability \"+\ *n* : the quality or state of being uncontrollable ⟨the ~ of a forest fire whipped by a dry south wind —A.R.Mead⟩

un·controllable \"+\ *adj* [¹*un-* + *controllable*] **1** *obs* : INDISPUTABLE **2** *archaic* : free from the control of a superior power : ABSOLUTE **3** : incapable of being controlled : UNMANAGEABLE ⟨rumor, irresponsible and ~, is dangerous to public morale —F.L.Mott⟩ — **un·con·trol·la·ble·ness** *n* -ES — **un·controllably** \"+\ *adv*

un·con·trolled \ˌənkən-ˈtrōld\ *adj* : not being under control : UNRESTRAINED ⟨the greatest ~ public health problem —G.T. Harrell⟩ — **un·con·trolled·ly** \-l(ə)dlē\ *adv*

un·controvertible \ˌən+\ *adj* : INCONTROVERTIBLE — **un·controvertibly** \"+\ *adv*

un·conventional \"+\ *adj* : not conventional : not bound by or in accordance with convention : being out of the ordinary ⟨~ behavior⟩ ⟨~ weapons⟩ — **un·conventionally** \"+\ *adv*

un·conventionalism \"+\ *n* : UNCONVENTIONALITY

un·conventionality \"+\ *n* : the quality or state of being unconventional

un·conversable \"+\ *adj*, *archaic* : not inclined or suited to conversation or sociability

un·convert \"+\ *vt* [²*un-* + *convert*] : to reverse the conversion of : restore to a state before conversion

un·converted \"+\ *adj* [¹*un-* + *converted*, past part. of *convert*] **1** : not changed in opinion or action; *specif* : not induced to accept a religious faith : UNREGENERATE ⟨the minds of men as yet ~ —H.O.Taylor⟩ **2** : not changed in form or function ⟨~ wood⟩ ⟨a plant that has stood idle, ~ to war use —*Christian Science Monitor*⟩

un·convertibility \"+\ *n* [*unconvertible* + *-ity*] : INCONVERTIBILITY

un·convertible \"+\ *adj* : INCONVERTIBLE — **un·convertibly** \"+\ *adv*

un·convince \ˌən+\ *vt* [²*un-* + *convince*] : to cause to abandon a conviction ⟨a man thus steeled to his beliefs . . . is not easily *unconvinced* —John Dollard⟩

un·convinced \"+\ *adj* [¹*un-* + *convinced*, past part. of *convince*] : not convinced : DUBIOUS ⟨admitted the force of the argument but remained ~⟩

un·convincing \"+\ *adj* : not convincing : IMPLAUSIBLE ⟨as ~ as a forced smile —Jan Struther⟩ — **un·con·vinc·ing·ly** *adv* — **un·con·vinc·ing·ness** *n* -ES

un·convoluted \"+\ *adj* : not convoluted

un·cooked \"+\ *adj* [¹*un-* + *cooked*, past part. of *cook*] : not cooked : RAW ⟨an ~ dish⟩ ⟨an ~ and slapdash theory of human nature —W.L.Sullivan⟩

un·cooled \"+\ *adj* [¹*un-* + *cooled*, past part. of *cool*] : not cooled

un·cooperative \"+\ *adj* : not cooperative : REFRACTORY ⟨an ~ attitude⟩ ⟨an ~ witness⟩

un·coordinated \"+\ *adj* : not coordinated : lacking proper or effective coordination ⟨~ scheduling often resulted in conflicting games in the same neighborhood —*Current Biog.*⟩ ⟨~, scattered agencies —*Scientific American*⟩

un·coquettish \"+\ *adj* : not coquettish : not trifling or insincere ⟨~ behavior⟩ — **un·co·quet·tish·ly** *adv*

uncor *abbr* uncorrected

un·cord \ˌən+\ *vt* [ME *uncorden*, fr. ²*un-* + *cord*, n.] : to release from cords : loosen the cords of

un·cordial \"+\ *adj* : not cordial : lacking in friendly warmth ⟨looked ~ and standoffish as they drove past —H.L.Davis⟩ — **un·cordially** \"+\ *adv*

un·core prist \ˈən,kō(ə)rˈprist\ *n* [AF, still ready] : an old plea at law that payment of a debt was and still is tendered

un·cork \ˌən+\ *vt* [²*un-* + *cork*] **1** : to draw a cork from ⟨~*ed* the bottle of wine⟩ **2 a** : to release from a sealed or pent-up state ⟨~*ed* another surprise last week —*Springfield (Mass.) Union*⟩ **b** : to let go or propel with sudden force ⟨~*ed* a wild pitch that got past the catcher⟩

ADMINISTRATIVE LAW
AND
PRACTICE

SECOND
EDITION

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TORONTO
BUTTERWORTHS

FAILURE TO GIVE REASONS[38]

Whether reasons must be given may be affected by statute.[39] Even where they are not statutorily required, a tribunal that fails to state them must be prepared to accept adverse inferences.[40] Although in the absence of a statutory requirement, failure to give reasons appears to have affected the decision in one instance[41] it would appear that such a failure will not usually be considered to be an error, although it is repeatedly observed that reasons are desirable.[42] Reasons ought to be given for the exercise of a discretion in the matter of penalty,[43] but the Court should not remit simply for the purpose of having reasons given.[44]

Where the statute requires reasons, those given must be real reasons,[45]

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[38] See s. 17 of The Statutory Powers Procedure Act, 1971 S.O., Vol. 2, c. 47.

[39] See *The Dominion Natural Gas Co. Ltd. v. United Gas & Fuel Co.*, [1935] O.R. 1, where the statute, an arbitrations Act, provided that the court may direct arbitrators to state their reasons; *R. v. Yule*, [1962] O.R. 584, 33 D.L.R. (2d) 179 (C.A.), and *R. ex rel. Lee v. Estevan*, [1952] 1 D.L.R. 362 (Sask. C.A.), where statutes provided that municipal councils may refuse licence applications without reasons. To the contrary, statute may require reasons to be given; see, The Ontario Energy Board Act, R.S.O. 1970, c. 312, s. 17; the Hotel Fire Safety Act, R.S.O. 1970, c. 211, s. 23(2) as amended; the Insurance Act, R.S.O. 1970, c. 224, s. 11(4); Statutory Powers Procedure Act, 1971 S.O., Vol. 2, c. 47, s. 17.

[40] See *Ross v. Bd. of Police Commrs. for City of Toronto*, [1953] O.R. 556, [1953] O.W.N. 497, [1953] 3 D.L.R. 597; [1953] O.R. 947, 107 C.C.C. 147, [1954] 1 D.L.R. 706, and *Re Henry's Drive-In and The Hamilton Police Bd.*, [1960] O.W.N. 468.

[41] *Re Commercial Taxi, Richards, Nelson v. Highway Traffic Bd.*, [1951] 1 D.L.R. 342, at p. 348; [1950] 2 W.W.R. 289; affd [1951] 2 D.L.R. 506, 1 W.W.R. (N.S.) 465 (Alta. C.A.).

[42] See *K.E. Roessler Const. v. Thiessen*, [1976] 4 W.W.R. 529; *Re Gill Lumber and United Brotherhood of Carpenters* (1973), 7 N.B.R. (2d) 41, 42 D.L.R. (3d) 271 (C.A.); *Re Lazar and Assoc. of Professional Engineers* (1971), 23 D.L.R. (3d) 614, [1971] 5 W.W.R. 614 (Man.); *Minister of Highways v. Toop*, [1973] 4 W.W.R. 219 (B.C.).; *Re Arbitration Act* (1962), 40 W.W.R. 296 (B.C.); *Re Hayward*, [1957] O.W.N. 4, at p. 7, 7 D.L.R. (2d) 136; *Dobson v. Edmonton* (1959), 19 D.L.R. (2d) 69, 27 W.W.R. 495 (Alta.); *Andreas v. Edmonton Hospital Bd.*, [1944] 4 D.L.R. 747, [1944] 3 W.W.R. 599 (Alta. C.A.). In *R. v. B.C. Turkey Marketing Bd.; ex p. Rosenberg* (1967), 61 D.L.R. (2d) 447, 59 W.W.R. 742, it was held that a board member may not be cross-examined on the reasons for the board's decision. In regard to the obligation of a court to give reasons, see *R. v. Chapman (and Carra)* (1958), 26 W.W.R. 385 (B.C.C.A.). Dissenting reasons have been held not to be part of an arbitration award: *Holland and Couper v. Vancouver* (1959), 19 D.L.R. (2d) 404.

[43] *Sask. Teachers' Federation v. De Moissac* (1973), 38 D.L.R. (3d) 296, at pp. 299-300 (Sask. C.A.).

[44] *Minister of Highways v. Toop*, [1973] 4 W.W.R. 219, at p. 222.

[45] *Re MacDonald and North York General Hospital* (1975), 9 O.R. (2d) 143, 59 D.L.R. (3d) 647, at p. 651.

and failure to give reasons may constitute jurisdictional error.[46] The phrase "believing it to be in the best interest of this community" does not suffice.[47] Adequate reasons require findings and reference to considerations upon which the decision was made.[48] Reasons must also disclose, expressly or by necessary implication, that the tribunal had regard to the matters which it was required by statute to consider.[49] Failure to include a specific matter of evidence does not, however, lead to the conclusion that it was not considered,[50] and the tribunal need not make explicit findings on each constituent element leading to its final conclusion.[51]

tribunal need not make explicit findings on each constit. element leading to its final conclusion

Whether it constitutes legal error or not, failure to give reasons can undermine confidence in a tribunal or in tribunals in general. It is highly desirable that reasons be given. Perhaps the reluctance of courts to call tribunals to task on this account stems from the failure of the courts themselves to adhere always to this essential practice.

FAILURE TO KEEP TRANSCRIPT

There is no general obligation to keep a transcript of the proceedings.[52]

SECTION 96 OF THE B.N.A. ACT

The constitutionality of the determination by tribunals, whether federally or provincially appointed, of questions of law has long been a serious issue in Canada.[53] It has been the subject of two recent Supreme Court of Canada decisions, each of which buttress the validity of such determinations by tribunals:

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[46] *Re Don Howson Chevrolet Oldsmobile Ltd. and Registrar of Motor Vehicle Dealers and Salesmen* (1974), 6 O.R. (2d) 39, 51 D.L.R. (3d) 683.

[47] *Re Howatson and Assiniboine Park Commn.* (1973), 37 D.L.R. (3d) 584, [1973] 4 W.W.R. 449 (Man.).

[48] *Re DiNardo and Liquor Licence Bd.* (1974), 5 O.R. (2d) 124, 49 D.L.R. (3d) 537.

[49] *Morin v. Provincial Planning Bd.*, [1974] 6 W.W.R. 291 (Alta.).

[50] *Woolaston v. Minister of Manpower & Immigration*, [1973] S.C.R. 102, 28 D.L.R. (3d) 489.

[51] *Service Employees v. Nipawin Dist. Staff Nurses Assoc.*, [1975] 1 S.C.R. 382, 41 D.L.R. (3d) 6.

[52] *Blagdon v. Public Service Commn.*, [1976] 2 F.C. 615 (C.A.); *United Assoc. of Journeymen & Apprentices of Plumbing & Pipefitting Industry of U.S. & Can. v. Bd. of Industrial Relations* (1975), 60 D.L.R. (3d) 690; [1976] 3 W.W.R. 303 (Alta. C.A.); *Re United Assoc. of Journeymen & Apprentices of Plumbing and Pipefitting Industry of U.S. & Can., Loc. 488 and Reynolds* (1975), 68 D.L.R. (3d) 81.

[53] Note the statement by Addy J. in *Re Steve Dart Co. and D.J. Duer Co.* (1974), 46