JUDICIAL REVIEW OF ADMINISTRATIVE AUTHORITIES IN CANADA

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I. *Introduction.*

"A Court of Law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor."[1]

"Even if it wished, the Legislature could not declare the absurdity that a court which acts without jurisdiction can be immunized against a writ of prohibition. Its decision is null and no text of a statute can give it any validity or decide that, in spite of its nullity, that decision should nevertheless be recognized as valid and carried into effect."[2]

These apparently irreconcilable statements illustrate the conflict that has developed in the field of judicial review of administrative authorities in Canada, in the process of extending judicial remedies to control the exercise of power by statutory bodies. The discussion of some recent Canadian cases in this article, will, it is hoped, amply demonstrate the prevailing confusion of thought and want of any clearly defined principles on which to base judicial review. It is submitted that this state of affairs has come about through careless use of language, and a superficial attitude on the part of the Bench to the problems inherent in judicial review of tribunals which perform functions of a different kind to those familiar in the hierarchy of the courts. It is also submitted that the confusion can be resolved, and a satisfactory foundation for judicial review can be established, only by means of a re-examination of the concept of jurisdiction.

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[1] Earl Loreburn L.C. in *A.G. for Ontario* v. *A.G. for Canada*, [1912] A.C. 571, at p. 583.

[2] Rinfret C.J.C. in *L'Alliance Des Professeurs Catholiques De Montreal* v. *La Commission des Relations Ouvrières de la Province Québec et la Commission des Ecoles Catholiques de Montréal*, [1953] 4 D.L.R. 161 (Que.).

As the number and scope of administrative bodies of all kinds have increased, the courts have sought to impose upon such bodies judicial standards of fair play, and to provide means to remedy apparent injustices perpetrated by administrative bodies. The application of judicial standards of conduct to administrative proceedings has often conflicted with legislative policy and attempts have therefore been made by the legislatures to reduce or eliminate recourse to the courts. It will be shown that such attempts have met with little success.

Whereas "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist",[3] the exercise of the administrative function requires decisions to be made and action to be taken in accordance with the policy of the legislature as expressed in the words of a statute.

To confine administrative bodies to only those actions that accord with judicial precedent is to reduce or extinguish the area within which their discretion is to operate, and to nullify the effectiveness of the statute to that extent. At the same time, one school of thought holds the view that the development of the statutory tribunals represents a dangerous encroachment on the rights and freedoms of the individual. One writer[4] said recently: "The rule of the law requires that administrative action be open to challenge in the courts, at least insofar as questions of jurisdiction are concerned. The courts should therefore hesitate before interpreting any statute so as wholly to bar the right of review."[5] The cases to be considered indicate how thoroughly most Canadian judges agree with the sentiments expressed by that writer.

Where no right of appeal from an order or decision of an administrative body is provided by statute, a person aggrieved must usually rely on what has been described as the "historic supervisory authority" of the courts over inferior tribunals.[6] In practice, this authority is exercised by means of the prerogative remedies of mandamus, certiorari and prohibition. "Prohibition will

[3] Holmes C.J. in *Prentis* v. *Atlantic Coast Line Co.* (1908), 211 U.S. 210.

[4] See B. Schwarz's comment on *re Workmen's Compensation Act and C.P.R.*, [1950] 2 D.L.R. 630, in (1950), 28 Can. Bar Rev. 679.

[5] Compare the report of the Committee on Administrative Tribunals and Enquiries (1957) (Cmd. 218), at para. 117 "Accordingly no statute should contain words purporting to oust these remedies." (namely, certiorari, prohibition and mandamus).

[6] For a discussion of the "historic supervisory authority of the courts" see Bora Laskin, Certiorari to Labour Boards: The Apparent Futility of Privative Clauses (1951), 29 Can. Bar Rev. 986.

be appropriate to restrain a tribunal which assumes or threatens to assume a jurisdiction which it does not possess, so long as there is something in the proceeding left to prohibit; mandamus will be appropriate to compel a tribunal to exercise a jurisdiction which it has but declines to exercise; certiorari will be appropriate to quash the decision of a tribunal which has assumed a jurisdiction which it does not possess."[7]

II. *Error of Law on the Face of the Record.*

Historically, the grounds on which the writs will be granted have been well defined and the grounds for certiorari and prohibition can be conveniently grouped for the purposes of this article, under the headings—Defect of Jurisdiction—Breach of Natural Justice—Error of Law on the Face of the Record.[8] Canadian judges have seldom defined the grounds for granting the remedies with any degree of precision, and it is common to find in the same case, all these grounds—singly, or in combinations, given to support the conclusions reached.[9] Neither is it unusual to find each judge reaching his decision by a different route, applying different principles to the same facts, and even assuming facts where convenient.[10] It is proposed now to examine the cases under general headings, to ascertain if possible, the principles governing judicial review of administrative tribunals.

The Nat Bell case

One of the leading cases on certiorari proceedings is *R.* v. *Nat Bell Liquors Ltd.*[11] decided in 1922, where it was emphasized that the remedy was not to be used as a means for reviewing the merits of a decision. The nature of certiorari proceedings and the grounds for granting the writ were considered in detail. The Nat Bell Company had been found guilty by a magistrate of an offence under the Alberta Liquor Export Act, and applied to the Superior Court for certiorari to quash. On appeal to the Alberta Court of Appeal from an order granting certiorari, the Superior Court's decision was upheld on the grounds that the evidence was un-

[7] See Halsbury's Laws of England (3d. ed. 1952), vol. 11, pp. 53-54.

[8] These headings were adopted by D.C.M. Yardley, The Grounds for Certiorari and Prohibition (1959), 37 Can. Bar Rev. 294.

[9] See particularly, *Perepolkin et al.* v. *Superintendent of Child Welfare for B.C.* (1958), 11 D.L.R. (2d) 245 and discussed *infra*, and the *Alliance* case, *supra*, footnote 2 and discussed *infra*.

[10] *Toronto Newspaper Guild* v. *Globe Printing Co.*, [1953] 3 D.L.R. 561, discussed *infra*.

[11] [1922] 2 A.C. 128.

trustworthy, the magistrate had misdirected himself on the evidence, and that a conviction in such circumstances was in excess of the magistrate's jurisdiction. On appeal to the Judicial Committee of the Privy Council, no question was raised as to the jurisdiction of the magistrate to entertain the charge, and it was clear that the decision to quash could only be supported on the ground that the magistrate erred in law. The Judicial Committee held that the weight of evidence was entirely for the magistrate, and that if the magistrate had jurisdiction to hear and determine the matter, his decision could not be impugned on certiorari, even if he convicted on no evidence at all, or without any evidence on a material point. In giving judgment, Lord Sumner commented on the effect of Lord Jervis' Acts prescribing a common form of record for summary conviction matters. He said the lack in the record of a statement of the evidence for conviction did not alter the law of certiorari, but it did disarm its exercise. "The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record 'spoke' no longer: it was the inscrutable face of the sphinx." Thus the *Nat Bell* case clearly and authoritatively restated the principle that error of law must appear on the face of the record to constitute this ground for certiorari to quash. It was also made abundantly clear that a want of evidence had nothing to do with jurisdiction. "A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not."[12] It will be seen that Lord Sumner's words have not been effective to prevent the enlargement of the notion of jurisdictional defect in the courts' struggle to maintain their role in controlling administrative action, nor have they prevented intensive scrutiny of evidence before administrative bodies or even the reception of new evidence of error when the error is said "to go to jurisdiction".[13]

The prerogative writs have provided effective means whereby

[12] *Ibid.*, at p. 151.

[13] In *Childrens Aid Society of the Catholic Archdiocese of Vancouver* v. *Salmon Arm*, [1941] 1 D.L.R. 532, at p. 535, O'Halloran J.A. of the British Columbia Court of Appeal pointed out "an important phase which does not seem to have emerged in the *Nat Bell* case, that is, a decision by a Court, as here, without any evidence to support it, is not an exercise of the judicial function at all. The Court has declined or failed to exercise its judicial function: it is, in effect, a refusal to decide according to the evidence. As such, it is a 'violation of an essential of justice' ".

injustices in inferior court proceedings might be remedied, though a right of appeal was not provided. In dealing with administrative bodies, however, a different approach was required, for in most cases, not only is no right of appeal given, but the decision of the administrative body is declared to be final, or final and conclusive, or final and conclusive and binding on all persons subject to it. The courts have been reluctant to quash administrative orders for error of law in the face of such statutory provisions, although it has been declared that such phrases mean only that no appeal shall be taken, and do not affect the prerogative remedies.[14]

Although there can be no doubt, since the *Nat Bell* case, that error of law must appear on the face of the record to support certiorari to quash,[15] yet in the *Childrens' Aid Society* case,[16] where the proceedings and evidence before a juvenile court contained nothing to prove that the City of Salmon Arm should be charged with the maintenance of an infant, the British Columbia Court of Appeal ruled that the record included the evidence, and went on to uphold the quashing of the juvenile court's order on the ground that a decision without evidence is made without jurisdiction.

Bunbury v. *Fuller*

An English decision rendered in 1853 has been relied on by Canadian courts to support an ingenious theory in which main issues are distinguished from collateral or preliminary issues in administrative proceedings. In *Bunbury* v. *Fuller*,[17] Coleridge J. said, in *obiter*: "Now it is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limits to

[14] *R.* v. *Medical Appeal Tribunal ex parte Gilmore*, [1957] 1 Q.B. 574, and see a note by S. A. de Smith (1957), 30 Mod. L. Rev. 394. Since the *Gilmore* case was decided, the position in England has been confirmed by The Tribunals and Inquiries Act, 1958, 6 Eliz 2 c. 66, s. 11 of which provides "11. (1) . . . any provision in an Act passed before the commencement of this Act that any order or determination shall not be called into question in any court . . . shall not have effect so as to prevent the removal of the proceedings into the High Court by order of certiorari or to prejudice the powers of the High Court to make orders of mandamus."

[15] There appears to be a difference between certiorari and prohibition in this respect, that it has been laid down that "Error in law upon a question, apart from jurisdiction to try, will not give a right to prohibition." *R.* v. *Seguin* (1921), 59 D.L.R. 534, at pp. 539-540 (and see cases cited therein). The reason for the distinction may be that an error can be corrected so long as proceedings continue, and when the proceedings are at an end, prohibition will not lie, as there is nothing for the writ to act upon. It would be open to a person aggrieved to apply for certiorari to quash, if the error remained uncorrected at the conclusion of the matter.

[16] *Supra*, footnote 13.

[17] (1853), 9 Ex. 111, 156 E.R. 47.

its jurisdiction depend, and however its decision may be final on all particulars making up together that subject matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary enquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to enquiry in the superior Court."

The Safeway case

In the *Safeway* case,[18] the grounds for certiorari were discussed at some length, and the "collateral issue" theory was expounded. The Act[19] gave to the Labour Relations Board the exclusive right and duty to decide whether any person was an employee, for the purposes of the Act. Persons employed in a confidential capacity were not to be classed as employees. On an application to quash a certificate issued by the Board, the trial judge Farris C.J.S.C., after examining the entire proceedings, found *some* evidence to support the Board's conclusion, and ruled that the case did not, therefore, come within the *Bunbury* v. *Fuller* rule. In the Court of Appeal,[20] Sloan C.J.B.C. held that the definition of employee was a collateral matter, preliminary to jurisdiction, and that the Board's erroneous decision thereon constituted error on the face of the record. In his opinion, the Board had exceeded its jurisdiction *in making that finding*. O'Halloran J.A. said the Board had erred on two points of law. It construed the Act's definition of employee wrongly, and it gave a decision "in the teeth of the evidence", thus acting unjudicially and in a manner not authorized by statute. He stated that the finding of the Board reflected an arbitrary, abrupt departure from the realities of everyday business life, and was therefore in a legal sense perverse, and hence unjudicial. He said that not only was a conclusion of that character an error in law, but also an *abuse of jurisdiction*. The appeal was allowed. In the Supreme Court of Canada,[21] Kellock J. concurred with Sloan C.J.B.C. and thought the Board had erred in law and exceeded its jurisdiction. The majority, however, allowed the appeal on the ground that there was evidence to support the Board's finding. Rand J.[22] said: "The task of evaluating all these considerations has been committed by the Legislature to the Board and so long as its judgment can be said to be consonant

[18] *In re Canada Safeway Ltd.*, [1952] 3 D.L.R. 855 (B.C.S.C.).
[19] The British Columbia Industrial Conciliation and Arbitration Act, R.S.B.C., 1948, c. 155.
[20] [1953] 1 D.L.R. 48. [21] [1953] 3 D.L.R. 641. [22] *Ibid.*, at p. 649.

with a rational appreciation of the situation presented, the Court is without power to modify or set it aside."

There can be no doubt as to the existence of at least some evidence in support of the Board's finding that the persons in question were not employed in a confidential capacity. If that question had been the only one in issue, it is submitted that all members of the Court of Appeal and of the Supreme Court of Canada should have agreed with the conclusion of the trial judge. The reports indicate, however, that both Sloan C.J.B.C. and O'Halloran J.A. rested their opinions on the weight of evidence, and both Rinfret C.J.C. and Kellock J. agreed with them. Kerwin J., with whom Estey and Cartwright J.J. agreed, after considering the evidence in some detail said: "I am satisfied that on this evidence, the Board and the Chief Justice of the Supreme Court of British Columbia came to the right conclusion on the important question whether [the persons in question] are persons employed in a confidential capacity."[23] It can be reasonably inferred from the remarks of Rand J. that his decision was also dictated by his agreement with the Board's conclusions from the evidence.

Thus it appears that although there was no statutory provision for appeal, a question which the legislature expressly committed to the Board for decision was reviewed by the courts, as one going to the Board's jurisdiction, where, in the opinion of the courts, it was not the very substance of the question the Board was to decide, but was a "collateral matter". It also appears (per Sloan C.J.B.C. and O'Halloran J.A., Rinfret C.J.C. and Kellock J.) that the Board erred in law in deciding a question expressly committed to it, and thereby rendered its decision liable to be quashed for want of jurisdiction.

The Woolworth case

In *Labour Relation Board of Saskatchewan* v. *The Queen ex. rel. F. W. Woolworth Co. Ltd. et al.*,[24] certain employees had applied to the Board for decertification of a union as their bargaining agent, on the ground that the union did not represent the majority of employees in the unit. The Board refused to grant the application, stating that the application was not *bona fide* that of the employees, and it was not shown that a majority of the employees supported the application. Section 17 of the Saskatchewan Trade Union Act,[25] provided that there should be no appeal from any

[23] *Ibid.*, at p. 643.
[24] [1955] 5 D.L.R. 607 (S.C.C.).
[25] R.S.S., 1953, c. 259.

order or decision of the Board and that its orders should not be reviewable by any court of law, or by any certiorari, mandamus, prohibition, injunction or other proceeding whatever. On appeal from the granting of an order of mandamus to compel the Board to determine the question of decertification according to law, Locke J. delivering judgment for the Supreme Court, mentioned the privative clause but made no comment on it. He said that while the Board had considered the application, it had dealt with it on grounds that were irrelevant. He also said that the Board had made a finding contrary to conclusive evidence in support of the application. Locke J. did not discuss the nature of the grounds on which mandamus could be granted, nor did he say whether or not he believed there to be any evidence in support of the Board's finding. The decision supports the conclusion that a privative clause is ineffective to protect a decision contrary to the evidence; and further, that a decision made on "irrelevant grounds" amounts to a refusal to exercise jurisdiction.

It is submitted that while the case can be supported by precedent, there is no support in principle. The courts admitted that the Board had made an inquiry, and reached a decision, but ruled that in order to come to that decision it must have considered irrelevant material, and such action amounted to a refusal to exercise jurisdiction. Jurisdiction means a right to decide particular questions when called upon to do so. The right to decide includes the right to decide more than one way, or it is not a right to decide, but rather a duty to give a particular answer. Here the Board's opinion that decertification should not be granted on the evidence before it, was not permitted to prevail. One must, therefore, conclude that the question of decertification depends not on the Board's views, but either on the existence of a majority in favour of decertification, in the absolute, and the absolute good faith of the applicants, or upon the view of those matters to be adopted by a Superior Court judge, the Court of Appeal, and the Supreme Court of Canada. It is obvious that the legislature did not intend absolute standards to apply, because of the impossibility of ascertaining such standards. The widely divergent opinions expressed in the *Safeway* case illustrate the difficulty in predicting the conclusions of the judges on matters on which they pronounce with such vigour. On any reasonable construction of the statute, the legislature intended the opinion of the Board to prevail. It is submitted that on the plain wording of the privative clause, no other conclusion is reasonably possible. Yet Locke J. denied the

Board any discretion in the matter. "It was the duty of the Board to hear the employees' application and to give effect to this statutory right." The effect of the judgment was to compel the Board to decertify the union. No attempt was made to justify the ignoring of the privative clause, nor was any apology made for denying that the Board had any discretion.

Privative clauses

The question of the effect to be given to a privative clause was squarely before the Saskatchewan Court of Appeal in *Marshall Wells Co. Ltd.* v. *Retail, Wholesale & Department Store Union*[26] when an application was made by the company for certiorari to quash an order of the Board declaring the company guilty of an unfair labour practice. Martin C.J.S. said[27]: "No question is raised as to the jurisdiction of the Board to deal with the application of the trade union for an order that the Company in refusing to bargain collectively was committing an unfair labour practice." He went on to consider the argument that the courts could not interfere with the Board's decision even if the Board had erred in its construction of the statute, so long as the Board had jurisdiction to enter upon the inquiry. He said: "I am of the opinion therefore that the order of the Board declaring the unfair labour practice could be quashed on certiorari if it appeared on the face of the proceedings that the order was wrong in law." In support of that opinion he cited *R.* v. *Northumberland Compensation Appeal Tribunal*.[28] He did not point out that the *Northumberland* case does not refer to a privative clause. He also referred to the *Globe Printing* case[29] which was declared to turn on a point of jurisdiction, and to the *Safeway* case[30] which concerned an Act without express privative words, and which, in any event, confirmed the order of the Board. After declaring unequivocally that error of law on the record remained a ground for certiorari to quash, notwithstanding the privative section, he found no error in the case before him and dismissed the application. McNiven J.A., dissenting, would have quashed the order on the merits, and made no reference to the privative clause.[31]

[26] [1955] 4 D.L.R. 591 (Sask C.A.). [27] *Ibid.*, at p. 593.

[28] [1951] 1 K.B. 711 affd. by the Court of Appeal in [1952] 1 K.B. 338, [1952] 1 All E.R. 122.

[29] *Supra*, footnote 10. [30] *Supra*, footnote 18.

[31] The majority decision in the *Marshall Wells* case was affirmed by the Supreme Court of Canada (1956), 2 D.L.R. (2d) 569, without comment on the effect of the privative clause on error of law as a ground for certiorari. In *Farrell et al.* v. *Workmen's Compensation Board* (1960), 31 W.W.R. 577, Manson J. disagreed with a Board's ruling as to the meaning

"Exclusive" jurisdiction

Two provincial court decisions that would appear to deny error of law as a ground for certiorari to quash an order of a Board entrusted with power to make a "final and conclusive" decision, are the *Electrical Workers* case[32] and *re Thibault et al.* v. *Canadian Labour Relations Board.*[33] In the first case, an electrical workers' union sought certification for a unit of gas workers who were not eligible for membership under the union's constitution. After considering the constitution, the Board was apparently in doubt as to whether the employees in the unit were in good standing with the union, and the Board directed a representation vote.[34] The union succeeded on the vote and the Board certified the union for the unit. On the hearing of an application for certiorari to quash the certificate, Whittaker J. defined the grounds for certiorari as (1) failure to perform the duty stated by Lord Loreburn L.C. in the *Rice* case,[35] to "act in good faith and fairly listen to both sides", (2) exceeding jurisdiction, (3) declining jurisdiction. In making his definition, he adopted the views of Cartwright J. in the *Globe Printing* case.[36] On the question of jurisdiction, Whittaker J. found that the Board's jurisdiction did not depend on the existence of a majority in good standing, but on the Board's opinion as to the existence of a majority. Thus, on a question expressly entrusted to the Board, the judge's finding that the de-

of "accident", and held that a privative section was ineffective to protect a ruling from quashing a wrong decision on a point of law. Also, in *Battaglia* v. *Workmen's Compensation Board* (1960), 32 W.W.R. 1, the British Columbia Court of Appeal ruled that by receiving the certificate of a specialist, which certificate had been obtained pursuant to the provisions of the Act, the Board had entertained an issue outside its jurisdiction, and its decision was declared a nullity, notwithstanding the privative clause. See also *re Workmen's Compensation Act: Ursaki's Certiorari and Mandamus Application* (1960), 33 W.W.R. 261.

[32] *Re International Brotherhood of Electrical Workers, Local 213 and Labour Relations Board (B.C.)*, [1955] 1 D.L.R. 502.

[33] (1957), 7 D.L.R. (2d) 526 (Ont. H.C.).

[34] The Labour Relations Act, 1954, S.B.C., 1954, c. 17 provides in s. 17(3) "If the Board or a majority thereof is in doubt as to whether or not a majority of the employees in the unit were, at the date of the application, members in good standing of the trade union making the application, the Board shall direct that a representation vote be taken. (4) If, on the taking of a representation vote under subsection (3) more than fifty percentum of the ballots of all those eligible to vote are cast in favour of the trade-union . . . the Board shall certify the trade-union for the employees in the unit."

[35] *Board of Education* v. *Rice*, [1911] A.C. 179, at p. 182.

[36] *Supra*, footnote 10. In *re Workmen's Compensation Act: Re Rammell* (1959), 30 W.W.R. 623, the question before the Board was whether the cause of a man's death arose out of or in the course of his employment. Whittaker J. said it was a question solely for the exclusive jurisdiction of the Board, and dismissed an application for certiorari. There was no indication here of denial of natural justice.

cision was wrong in law, did not provide sufficient ground to quash the decision.

The facts in the *Thibault* case are similar. On an application for certification, the Board found that the union had shown a majority of the employees to be members in good standing, even though no dues had been paid, and the union constitution made payment of dues a condition precedent to membership. Stewart J.[37] said: "How the President [of the union] can interpret[the] constitution in relation to a point on which it is quite silent, or how the Board can say that any practice unconnected with the constitution is nevertheless part of it, I have difficulty in understanding, but they have nevertheless done so. The question is, has the Board the right to do so?" He referred to the *Rice* case, and, on holding that the Board had acted in good faith, and listened fairly to both sides, he dismissed the application for certiorari to quash the certificate issued by the Board.

Both these cases would seem to have been decided on a literal interpretation of the "final and conclusive" sections of the Acts, and can hardly be reconciled with the *Marshall-Wells* line of decisions.[38] It is submitted that the effect of a privative clause upon "error of law" as a ground for certiorari to quash should be not to eliminate it as a ground, but to prevent the court from inquiring into the record to find error. In fact, the privative clauses have not had such effect, because whenever it is held that the authority in question has no jurisdiction to make a mistake, the decision does not come under the protection of the statute.[39] Of course, it

[37] *Supra*, footnote 33, at p. 528.

[38] An interesting view on error of law is seen in *re Labour Relations Board (Nova Scotia), International Union etc.* v. *Municipal Spraying & Contracting Ltd.*, [1955] 1 D.L.R. 353 (N.S.S.C.), where it was held that since the Labour Relations Act made the Board's decision final, on the question whether or not a group of employees constituted an appropriate unit for collective bargaining, the court would have to find that there was no evidence at all on which the Board could find some community of interest among the employees in the unit, before the court could hold that the error was such as to exceed the Board's jurisdiction.

[39] Thus in *re Leon Ba Chai*, [1952] 4 D.L.R. 715 (B.C.S.C.), it had been provided by Order in Council that when an Asiatic immigrant who otherwise complied with the Immigration Act, had shown to the satisfaction of the immigration officer certain facts, including the applicant's legitimacy, then the officer "may admit" the immigrant. The Immigration Act contained a privative clause. An enquiry was made and a hearing given, but the applicant was refused admission when the officer decided he was illegitimate. An application for mandamus was made and the record was examined and expert testimony was received. The officer's ruling was held to be wrong in law, and to have led to a refusal to exercise jurisdiction and beyond the protection of the Act. The decision was affirmed by the Supreme Court of Canada in [1954] 1 D.L.R. 401.

In *Creamette Co.* v. *Retail Store etc. Union* (1956), 4 D.L.R. (2d) 78, Trischler J. of the Manitoba Queen's Bench considered the point with

is sometimes held that the jurisdiction given by the statute so clearly includes the question on which error was made, that no inquiry can be made in the face of the privative clause.[40]

Classes of error

It is not clear how the courts distinguish between error which a Board is entitled to make and one which a Board is not entitled to make. While many tests have been suggested, the distinctions appear arbitrary and the judges do not seem able to achieve any degree of consistency in applying the various contradictory rules that have been laid down. In the *MacCosham Storage* case,[41] a Labour Relations Board, after finding an employer guilty of an unfair labour practice in dismissing an employee, directed reinstatement to be made within twenty-four hours of the order for

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reference to the Manitoba Labour Relations Act which also provided that decisions of the Board were final and conclusive and not open to question or review. R.S.M., 1954, c. 132. He said at p. 83, "This Court must be at pains to avoid by a pretext to attempt to review a decision by way of appeal or to act as though error always goes to jurisdiction instead of rarely. The Board has the right to be wrong on questions of law or fact, save at least, that it must not, by error, decline or exceed its jurisdiction." He then found that by reason of an erroneous interpretation of the Act, the Board had failed to make a necessary inquiry as to membership in good standing, and thereby exceeded its jurisdiction when it certified without inquiry, and he quashed the order. In the course of his judgment, he referred to the *Northumberland Compensation* case, *supra*, footnote 28, but apparently the *Marshall-Wells* decision, *supra*, footnote 26, was not cited.

The judgment in *re Canadian General Electric Co.* (1956), 4 D.L.R. (2d) 243 is an interesting example of the prevailing confusion. The Ontario Labour Relations Act, R.S.O., 1950, c. 194 provided that the Board should have exclusive jurisdiction to exercise the powers conferred on it by the Act or under the Act and "if any question arises in any proceeding, (a) as to whether any person is an employer or an employee, the decision of the Board thereon shall be final and conclusive for all purposes." (s. 68(1)). The Act also provided that no person was to be deemed to be an employee who exercised a managerial function or was employed in a confidential capacity. The Board had certified a union as bargaining agent for a unit including persons alleged by the company to be employed in a confidential capacity or to exercise managerial functions.

Wells J. said at p. 245: "It is, I think, trite law that if the Board acted within the jurisdiction conferred on it by the Legislature of Ontario, there is no jurisdiction in this Court to review its findings," (presumably in view of the Board's "exclusive jurisdiction"). He held that the scope of the Board's exclusive jurisdiction was limited by the positive prohibition against classifying confidential employees and managerial staff as employees and that the Board had erred in law in its classification, and thereby acted without jurisdiction.

[40] *Acme Home Improvements Ltd.* v. *Workmen's Compensation Board* (1958), 11 D.L.R. (2d) 461 (B.C.C.A.), (1957), 23 W.W.R. 545, and see also *re Ontario Labour Relations Board, Bradley et al.* v. *Canadian General Electric* (1957), 8 D.L.R. (2d) 65 (Ont. C.A.).

[41] *MacCosham Storage & Distributing Co. (Saskatchewan) Ltd.* v. *Canadian Brotherhood of Railway Employees* (1958), 14 D.L.R. (2d) 725 (Sask. C.A.).

reinstatement. The order was alleged to be bad in law in not specifying facts in support of the finding and also in failing to direct reinstatement forthwith. The statute prohibited review by any court. Gordon and Proctor J.J.A., dissenting, thought the order bad and would have quashed it. As to the privative clause, Proctor J.A. cited Lord Simonds' judgment in the *John East* case[42] as authority for the proposition that error in law on the face of the record would justify certiorari to quash, notwithstanding the privative clause. He also quoted Lord Sumner in the *Nat Bell* case.[43] "That the Superior Court should be bound by the record is inherent in the nature of the case. . . . That supervision goes to two points: one is the area of the inferior jurisdiction; and the other is the observance of the law in the course of its exercise." He also quoted *R.* v. *Northumberland Compensation Appeal Tribunal* where Denning L.J. said:[44] "The statutory tribunals, like the one in question here, are often made the judges both of fact and law, with no appeal to the High Court. If, then, the King's Bench should interfere when a tribunal makes a mistake of law, the King's Bench may well be said to be exceeding its own jurisdiction. The answer to this argument, however, is that the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in any appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law."

In delivering the majority opinion, McNiven J.A. rejected the contention that the privative clause would preclude the granting of certiorari to quash, but found no error in law and dismissed the appeal.

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[42] *John East Iron Works* v. *Labour Relations*, [1949] 3 D.L.R. 51 (Sask. C.A.). Orders of the Board directed reinstatement in their employment of certain employees and payment to them of monetary loss suffered by reason of their discharge. The amount ordered to be paid was equal to the amount of the wage the employees would have received had they continued in employment throughout the period. The Saskatchewan Court of Appeal found error of law on the face of the record in that no allowance for mitigation appeared to have been made, and granted certiorari to quash.

The case had gone to the Judicial Committee of the Privy Council [1948] 4 D.L.R. 673, on a constitutional question. Lord Simon had said at pp. 682-3: "Nor must its [the Board's] immunity from certiorari or other proceedings be pressed too far. It does not fall to their Lordships upon the present appeal to determine the scope of that provision [the privative clause] but it seems clear that it would not avail the tribunal if it purported to exercise a jurisdiction wider than that specifically entrusted to it."

[43] *Supra*, footnote 11.

[44] *Supra*, footnote 28, at p. 127 (All E.R.).

III. *Breach of a Principle of Natural Justice.*

Breach of a principle of natural justice has been clearly recognized as a ground for certiorari to quash, but it is not clear whether this ground is distinct or comes under the heading of jurisdictional defect. In *re Low Hong Hing*,[45] the controller of Chinese immigration had undertaken an inquiry into the status of a respondent under the Chinese Immigration Act.[46] After a hearing in which the respondent was given full opportunity to defend, the controller found the respondent to be of Chinese descent and not a Canadian citizen, and accordingly ordered him to be deported to China. Certiorari was granted to quash the order for a procedural defect alleged to amount to a denial of natural justice. The British Columbia Court of Appeal examined the whole proceeding, and on finding no violation of "the essential requirements of justice", allowed the appeal and restored the deportation order. The inquiry was made by the court, notwithstanding an express prohibition against certiorari, on the grounds that a breach of natural justice could go to jurisdiction.[47]

Similarly, bias has been held to destroy jurisdiction,[48] and notice has been held to be a condition precedent to the exercise of an authority to pass a municipal by-law.[49]

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[45] [1926] 3 D.L.R. 692 (B.C.C.A.) [46] S.C., 1923, c. 38.

[47] But see *Jurak et al.* v. *Cunningham et al.* (1959), 29 W.W.R. 561 (B.C.S.C.), where there were clear denials of natural justice. An application to quash was rejected as being premature because a contractual right of appeal existed. Although this decision is founded on the high authority of *Kuzyck* v. *White* (No. 3) (1951), 2 W.W.R. (N.S.) 679 (P.C.), it points up the inconsistency in the notion that a breach of natural justice destroys jurisdiction, for surely a decision made without jurisdiction is void, regardless of when the point may be raised. A contractual right of appeal must be distinguished from a statutory right of appeal. In *Jim Patrick Ltd.* v. *United Stone and Allied Products Workers of America Local 189 and Labour Relations Board* (1959), 29 W.W.R. 592 (Sask. C.A.), it was held that if there is a denial of natural justice, certiorari will always lie against an inferior tribunal, even though it is apparently acting within its jurisdiction.

[48] In *re Speers and Labour Relations Board*, [1947] 2 D.L.R. 835, the Saskatchewan Court of King's Bench quashed the certification of a union as bargaining agent when the Board had instructed its executive officer to interview the employees in question to ascertain their wishes. It was held that such action showed a reasonable probability of bias. The decision is of questionable value, for any bias was just as much in favour of the employer as the union, and the Board had a clear duty to satisfy itself as to the wishes of the majority, but the principle would appear to be that by satisfying itself, that is, by acquiring information in a way not authorized by the Act, nor "inherent in the judicial process", in the way adopted here, the Board became disqualified to make an order. See also *re Alberta Labour Act: F. F. Ayriss & Co. et al.* v. *Board of Industrial Relations et al.* (1960), 30 W.W.R. 634 (Alta. S.C.).

[49] In *Wetaskiwin Municipal District* v. *Kaiser*, [1947] 4 D.L.R. 461 (Alta. S.C.), a statute authorized the passage of by-laws taking away from the owners of land, control of the land, and the statute was silent as

In *re Commercial Taxi*,[50] a statute gave to the Highway Traffic Board a wide discretion in the granting of liverymen's licences and provided that, after considering any application, the Board "may in its sole discretion," grant or refuse the licence. The Board's decision was declared to be final. When it appeared on an application for mandamus to compel the Board to issue a licence, that the Board had received certain police reports which were not disclosed to the applicant, the court granted mandamus. Egbert J. acknowledged that the Board had a discretion, but refused to permit the Board to exercise it. He said[51]: "Since the Legislature has seen fit to confer upon the Executive branch of the Government, through the medium of the Board, such wide and arbitrary powers whereby the means of livelihood and the property of the subject may, by the discretionary action of the Board, be imperilled, it is, in my opinion, the duty of the Courts to be particularly assiduous in ensuring that the Board does not attempt to exercise powers which were not clearly conferred upon it by the Legislature in language which can leave no doubt as to the intention of the Legislature." The learned judge thereupon decided that the Board had no discretion when an applicant had fulfilled the statutory requirements. Such a decision negated the words of the statute and is clearly a substitution of the court's opinion for that of the Board. The breach of the principle whereby an interested party is entitled to a hearing, again was held to go to jurisdiction, for if the Board had power to make its decision without disclosing the police reports and hearing the applicant in rebuttal, then its decision could only have been questioned on appeal, for which no provision was made.

Implied conditions precedent

In the *Alliance* case,[52] the Supreme Court of Canada ruled on the question. The Alliance had been certified as bargaining agent for certain teachers. An illegal strike was called and the school Commission wrote to the Board asking that the certificate of the Alliance be cancelled. Before receiving the request, and apparently on its own initiative, the Board made an order for the cancellation of the certificate. The Superior Court granted prohibition to prevent enforcement of the order, and declared the

to the necessity for a hearing. Nevertheless, it was held that where no opportuntity to be heard was given to the owner to be deprived of possession, the by-law was a nullity. The failure to give a hearing must therefore go to jurisdiction and be a condition of the exercise of jurisdiction.

[50] [1951] 1 D.L.R. 342 (Alta. S.C.).

[51] *Ibid.*, at p. 343.

[52] *Supra*, footnote 2.

decision to have been made without jurisdiction, and therefore, a nullity. Under the Act, the Board was authorized to cancel the certificate for cause, and there was no requirement as to notice. A majority of the Court of Appeal held the illegal strike was "cause" and that the Act being silent as to notice, none was required. In the Supreme Court, the want of notice to the Alliance was held to be fatal to the Board's jurisdiction. Rinfret C.J.C., referring to the Board's action before receipt of the Commission's request, said: "It is repugnant to reason to believe that any court whatever may grant a petition before being seized of it. . . . It is more than a lack of notice to the interested party; it is an adjudication on a procedure that is not before the court."[53] It is submitted that the finding that the Board's jurisdiction had never been invoked, should have sufficed to dispose of the matter, but the learned Chief Justice went on to rule that want of notice to the Alliance and failure to afford a hearing went to jurisdiction, even though the Act made no such requirement. Counsel for the Board made reference to the privative clause, "no writ of injunction or prohibition or other legal proceeding shall interfere with or stay the proceedings of [the Board]". The learned Chief Justice disposed of the privative clause by saying: "The privative clause cannot be invoked to prevent prohibition against a decision rendered in the absence of jurisdiction."[54]

According to Kerwin J. ". . . the Legislature must be presumed to know that notice is required by the general rule, and it would be necessary for it to use explicit terms in order to absolve the Board from the necessity of giving notice."[55] Estey J. concurred. Rand J. said the Board might be charged with administrative, executive and judicial functions. "When of a judicial character, they effect the extinguishment or modification of private rights or interests. The rights here, some recognized and others conferred by the statute, depend for their full exercise upon findings of the Board; but they are not created by the Board . . . and the Association can only be deprived of their benefits by means of a procedure inherent in the judicial process."[56] Fauteux J. was also of

[53] *Ibid.*, at p. 168. [54] *Ibid.*, at p. 175. [55] *Ibid.*, at p. 177.

[56] *Ibid.*, at pp. 180-1. It is submitted that the reasoning of Rand J. is inaccurate. If a Board's function is judicial, then surely it cannot affect the extinguishment or modification of rights or interests, but only ascertain and declare those rights or interests. The learned judge acknowledges that the rights of a union are not created by the Board, but goes on to say that such rights can be taken away from the union by means of the Board's ruling, so long as it proceeds judicially. If the Board can properly deprive a union of its rights, then surely its function in that aspect is better described as administrative, or even legislative, than judicial.

the opinion that the Board had no power to cancel the certificate without first giving the appellant the opportunity to be heard, "not only on the facts, but on the law itself".[57] Thus we see that notice and a hearing are prerequisites to the jurisdiction of a statutory administrative body, notwithstanding the silence of the statute on the point; and even express words forbidding curial intervention are ineffective when the implied requirements are not met.[58]

Pleading and jurisdiction

If a breach of the principles of natural justice goes to jurisdiction, and a failure to give notice or an opportunity to be heard renders a decision, "... in every way *ultra vires*, and consequently, absolutely null",[59] then it should never be too late to raise the issue. Yet in *Marcotte* v. *Societé Co-operative*,[60] the Supreme Court of Canada, two of whose members also sat on the *Alliance* case, ruled that the failure to hear the appellant before expelling him from the society was "a question of fact which should have been expressly pleaded if the appellant wished to rely on it in his action".[61] Although, according to the Chief Justice of Canada, Parliament is without power to prevent the court from attacking an order of an administrative body made without notice, the Supreme Court of Canada, without statutory authority, can render valid and binding a decision of a domestic tribunal made in breach of the *audi alteram partem* rule, and thereby, without jurisdiction.[62]

The Perepolkin case

The uncertainty now prevailing because of the impossibility of reconciling the conflicting authorities, as well as the dangers involved in extending the concept of jurisdictional defect to include breaches of so-called natural justice and procedural error

[57] *Re Labour Relations Act: Northern Taxi Ltd.* v. *Manitoba Labour Relations Board* (Nos. 1 and 2) (1959), 27 W.W.R. 12. The Manitoba Labour Relations Board, on its own motion, decided to reconsider its decision. It was held that notice must be given to all interested parties before the Board had jurisdiction to enter upon such reconsideration.

[58] It is difficult to define natural justice and this difficulty was the subject of comment by Clyne J. in *re Alcazar Hotel*, [1954] 1 D.L.R. 772 (B.C.S.C.): "It is not easy to define natural justice. It is easier to say what it is not, and I do not think it consists in coercing a group of individuals into joining a union with which they do not desire to associate."

[59] See Rinfret C.J.C. in the *Alliance* case, *supra*, footnote 2.

[60] [1955] 4 D.L.R. 690.

[61] *Ibid.*, per Abbott J., at pp. 692-3.

[62] Compare *Knapman* v. *Board of Health for Saltfleet Township*, [1954] 3 D.L.R. 760 (Ont. H.C.), upheld by the Supreme Court of Canada

are exemplified in the judgments in the British Columbia Court of Appeal in the *Perepolkin* case.[63]

On an application to commit a child to the Superintendent of Child Welfare as an habitual truant, a magistrate received unsworn testimony. The Act under which the application was made[64] did not require witnesses to be sworn. The trial judge (McInnes J.) dismissed an application to quash after rejecting supplementary affidavit evidence of the reception of unsworn testimony. On appeal, the majority ruled that the affidavit was admissible and exercised the discretion to receive it that McInnes J. had declined. In the result, the failure of the magistrate to cause the evidence to be given under oath was held to be fatal, but the two judges in the majority did not agree as to why the omission was fatal. Davey J.A. referred to the two points of supervision by the Superior Court described by Lord Sumner in the *Nat Bell* case,[65] and ruled that extrinsic evidence could be received in the course of exercising supervision as to the "area of the inferior jurisdiction". He then referred to the judgment of Rand J. in *Regina and Archer* v. *White*[66]. "The question, therefore, is whether or not in the application . . . anything has been alleged and supported by evidence to show that the proceedings infringed or were outside the au-

(1957), 6 D.L.R. (2d) 81. In that case, the Board, acting on a report made by an inspector, made an order condemning certain premises, without notice to the owner or occupiers. It was decided that the Board had a duty to act judicially, and therefore certiorari was granted to quash the order, notwithstanding a privative clause, because the Board in arriving at its decision so conducted itself as to deny to the applicant "his fair measure of natural justice", at p. 768. In the Supreme Court, Taschereau J. said that failure to give Knapman a hearing was fatal to jurisdiction.

The belief that a procedural error of the type generally grouped under the heading of "breach of natural justice" destroys jurisdiction is so strong that it is often accepted without question, and in *Regina* v. *Spalding*, [1955] 5 D.L.R. 374 (B.C.C.A.), counsel opposing the application for certiorari conceded the point without argument. A special inquiry officer acting under the provisions of the Immigration Act made an order for the deportation of Spalding after a hearing in which a principle of natural justice was violated. The order was quashed on that ground, although an appeal lay to the Minister and an appeal had been launched. Counsel for the Minister argued that it was premature to quash at that point, as the appeal had not been heard. It was held that there had been a mishearing and no legal hearing at all. O'Halloran J.A., at p. 377, said, "Upon this understanding of the situation, the right to certiorari arose *ex debito justiciae* unhampered by considerations which might otherwise affect the exercise of a discretion in a case where there is a pending appeal safeguarded by statute from a constituted court to a provincial Appellate Court." The view was expressed that there was little chance of justice on appeal to the Minister, and that such an appeal would provide neither a convenient nor an adequate remedy.

[63] *Supra*, footnote 9.

[64] Protection of Children Act, R.S.B.C., 1948, c. 47.

[65] *Supra*, footnote 11.

[66] (1956), 1 D.L.R. (2d) 305, at p. 309.

thority of either the statute or those underlying principles of judicial process to be deemed to be annexed to legislation unless excluded by its implications." Davey J.A. then held it to be essential that evidence be given under oath in all judicial proceedings and that by proceeding without sworn testimony, the magistrate did not hold that kind of hearing required by the Act, and failed to observe a basic requirement of the Act, and one of the fundamental principles governing judicial proceedings. He suggested[67] that this denial of one of the essentials of justice was not a matter of jurisdiction in the strict sense, yet it made the order voidable and liable to be quashed on certiorari. Sheppard J.A. read into the Act a requirement that evidence be given under oath and said: ". . . the failure to observe the statutory requirements is not mere procedural error, but must invalidate the jurisdiction."[68] In a strong dissenting judgment, Sydney Smith J.A. adopted what he called the orthodox approach. To be remediable on certiorari, error must appear on the record and latent error cannot be shown by affidavit. He denied that error, whether in substantive law or procedure, could go to jurisdiction.

Thus we see one judge expressing the opinion that jurisdiction must be ascertained at the outset of the inquiry. Having once found jurisdiction to have been established, then the worst that can be said is that the magistrate miscarried in his manner of conducting the inquiry. Another member of the court holds that failure to have the witnesses sworn destroys jurisdiction. The third member of the court also holds the error to be fatal, not as a condition precedent to the exercise of jurisdiction, but as an "essential right inherent in all judicial proceedings". The error did not render the decision void, but "voidable in the sense that it will be quashed in [certiorari] proceedings".[69]

The Traders Service case

Perhaps the most remarkable decision of the Supreme Court of Canada in administrative law in recent years is the *Traders Service* case.[70] In that case, a union applied for certification in respect of certain persons alleged to be employees of Traders Service. An associated company carried on business at the same address,

[67] *Supra*, footnote 63, at p. 264.
[68] *Ibid.*, at p. 274.
[69] It is interesting to note that each of the three judges refers to Lord Sumner's judgment in the *Nat Bell* case, *supra* footnote 11, as authority for his point of view.
[70] *Labour Relations Board and A.G. for B.C.* v. *Traders Service Ltd.* (1958), 15 D.L.R. (2d) 305.

and upon receiving the notice of the application required by statute, Traders Service advised the Board that a mistake in identity had been made, as the employees in question (whose membership in the union was essential to the success of the application) were employed by the associated company. The Board replied that any mistake would be disclosed by its investigation. There was no further communication between the Board and Traders Service until after the Board had granted a certificate to the union.

On an application for certiorari to quash the certificate, McInnes J. held that the only substantial issue before the Board was the identity of the group of employees in respect of which certification was sought, and the Board's failure to give notice to Traders Service of that issue, and to afford an opportunity to make representations thereon, amounted to a declining of jurisdiction.[71]

The Court of Appeal[72] agreed generally with the trial judge. In the Supreme Court, Cartwright J. said the Board's duty was "to disclose to the applicant the issue raised by the Union's application for certification, and to give the applicant an opportunity to meet it".[73] He referred to the concurrent and unanimous findings in the court below, and, declaring his agreement with those findings, would have dismissed the appeal. Locke J. also thought the Board had failed in its duty to afford both sides full opportunity to be heard, and agreed with the court below. Thus we have six judges declaring that the Board acted in excess of its jurisdiction and that its order should be quashed. However, Judson J., with whom Rand and Abbott J.J. concurred, held that Traders Service did have notice of the issues, but that notice of the specific point referred to by the other judges as the only substantial issue, was not required by the Act, and "failure to do what is not required should not be construed as a denial of the right to be heard or a refusal of jurisdiction".[74] He went on to express the opinion that the Board was correct in holding the persons in question to be employees of Traders Service. "All the evidence pointed to these employees being the employees of [Traders Service]."[75]

[71] (1957), 9 D.L.R. (2d) 530. [72] (1958), 11 D.L.R. (2d) 364.
[73] *Supra*, footnote 70, at p. 316. [74] *Ibid.*, p. 320.
[75] The case may indicate more than a difference in approach to the facts involved and may presage a less vigorous application of the *audi alteram partem* rule to administrative proceedings, at least in cases where notice in form prescribed by statute has been given. *Cf. Regina* v. *County of London Quarter Sessions Appeals Committee ex parte Rossi*, [1956] 1

Scope of the judicial inquiry

It is not clear from the cases whether a breach of the principles of natural justice goes to jurisdiction or simply renders an order voidable and liable to be quashed on certiorari. Some cases indicate that notice is a condition precedent to the exercise of jurisdiction,[76] so that, until notice is given, the tribunal is not seized of the matter, whereas a failure to afford a full hearing during the proceedings, not occasioned by want of notice, does not detract from jurisdiction, but renders the proceeding voidable.[77]

It seems reasonable to assume that the Canadian view, that error of law and breach of a principle of natural justice can both affect jurisdiction, has been developed over a period of time to overcome the attempts of the legislature to establish a degree of administrative finality, as only on the basis of jurisdictional defect can the courts justify their intervention in administrative proceedings in the face of "final and conclusive" clauses and express statutory prohibitions. The scope of the court's inquiry is also much extended when the search is for a breach of natural justice or defects in jurisdiction, for affidavits will not be received in support of an application for certiorari to quash for error of

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Q.B. 682 (C.A.), where notice of a hearing, though in proper form and served in the manner authorized by statute, was known to the court not to have reached its destination. An order made by the court was quashed on certiorari for a breach of natural justice, but there was no suggestion in the judgment in the Court of Appeal that the order was one made without jurisdiction.

[76] The *Alliance* case, *supra*, footnote 2, and see particularly the judgment of Rinfret C.J.C.

[77] *re Corporation of the District of Surrey* (1957), 6 D.L.R. (2d) 768 (B.C.S.C.), where it was held that service of a proper notice was a condition precedent to jurisdiction. The error in *re Commercial Taxi, supra*, footnote 50, was that the Board received certain police reports in connection with an application for a licence and these reports were not disclosed to the applicant, so that he had no opportunity to challenge the contents or the relevance of the reports. See also *re Northern Ontario Natural Gas Co. Ltd. and La Rocque* (1959), 18 D.L.R. (2d) 73 (Ont. H.C.), where the Ontario Fuel Board Act required that persons whose rights would be affected by an order of the Board should be given such notice as the Board considered proper. The Board directed notice of an application for expropriation to be served upon the applicant, as a person whose rights would be affected by the expropriation, by registered mail. Service was made in compliance with the Board's directions, but did not reach the applicant. McLennon J. of the Ontario High Court held that actual notice was a condition precedent to the Board's jurisdiction to make the order. This view differs fundamentally from that expressed in the *Rossi* case *supra*, footnote 75, where Denning L.J. made it clear that when the court proceeded with the knowledge that service had been ineffective, the order was *irregularly* obtained and liable to be set aside for procedural error.

law, which must appear on the face of the record.[78] This latter motive for extending the concept of jurisdictional defect must be somewhat weakened by rulings such as those in the *Children's Aid Society* case,[79] where it was held that the record included all the evidence and proceedings before the inferior tribunal.[80]

Waiver of breach of natural justice

The whole field of administrative law is encumbered with conflicting notions and entangled in semantic difficulties, and little effort has been devoted to analysis of the principles sought to be applied. In *re Imperial Tobacco Co.*,[81] it was sought to quash a report of a commissioner acting under the Combines Investigation Act,[82] for want of notice, and failure to give a proper hearing to the companies investigated. Hogg J., of the Ontario Supreme Court, found that the commissioner acted as an administrative body and not as a judicial body, but that "he was bound to act judicially in the sense that he was obliged to act fairly and impartially, or, in other words, to act according to the dictates of what has sometimes been termed, natural justice" .To the argument that the commissioner had exceeded his jurisdiction the learned judge replied that any such excess had been waived by the applicant. In the Court of Appeal,[83] the confusion was not resolved. Riddell J.A. did not discuss the nature of the commissioner's function, but found no breach of natural justice and considered that any defect had been waived. Fisher J.A. characterized the function as administrative and held that certiorari would not lie. Gillanders J.A. agreed with the reasoning of Hogg J. and found the duties administrative, but qualified his findings by holding that the administrative duties had been performed in a judicial manner.[84]

[78] The English position is set out in *The King* v. *Wandsworth Justices* [1942] 1 K.B. 281. The law on this point appears to be the same in Canada see *MacCosham Storage & Distributing Co. (Saskatchewan) Ltd.* v. *Canadian Brotherhood of Railway Employees, supra,* footnote 41.

[79] *Supra,* footnote 13.

[80] See however, *Bujar* v. *Workmen's Compensation Board* (1960), 33 W.W.R. 417 (B.C.S.C.), where Lord J. re-affirmed what Sydney Smith J.A. called the "orthodox approach" in the *Perepolkin* case, *supra,* footnote 9.

[81] [1939] 3 D.L.R. 750 (Ont. H.C.).

[82] R.S.C., 1927, c. 26.

[83] [1939] 4 D.L.R. 99.

[84] *Dobson et ux* v. *Edmonton (City) and Board of Trustees, Metropolitan United Church* (1959), 27 W.W.R. 495, (1959), 19 D.L.R. (2d) 65. (Alta. S.C.). A municipal interim development appeal board was held to have been exercising a purely administrative function in approving a development permit. It will be noted that there was no want of good faith or any breach of natural justice.

It is submitted that the classification of the commissioner's functions as administrative should have precluded any further inquiry on certiorari,[85] but the court might well have made specific findings as to the alleged excess of jurisdiction, for jurisdiction cannot be acquired by consent and waiver cannot validate a nullity.

IV. *Jurisdictional Defect.*

The courts' greatest instrument in the control of administrative bodies is the concept of jurisdictional defect. Jurisdiction has been defined as legal authority or the extent of power to make a binding decision, or "the area of judicial power".[86] The courts seldom undertake a definition of the term, but are astute to find a want, excess or declining of jurisdiction when other avenues by which control may be enforced are not open. To find a defect of jurisdiction the courts often begin with an error in law or breach of a principle of natural justice and rationalize such error or breach into a suitable jurisdictional imperfection. One authority has expressed the opinion that there is no branch of English (or Canadian) law in which there is more confusion and conflict than that of jurisdiction. The same writer said: "Anything like serious examination at large of the case law on jurisdiction must convince an open-minded inquirer that there is virtually no proposition so preposterous that some show of authority to support it cannot be found."[87] An examination of the recent Canadian case law relating to the jurisdiction of administrative bodies goes far to bear out that observation.

[85] Compare the reasoning of the Judicial Committee of the Privy Council in *Nakkuda Ali* v. *M. F. de S. Jayaratne*, [1951] A.C. 66 on appeal from the Supreme Court of Ceylon. The Controller of Textiles in Ceylon cancelled the appellant's textile licence under a regulation which empowered him to do so, "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer". It was held that the Controller's decision must be made according to objective standards, but that certiorari would not lie, because, although the Controller was obliged to act reasonably, he was under no duty to act judicially. In an article entitled "The Twilight of Natural Justice" in (1951), 67 L.Q. Rev. 103, H.W. Wade criticized the decision, saying that characterization of the Commissioner's function as something other than judicial, should not defeat an application for certiorari, as the courts have in fact not hesitated to review administrative decisions affecting individuals' rights or liberties where such individuals have not had a fair hearing. It is submitted that Mr. Wade is quite right in raising that point, but it should also be noted that the courts are usually careful to identify at least part of the administrative process as judicial, or quasi judicial before deciding that certiorari will lie. It might be more accurate to say that the decision as to the applicability of certiorari comes first, and that the tag "judicial" is then affixed to the proceeding to justify the court order.

[86] Per Lord Sumner in the *Nat Bell* case, *supra*, footnote 11.

[87] D. M. Gordon, The Relation of Facts to Jurisdiction (1929), 45 L.Q. Rev. 459.

"Jurisdiction, or the want of it, should be ascertained as at the outset, not at the conclusion of an inquiry."[88] Thus, whenever an application is made to a tribunal, its first inquiry should be as to its own authority to hear and determine the question, which will depend upon the interpretation to be given the enabling Act. Conditions precedent to jurisdiction are sometimes held to be absolute, and sometimes held to be within the competence of the tribunal to determine. Assuming the existence of a justiciable issue, or a question falling within the competence of a tribunal, jurisdiction is not perfected until conditions precedent are fulfilled. For example, even where notice is not expressly required by statute, it is often held to be a condition precedent to a tribunal's exercise of a jurisdiction which it would otherwise have had.[89] Again, where a municipal council was empowered by statute to pass a by-law which would have the effect of depriving of the possession of land an owner deemed incompetent to work his land properly, the by-law was declared a nullity, because the owner had not been given notice and a full opportunity to present his side of the argument, even though the statute made no mention of notice or a hearing.[90] Sometimes the statute expressly requires the tribunal to give notice and to afford an opportunity to be heard, and in one such case a failure to comply was described by the court as "a complete refusal of jurisdiction",[91] and a privative section will not protect such a proceeding. The notice must be sufficiently detailed to provide a reasonably intelligible definition of the issues and of the case to be met, and where, in a deportation inquiry a person was told that her admission to Canada was prohibited, because, in the opinion of an immigration officer, she was "unsuitable under the regulations", the deportation order was held to have been made without jurisdiction.[92]

There appears to be no limitation as to the kind of proceeding nor the type of authority with respect to which notice and a fair hearing are deemed to be required, so long as at some point the body is required to act judicially. Thus, in *Knapman* v. *Board*

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[88] Per Sydney Smith in the *Perepolkin* case, *supra*, footnote 9, at p. 250 and see cases cited therein.

[89] See the judgment of Roach J.A. in *re Brown and Brock and Rentals Administrator*, [1945] 3 D.L.R. 324 (Ont. C.A.).

[90] *Wetaskiwin Municipal District* v. *Kaiser*, *supra*, footnote 49, and compare the *Alliance* case, *supra*, footnote 2.

[91] *Martin & Robertson Ltd.* v. *Labour Relations Board (British Columbia)*, [1954] 2 D.L.R. 622 (B.C.S.C.).

[92] *Ex p. Brent*, [1955] 3 D.L.R. 587 (Ont. C.A.) and see *R.* v. *Spalding*, *supra*, footnote 62.

of Health for Saltfleet Township,[93] where the Board made an order condemning certain cottages under express statutory authority, and gave the occupants notice to vacate, the proceedings were held to be a nullity, because a proper hearing was not given. The Act was silent as to a hearing, but the decision of the trial judge was upheld in the Court of Appeal[94] and the Supreme Court.[95] Taschereau J. thought it was a condition precedent to the Board's exercise of power to condemn, that they be satisfied on due examination that the premises were unfit. Thus they had a duty to act judicially, and the failure to give a proper hearing was fatal, and the privative clause in the Act was ineffective.[96] The principle extends to domestic tribunals, and when the executive council of a union made an order to suspend a person from membership, the order was held to have been made without jurisdiction, as no hearing was given.[97]

Statutory conditions

When a statute prescribes standards to be applied by the authority in its proceedings, the courts sometimes construe such provisions as imposing additional conditions precedent to the exercise of jurisdiction.[98] Thus, in *re B.C. Hotel Employees Union and Labour Relations Board*,[99] the statute provided that where the Board directed that a representation vote be taken, "the Board shall settle the list of employees eligible to vote". The British Columbia Court of Appeal ruled that there was an imperative duty on the Board to settle the list, and that no valid order could be made on the strength of proceedings in which that condition had not been fulfilled. In effect, this ruling means that a tribunal

[93] *Supra*, footnote 62.

[94] [1955] 3 D.L.R. 248.

[95] (1957), 6 D.L.R. (2d) 281.

[96] But see *re Morrisey, Armstrong and Ontario Racing Commission* (1958), 12 D.L.R. (2d) 772 (Ont. C.A.), where a statute gave the Commission power to suspend or revoke any licence for conduct which the Commission considered to be contrary to the public interest, and stated that any order of the Commission should be deemed to be of an administrative nature. The court refused to interfere with an order of the Commission, declaring that there was no judicial proceeding involved. It should be noted that no breach of natural justice or error was found, however. See also *Young* v. *A.G. of Man.* (1960), 33 W.W.R. 3 (Man. C.A.),

[97] *Bimson* v. *Johnson* (1957), 10 D.L.R. (2d) 11 (Ont. H.C.), confirmed on appeal in (1958), 12 D.L.R. (2d) 379. In *Jurak et al.* v. *Cunningham et al.*, *supra*, footnote 47, following *Kuzyck* v. *White*, *supra*, footnote 47, it was held that a union tribunal was accorded, by contract, a freedom from supervision by the courts.

[98] *Re Herrons Appeal* (1959), 28 W.W.R. 364 (Alta S.C.). Breach of statutory requirement as to filing notice of objections within specified time limit, resulted in want of jurisdiction.

[99] (1956), 2 D.L.R. (2d) 460 (B.C.C.A.).

properly seized of a proceeding within its jurisdiction, can lose its authority by a failure to fulfil a procedural requirement during the course of the inquiry.[100] The idea that error can result in a failure to observe a condition precedent has been carried to greater lengths than that, however. In *Creamette Co. of Canada Ltd.* v. *Retail Store Employees Union 830*,[101] the statute provided that the Labour Relations Board should decide any question as to a person's good standing in a trade union, and that such decision should be final and conclusive. It was held that the Board had misinterpreted a regulation referring to membership, in coming to a decision, and, as a result of the error of interpretation, refused to exercise its jurisdiction to embark upon the very inquiry which was imposed on it by the Act. "Having thus declined jurisdiction, it proceeded to issue a certificate as though it were bound to do so. This was exceeding jurisdiction by doing that which it was not authorized to do, that is, certify without inquiry."

Two Supreme Court decisions may indicate a need for reappraisal of the "condition precedent to jurisdiction" theory. In the *Marcotte* case,[102] a member of the co-operative was expelled by its board of directors. In the proceedings for reinstatement, the Court of Appeal raised the question of notice and a hearing before the Board, prior to its resolution expelling the plaintiff. The Supreme Court ruled that, as the point had not been raised in the pleadings it could not be relied upon. Thus, it seems that notice and a hearing are not always conditions precedent to authority to make a decision, as the difference between a condition precedent and a mere procedural error cannot depend upon whether or not the error is pleaded, and if the requirement of notice and a hearing is a condition precedent, then the decision must be declared a nullity, however the issue comes before the court. In the *Traders Service* case,[103] the common-law obligation to give to all interested parties an opportunity to be heard was reinforced by express words of the statute. The trial judge, all three judges in the Court of Appeal, and two Supreme Court judges, were agreed that the issue raised by the application for certification was whether employees allegedly working for the associated company, were to be included in the

[100] For clear examples of "want of jurisdiction" see *Hannon* v. *Eisler*, [1955] 1 D.L.R. 183 (Man. C.A.), where a custody order was made, despite the fact that the children, the subjects of the order, and their custodian were all out of the province. Also *re Corporation of District of Surrey*, *supra*, footnote 77, where a planning board made an order under the Town Planning Act, although no proper notice of appeal had been given, so that it was not seized of the matter.

[101] *Supra*, footnote 39.

[102] *Supra*, footnote 60.

[103] *Supra*, footnote 70.

certification as employees of Traders Service. The six judges agreed that the Board was obliged to give Traders Service notice of that issue, and that in fact no notice had been given. The other three judges in the Supreme Court held that by sending to Traders Service the notice of the application as required by statute, the Board had fulfilled all requirements as to notice and had jurisdiction to grant the certificate, even though Traders Service may not have had actual notice of the issue before the Board. According to Judson J:[104] "The issue raised was perfectly plain to the Union and the Board, and I think it was equally plain to the respondent. *Whether or not this is so can make no difference.*" It is submitted that this decision can be reconciled with earlier cases only by interpreting the statutory provision as to notice as supplanting the common-law right to notice, and interpreting the Act to mean that a bare notice that an application for certification has been made shall be deemed to constitute notice of the issues involved. This view hardly agrees with Lord Loreburn's words in the *Rice* case,[105] where he said that a Board required to act judicially must act in good faith and fairly listen to both sides, "for that is a duty lying upon everyone who decides anything".[106]

The nature of administrative jurisdiction

If the proceedings of administrative bodies are regarded not as being similar to the trial of an issue in a judicial proceeding, but rather, as an exercise of strictly limited discretion to choose between defined alternatives (that is, to grant or refuse a certificate: to expropriate or not, and so on) after the fulfillment of certain imperative conditions, some express and some imported by common law, then the idea that a want of notice or a failure to afford an opportunity to be heard, or failure formally to settle a voters' list, precludes the valid exercise of jurisdiction, is acceptable. In other words, if, in administrative proceedings, the tribunals' "area of judicial power" does not include anything except the actual making of the decision, then clearly, error in any of the imperative preliminaries results in the tribunal failing to reach the area of its judicial power. However, to so regard administrative proceedings is to deny the clear intention of the legislature, and to render illusory the powers of such tribunals. An administrative decision

[104] *Ibid.*, at p. 320. [105] *Supra*, footnote 35, at p. 182.

[106] The *Traders* case was not cited in the *La Rocque* case, *supra*, footnote 77, where McLennan J. held that the requirement of notice was not met by the sending of notice by registered mail where in fact the notice did not reach the affected person, even though the Board was clearly authorized to direct the manner of service.

is said to be one founded on policy and expediency and the merits of such a decision are not to be reviewed by the court.[107] It is abundantly clear that it is not the actual making of the decision that is governed by the duty to act judicially, but the proceedings preliminary to that decision. Jurisdiction, according to Lord Sumner in the *Nat Bell* case,[108] must be established at the outset, not at the conclusion of an inquiry. Jurisdiction accrues to a properly constituted administrative body on receipt of an application for determination of an issue within that body's statutory competence. The principle was enunciated in *Regina* v. *Justices of Kent*.[109] "If justices have jurisdiction over the subject matter of the proceedings before them, a prohibition cannot be issued on the ground that they may make a mistake in exercising the jurisdiction. . . . But it is necessary that the subject matter of the inquiry should be within their jurisdiction." Again: "The question is whether the inferior court had jurisdiction to enter upon the inquiry and not whether there had been a miscarriage in the course of the inquiry."[110] "Error in law upon a question, apart from jurisdiction to try, will not give a right to prohibition."[111] These principles were discussed and approved in the leading case *Rex* v. *Seguin*.[112] The courts do not apply the *Rex* v. *Seguin* rule with any degree of consistency, but seem to regard jurisdiction as subject to defeasance after accrual, or as split up into a separate jurisdiction for each separate question requiring determination. Thus, in the *re B.C. Hotel Employees* case,[113] the trial judge found as a fact that the Board had settled the voters' list as directed by the statute, in connection with the representation vote. In the Court of Appeal,[114] one judge agreed with the result reached by the trial judge, but the two judges constituting the majority found that, while the Board had jurisdiction, it had not settled the list; that their duty

[107] *Re securities Act: Duplain* v. *Cameron et al.* (1960), 32 W.W.R. 193 (Sask. C.A.).

[108] *Supra*, footnote 11.

[109] (1889), 24 Q.B. 181, at pp. 183-4.

[110] *In re Long Point Co.* v. *Anderson* (1891), 18 O.A.R. 401, at p. 405.

[111] *Re Sigurdson* (1916), 28 D.L.R. 375 (Man. K.B.). It may be that error of law on the face of the record, while a proper ground for the granting of certiorari to quash, will not support prohibition, because such error may be corrected during the proceedings, and if no correction is made, then certiorari will lie after the proceedings have been concluded.

[112] *Supra*, footnote 15. One assumes that the judges in the cases cited in this and the three preceding footnotes were not faced with statutory prohibitions against judicial intervention, and therefore were not impelled to find defects of jurisdiction to prevent the inferior tribunal from coming within the protection of the statute.

[113] *Supra*, footnote 99.

[114] (1956), 2 D.L.R. (2d) 560.

to settle was imperative; and that the entire proceedings and the order of the Board were therefore *ultra vires* and void.[115]

Classification of issues

The fulfilment of conditions precedent, or the existence of facts upon which jurisdiction is said to be founded, are sometimes called matters collateral to the main issue, or to the actual matter which the inferior tribunal is to determine. "The determination whether it exists or not is logically and temporally prior to the determination of the actual question which the inferior tribunal has to try. The inferior tribunal must itself decide as to the collateral facts . . . ."[116]

"There may be tribunals which, by virtue of legislation constituting them, have the power to determine finally the preliminary facts upon which the further exercise of this jurisdiction depends; but subject to that, an inferior tribunal cannot, by a wrong decision with regard to a collateral fact, give itself a jurisdiction which it would not otherwise possess."[117] The distinction between a collateral fact and an issue for the determination of the tribunal is a fifficult one,[118] particularly when a fact upon the existence of which the jurisdiction of the tribunal may depend, may also be a question expressly committed to the tribunal for determination.

Examples of non-collateral questions

Judicial precedents are of little help to one seeking a test for distinguishing between collateral issues, and those forming part of the very substance of the question to be decided.

The question of Chinese descent, while the sole question of fact upon which the jurisdiction of the controller of Chinese immigration depended, was held to be the very question the controller was required to decide in discharging his statutory duty.[119] Whether or not a person is doing business as a canvasser in breach of a municipal by-law is the main issue before a magistrate trying the person under the by-law, and his decision will not be interfered

[115] Again, in the *Creamette* case, *supra*, footnote 39, the Board had jurisdiction to hear the application, but lost it by misinterpreting a regulation, and thereby failing to make an inquiry incidental to certification.

[116] Halsbury's Laws of England (Simonds ed., 1955), vol. 11, p. 59.

[117] *Bunbury* v. *Fuller*, *supra*, footnote 17 at p. 140 (Exch.) per Coleridge J.

[118] Indeed, the distinction is ephemeral in the opinion of D. M. Gordon, *op. cit.*, *supra*, footnote 87.

[119] *In re Low Hong Hing*, *supra*, footnote 45. It is worthy of note that the Court of Appeal found there had been no injustice and the controller's conclusions were amply justified.

with, even though erroneous, on prohibition.[120] Also, the question of public convenience and necessity is the main issue before the Public Utilities Commission in an application for a certificate of convenience and necessity.[121] The *Safeway* case[122] might be urged in support of the view that the question whether or not a person is an employee, in certification proceedings, is not a collateral question for a Labour Relations Board. In the *Electrical Workers* case,[123] the British Columbia Labour Relations Act[124] was construed to mean that the legislature had entrusted the Labour Relations Board with a jurisdiction that was not conditional upon the existence of certain facts, but on its own finding that such facts existed.[125] The forces promoting administrative finality achieved a signal victory in *Thibault* v. *Canadian Labour Relations Board*,[126] where an application was made for certiorari to quash a certification on the ground (*inter alia*) that there was no evidence before the Board on which a finding could be made as to the good standing as union members of a majority of employees in the unit. Wells J. said: "It is now I think, in the present state of the authorities, trite law to say that if the Canadian Labour Relations Board acted within the jurisdiction conferred on it by the statute, certiorari does not lie, and this Court has no jurisdiction to quash any order made by the Board. I am not concerned with whether the Board's decision was correct or incorrect, on the evidence it had before it."[127]

Examples of collateral questions

In *Bruton* v. *Regina City Policemen's Association*,[128] a Labour

[120] *Segal* v. *Montreal*, [1931] 4 D.L.R. 603 (S.C.C.).

[121] See *Veterans' Sightseeing and Transportation Co. Ltd.* v. *Public Utility Commission*, [1946] 2 D.L.R. 188 (B.C.C.A.); *Union Gas Co. of Canada Ltd.* v. *Sydenham Gas & Petroleum Co. Ltd.* (1957), 7 D.L.R. (2d) 65 (S.C.C.); *Memorial Gardens Association (Canada) Ltd.* v. *Colwood Cemetary Co. et al.* (1958), 13 D.L.R. (2d) 97 (S.C.C.). According to the majority decision in the *Union Gas* case, the question was one of administrative opinion for the Board only, and beyond the *jurisdiction* of the court. That decision was referred to with approval in the *Memorial Gardens* case, but the court went on to say that it would not interfere, unless there was *no evidence*. Can it be that a want of evidence changes a question from an administrative to a judicial one, and also vests jurisdiction in a Court of Appeal?

[122] *Supra*, footnote 18. [123] *Supra*, footnote 32. [124] *Supra*, footnote 34.

[125] See also *re Thibault*, *supra*, footnote 33, where a certification based on a finding by the Board that the majority of the employees in the unit were in good standing, was not quashed, even though it was clear that under the union constitution the employees could not be in good standing. Compare also *Acme Home Improvements Ltd.*, *supra*, footnote 40.

[126] (1958), 12 D.L.R. (2d) 150 (Ont. H.C.), at pp. 154-5.

[127] And see *re Workmen's Compensation Act: re Rammell*, *supra*, footnote 36, approving *Acme Home Improvement Ltd.*, *supra*, footnote 40.

[128] [1945] 3 D.L.R. 437 (Sask. C.A.).

Relations Board made an order directed to the chief of police, as the employer's agent, to refrain from the unfair practice of refusing to negotiate with employee representatives. The Act gave the Board power to make orders, "5 (d) Requiring any person to refrain . . . from engaging in any unfair labour practice", and prohibited review of the Board's orders. The order was quashed for want of jurisdiction on the ground that the chief was neither an employer nor an employer's agent. It was declared that the Board had given itself jurisdiction by an erroneous decision on a question of law, and therefore acted without jurisdiction.[129]

Where workers engaged in the mining industry were to be excluded from the operation of the Trade Union Act, a Labour Relations Board decided that the obtaining of clay for brick-making did not involve mining, and granted a certificate in respect of the workers involved. The court disagreed with the Board and held the question to be a collateral issue and quashed the Board's order for want of jurisdiction.[130]

Similarly, it was held that the jurisdiction of a Labour Relations Board was conditional on the existence of an employer-employee relationship. That was held to be a preliminary issue which the court was entitled to decide on certiorari proceedings, as a matter of law.[131] In *re Workmen's Compensation Board* v. *C.P.R.*,[132] the Act gave the Board exclusive jurisdiction to determine all matters and questions arising under the Act, and declared that its decisions were to be final and not subject to review, but when the Board made an assessment with respect to a person who had been injured, the court held that his status was a collateral question and the Board was without jurisdiction when the court was of the

[129] There was also evidence of bias and serious procedural defects. It is submitted that the case is logically indefensible on the issue of jurisdiction. It is clear that the power to review on certiorari extends only to those of the Board's functions that are, or are deemed to be required to be, judicial in nature (see McDonald J.A. at p. 455). If the Board has no power to decide whether a particular individual can be subject to an order to refrain from an unfair practice, and the power to make such an order is conditional upon the individual's status according to absolute standards, or according to the opinion of the court, then the Board can not be deemed to act, or be required to act, judicially in that respect, for it can have no choice in the matter, and certiorari would not lie (See *Joyce and Smith Co.* v. *A.G. Ont.* (1957), 7 D.L.R. (2d) 321 (Ont. H.C.), where the order in question was not judicial so could not be attacked on certiorari). On the other hand, if the Board is required to act judicially with respect to the question, then its decision, right or wrong, is within its jurisdiction.

[130] *Dominion Fire Brick & Clay Products Ltd.* v. *Labour Relations Board et al.*, [1946] 4 D.L.R. 130 (Sask. K.B.).

[131] *Lunenberg Sea Products Ltd.*, [1947] 3 D.L.R. 195 (N.S.S.C.).

[132] [1950] 2 D.L.R. 630 (Man. C.A.).

opinion that the man was not an employee. Again, where the business of market gardening was excluded from the operation of the Manitoba Vacations With Pay Act,[133] and the Labour Relations Board was empowered to decide questions as to the applicability of the Act, its orders were expressed to be final and conclusive and binding. Yet it was held that, whether or not the applicant was a market gardener, was a collateral matter, and the Board's order was quashed when it was declared to have erred in its classification.[134] Then in *re Canadian General Electric Ltd.*,[135] Wells J. was asked to quash a certification on the ground that the personnel in question exercised managerial functions and were therefore excluded by the Act from inclusion in a bargaining unit. The learned judge referred to the same "trite law" to which he later referred in the *Thibault* case,[136] that if the Board acted within the jurisdiction conferred by the Act, its decisions were not subject to review, by reason of the privative section. In this case, however, he went on to classify the question of managerial capacity as a collateral issue and quashed the certification for want of jurisdiction when his opinion differed from that of the Board.[137]

Duty to inquire

The misconception that error of law goes to jurisdiction if the error concerns a matter "collateral" to the inquiry, or one "preliminary to jurisdiction", may have evolved from a misunderstanding of Lord Sumner's paraphrase of some remarks made by Lord Esher M.R. in *The Queen* v. *Commissioners for Special Purposes of the Income Tax*.[138] Lord Sumner said:[139] "As Lord Esher points out . . . if a statute says that a tribunal shall have jurisdiction if certain facts exist, the tribunal has jurisdiction to inquire into the existence of these facts as well as into the questions to be heard, but while its decision is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on certiorari by a Superior Court. On the other hand, the fact on which the presence or absence of jurisdiction turns may itself be one which can only be determined as part of the general inquiry into the charge which is being heard." If "jurisdiction"

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[133] S.M., 1947, c. 62.
[134] *Re F.C. Pound Ltd. and Manitoba Labour Board*, [1955] 5 D.L.R. 126 (Man. Q.B.).
[135] *Supra*, footnote 39. [136] See *supra* and footnote 126.
[137] See also *Farrell et al.* v. *Workmen's Compensation Board*, *supra*, footnote 31.
[138] (1888), 21 Q.B.D. 313, at p. 319.
[139] *Rex* v. *Nat Bell Liquor Ltd.*, *supra*, footnote 11, at p. 158.

in the phrase " jurisdiction to inquire into the existence of these facts" is used in the sense of a jurisdiction to decide the issue before the tribunal, the confusion is inevitable, for the two functions are entirely different. The statement makes sense only if by "jurisdiction to inquire into the existence of these facts" is meant the duty to ascertain whether the tribunal is properly seized of an issue within its competence to try; that is, is the subject of the inquiry within the area of judicial power? When a magistrate has jurisdiction to try charges of driving without due care and attention, he cannot extend the area of his judicial power by declaring that he can also try charges of manslaughter, and if he attempted to convict a person of the latter offence, his decision would be a nullity. He has a duty, before exercising his jurisdiction, to see that the charge before him is one within his power to try. If, however a person is before him, charged with an offence of which he has cognizance, he cannot be said to have lost cognizance, if on certiorari it is found that he misconstrued the meaning of "due care and attention" or convicted on irrelevant evidence, or even because, in the superior court's view, the offence actually committed by the accused was manslaughter, and not driving without due care.

Declining jurisdiction

Another ingenious device whereby the courts avoid privative clauses and quash orders for error of law—whether on the face of the record or not—is the idea that an inferior tribunal whose jurisdiction has been invoked, and is in the course of an inquiry leading up to its decision, declines jurisdiction if it wrongly decides that an issue of fact is not material to its inquiry. In the *Globe Printing* case,[140] an application was made for certification, and the issues before the Board were reduced to the question whether or not a majority of persons in the unit were union members in good standing. The company asked the Board to inquire whether any of the employees who had become members of the union had resigned, but the Board granted its certificate without making the inquiry. In considering the effect of the Board's refusal, the court regarded it as similar to a refusal to hear evidence, and referred to *Regina* v. *Marsham*[141] for the appropriate test to be applied. In that case, Lord Esher, after stating that the application was made on the ground that the magistrate had declined to exercise

[140] *Toronto Newspaper Guild* v. *Globe Printing Co.*, *supra*, footnote 10.
[141] (1892), 1 Q.B. 371, at p. 378.

the jurisdiction given to him by law, went on: "Now the form in which he is said to have declined jurisdiction is that he refused to hear certain evidence that was tendered before him, and it is suggested on behalf of the Board that such refusal at most, only amounted to a wrongful refusal to receive evidence and not to a declining of jurisdiction. The distinction between the two is rather nice, but it is plain that a judge may wrongly refuse to hear evidence on either one of two grounds: one, that even if received, the evidence would not prove the subject matter which the judge was bound to inquire into; the other, that whether the evidence would prove the subject matter or not, the subject matter itself was one into which he had no jurisdiction to inquire. In the former case, the judge would be wrongfully refusing to receive evidence, but would not be refusing jurisdiction as he would in the latter." Kerwin J., after applying the *Marsham* test, found a refusal of jurisdiction, as did Kellock J. with whom Estey and Locke J.J. concurred. Rand J. gave effect to the privative clause and thus must have found no defect in jurisdiction, while Cartwright J., who also referred to the *Marsham* test, classed the matter as a simple, though wrongful, refusal to hear evidence. In fact, there was no evidence as to which of the two grounds referred to by Lord Esher was relied on by the Board in refusing to make the inquiry, if indeed either ground was considered by the Board. The Supreme Court decided, without evidence, that the Board, when it erred in refusing to make the inquiry, did so pursuant to a ruling the court deemed the Board to have made, which ruling, of the two conceivable by the court, was the one which could be used by the court to find a want of jurisdiction. Even if the Supreme Court's findings were in some way supported by evidence, it is submitted that the test prescribed is meaningless in that context. Assuming for the moment that the manner of exercising power in some way affects the existence of a statutory authority, to suggest further that the subjective reason for committing an error in the exercise of power can render the power non-existent or continuing in full vigour, depending on whether the thought process is along line A or B, is surely not worthy of serious consideration. Perhaps the only argument that can be advanced in support of such a superficial proposition is the negative one put forward by Rand J. in the *Globe Printing* case[142] to justify the court's disregard of privative clauses, that is, that the legislature's acquiescence confirms the interpretation which has consistently been given by the courts.

[142] *Supra*, footnote 10.

The categorization dilemma

The attempt to transpose judicial remedies into the relatively new field of administrative law, without any critical examination of the diverse functions it is sought to control, has led to the misapplication of rigid judicial concepts to cover situations for which they were not designed. The disturbing element in this development is that few judges seem to be aware of the problem and of the impossibility of reconciling concepts applicable to proceedings in a court of law, with the basically different field of administrative discretion. It is accepted by most judges who direct their minds to the matter, as fundamental that certiorari and prohibition lie only with respect to proceedings of a judicial nature. The remedies are not applicable when the function is ministerial,[143] or administrative,[144] although dicta suggest that some action would be taken if bad faith were shown. It is equally clear that although an administrative body may be obliged to act judicially, it need not adopt the procedures of a court of law,[145] but may in the absence of a statutory direction to the contrary, follow the procedure that is its own. Thus characterization of proceedings as judicial does not have reference to formal attributes thereof, and must be founded on something "inherent in judicial process". Many attempts have been made to design tests whereby the judicial element in a proceeding may be identified, and intervention by the courts thereby warranted, but when some question of jurisdictional defect is raised, there appears a dilemma for which a solution is not attempted. If the function is judicial and is subject to supervision, then by definition, the body must have authority to decide the question in issue before it. If it has no power to decide the question in issue, so that a finding contrary to that of the court will be declared to have been made without jurisdiction, then it has no choice in the matter, and is not performing a judicial function, but a ministerial one, and neither prohibition nor certiorari will lie.

Error of law and jurisdiction

Error of law, that is, an incorrect interpretation or application of the law, is a ground for certiorari to quash if the error appears on the face of the record. That proposition has not been seriously

[143] *The King* v. *Roy ex. p. Duquesne*, [1931] 4 D.L.R. 748 (N.B.S.C.). See also the *Imperial Tobacco* case, *supra*, footnote 81.

[144] *Joyce and Smith Co.* v. *A.G. Ont.*, *supra*, footnote 129. See also *Calgary Power Ltd.* v. *Copithorne* (1959), 16 D.L.R. (2d) 241 (S.C.C.) and *Dobson et ux* v. *Edmonton (City) etc.*, *supra*, footnote 84.

[145] *Local Government Board* v. *Arlidge*, [1915] A.C. 120, and *Board of Education* v. *Rice*. *supra*, footnote 35.

questioned in Canada since 1922. The concept of error of law presupposes authority to make a finding on the law, and such authority must consist of power to make a finding on the law as it appears to the tribunal making it. The authority of a tribunal to make a particular finding cannot be dependant upon the views of a superior court as to the correctness of the finding. If the tribunal has jurisdiction, then error of law cannot destroy it, for error of law only affects the way in which jurisdiction is exercised, and does not alter or affect the nature of the subject of the jurisdiction. Even in *Rex* v. *Seguin*,[146] however, where recognition of this self-evident truth was implicit, a confusion of thought appeared, for it was suggested that a failure by the inferior tribunal to observe imperative procedural requirements might affect its jurisdiction. With respect, even breach of an imperative procedural requirement could not affect jurisdiction, for it would be no more than error in the exercise of power and not related to the matter of the area of authority. It seems that even if a statute declared that breach of procedural requirements would render proceedings null, it would not be by reason of a want, excess or declining of jurisdiction that the proceedings would be null, but because the statute said so. The proper rule was laid down by Lord Sumner in the *Nat Bell* case:[147] "The question of jurisdiction does not depend upon the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the inquiry: and affidavits to be receivable must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry." This clear and precise statement of the law has never been directly denied in Canada, but it has often been ignored. No one could seriously suggest that the clear meaning of a statute, passed by a Canadian legislature, acting within its constitutional limitations, should not be given effect. Yet that is exactly the inference to be taken from the statements of many Canadian judges.[148] It seems that because a want of jurisdiction is the only valid excuse for ignoring the clear words of a statute, simple errors of law and procedure are called defects of jurisdiction, without any real attempt to justify such a claim.

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[146] *Supra*, footnote 15.

[147] *Supra*, footnote 11, at p. 154. In this passage Lord Sumner is quoting Lord Denman's remarks in *Reg.* v. *Bolton* (1841), 1 Q.B. 66, at p. 72 *et seq.*

[148] See Rinfret C.J.C. in the *Alliance* case, *supra*, footnote 2, particularly the passage quoted at the beginning of this article. See also O'Halloran J.A. in the *Safeway* case, *supra*, footnote 18, at p. 60.

The weight of evidence

Disparate concepts of jurisdiction are propounded by the members of the British Columbia Court of Appeal in the *Safeway* case.[149] There, the Act made the Board the sole judge of whether or not any person was an employee. While the court did not expressly deny that that was the clear meaning of the statute, its reasoning seemed to be as follows: the Board found the persons in question were employees within the Act. In the court's opinion, that finding was against the weight of evidence. to make a finding against the weight of evidence is to commit an error in law. Error in law would not support certiorari to quash where it did not appear on the record. The legislature did not mean what it said when it declared the Board to be the tribunal to decide whether persons were employees, but instead, intended the courts to rule on the question; and, as the court's view differed from that of the Board, the Board's finding was a nullity.[150] The Supreme Court of Canada made little pretence of restricting itself to a supervisory role, and appeared to accept the Court of Appeal's reasoning without question. The court clearly weighed the evidence before the Board, and restored the Board's decision only after finding it to be "consonant with a rational appreciation of the situation presented". If, in fact, the Board's jurisdiction depended upon the accuracy of its finding on the question of employee status, then, whether or not its appreciation was rational or irrational must be irrelevant, and only a positive finding by the Supreme Court that the Board's interpretation of the evidence was correct would justify the court in restoring the Board's order. In fact, the court did not direct its mind to the question of jurisdiction, but treated the case as an appeal on the merits.[151]

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[149] *Supra*, footnote 90 and discussion *supra* p. 356.

[150] If the statute can be given that interpretation, then the Board has no jurisdiction to make any finding on the question, and its orders would be nullities whether its finding was right or wrong, so that the Board could never issue a certificate to a union as bargaining agent until a superior court had ruled on the question of employment. In view of the consistently differing opinions expressed by the trial courts, the courts of appeal, and the Supreme Court, presumably, jurisdiction would not be finally established until the Supreme Court so found.

[151] *Supra*, footnote 21. See also *Smith & Rhuland Ltd.* v. *The Queen*, [1953] 3 D.L.R. 690, where the Supreme Court of Canada compelled a labour board to certify a union after the board had refused to do so on a ground which the majority of the court thought to be irrelevant. The court held that either the board had no discretion in the matter, or that it had no right to exercise its discretion on the grounds stated, and thus had exceeded its jurisdiction in failing to certify. If this reasoning is valid, then perhaps any conclusion with which the court does not agree is made without jurisdiction, because it must be founded on irrelevant material.

Public utility cases

A rather curious reluctance to interfere with administrative decisions on utility matters is displayed on appeals relating to the question of public convenience and necessity. In *Veterans Sightseeing and Transportation Co.* v. *Public Utilities Commission*,[152] the statute provided an appeal to the British Columbia Court of Appeal from a decision of the Commission. The granting of a certificate of public convenience and necessity was appealed on the grounds that the Commission had erred in finding the licence necessary for the public convenience, and that it properly conserved the public interest. The majority held that the Commission was acting as an administrative body and exercised its discretion as a matter of policy and expediency. It is submitted that such finding should have sufficed to dispose of the appeal, but the court went on to say: "Nevertheless, the Commission 'must act judicially', that is, 'fairly and impartially'."[153] O'Halloran J.A., dissenting, would have allowed the appeal on the ground that the Commission's decision was irreconcilable with "facts upon which the evidence leaves no room for doubt".

In *Union Gas Co. of Canada Ltd.* v. *Sydenham Gas & Petroleum Co. Ltd*,.[154] an appeal was taken from a decision of the Ontario Fuel Board granting a certificate of public convenience and necessity. The Court of Appeal[155] held that the question of public convenience and necessity was one of fact, and that the Board had drawn the wrong conclusion from the evidence. In the Supreme Court of Canada, Locke J. agreed with the unanimous opinion of the Court of Appeal, but, notwithstanding that the Act provided that,[156] "With leave of a judge thereof, an appeal shall lie on any question of law or fact to the Court of Appeal from any decision of the Ontario Fuel Board, granting or refusing to grant a certificate", the majority in the Supreme Court held that the question of convenience and necessity was one of administrative opinion for the Board only.

Again, *in Memorial Gardens Association (Canada) Ltd.* v.

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[152] *Supra*, footnote 121.

[153] It is interesting to speculate as to the possible outcome in this case had the court found the Commission had failed to act "fairly and impartially". Also, how can a body under a positive duty to act judicially, exercise its discretion as a matter of policy and expediency? The words "judicial" and "administrative" lose all meaning when used in this context.

[154] *Supra*, footnote 121.

[155] [1955] 4 D.L.R. 600.

[156] Municipal Franchises Act, R.S.O., 1950, c. 249, s. 8 (4), as am. by 1954, c. 60.

Colwood Cemetery Co. et al.,[157] an appeal was taken from a decision of the Public Utilities Commission to grant a certificate of public convenience and necessity. The British Columbia Court of Appeal[158] allowed the appeal, on the ground (*inter alia*) that, although the Commission had a discretion to be exercised in accordance with policy, yet "the Commission has got to find necessity as a prerequisite in exercising their relevant powers, and the meaning of this word [necessity] has been fixed by a series of decisions".[159] Thus: "The [Commission] can only have a policy in harmony with the Act as construed by the Courts." The *Union Gas* case was distinguished on the ground that the case at bar turned on a point of law. It was held that the Commission had misconstrued the Act, resulting in their misdirecting themselves and thereby erring in law. The Supreme Court did not agree with the Court of Appeal and Abbott J., with whom Cartwright J. concurred, said the question of convenience and necessity was neither one of fact nor law, but of administrative discretion. "As this Court held in the *Union Gas* case, this is not a question of law upon which an appeal is given, and the Court below was therefore without jurisdiction. It would have been otherwise if it were shown that the Commission had given a meaning to the words of the statute which, as a matter of law, they could not bear." Again we see the Supreme Court of Canada basing its ruling on a want of jurisdiction. There can be no doubt that the Court of Appeal had jurisdiction to hear the appeal, for the statute gave it jurisdiction in express words. Yet, according to our highest court, a decision which, in the opinion of that court, was wrong in law, took away the jurisdiction which had been given to the Court of Appeal by statute. In view of this, one can fairly conclude that the observance of law is a condition of jurisdiction, notwithstanding the occasional learned argument to the contrary.[160] In each of these three cases, provision for appeal was made by statute. It seems that a court may be less likely to upset a decision of an administrative body when the legislature gives the court a clear authority to do so than when the legislature in express words prohibits curial intervention of any kind.

The boundaries of discretion

Where it is clear that an officer or body has a discretion to exercise in the performance of his duties it has been held again and

[157] *Supra*, footnote 121. [158] (1957), 9 D.L.R. (2d) 660.
[159] *Ibid.*, per Sydney Smith J.A., at p. 660.
[160] See D. M. Gordon, The Observance of Law as a Condition of Jurisdiction (1931), 47 L.Q. Rev. 386, 557.

again that the court will not compel the exercise of the discretion in any particular way, so long as it is exercised.[161] Yet it seems the discretion must be exercised only when there is some evidence to go on,[162] for to make a decision without any evidence to support it has been said to be error in law.[163] Furthermore, the evidence must be sworn when the proceeding is a judicial one.[164] Where there is, in the court's opinion, a total lack of evidence, even the plain words of a statute will not prevent the exercise of the discretion to grant certiorari where judicial minds are "outraged by seemingly arbitrary if not irrational treatment of questions raised".[165] Even a so-called absolute discretion was interfered with when it "was manifestly against sound and fundamental principles", for then it seems the discretion has not been exercised at all.[166] In *re Commercial Taxi*,[167] where a statute provided that the Alberta Highway Traffic Board "may in its sole discretion" grant or refuse a licence and that its decision was to be final, the Board was compelled to issue a licence when its refusal to do so appeared arbitrary and unjust. Even the broadest discretion must be exercised on reasonable grounds, or to put it another way, if it is

[161] See *The King* v. *Roy ex p. Duquesne*, *supra*, footnote 143; *Segal* v. *Montreal*, *supra*, footnote 120; *R.* v. *Seguin*, *supra*, footnote 15; *re Low Hong Hing*, *supra*, footnote 45; *Poizier* v. *Ward*, [1947] 4 D.L.R. 316 (Man. C.A.); *re Martin*, [1949] 2 D.L.R. 559 (B.C.S.C.); *Sunshine Valley Co-operative* v. *Grand Forks*, [1949] 2 D.L.R. 51 (B.C.C.A.); *Fawcett* v. *Euphrasia Township*, [1949] 3 D.L.R. 588 (Ont. H.C.); *The King* v. *Registrar of Companies*, [1950] 3 D.L.R. 507 (B.C.S.C.); *re Hammond*, [1950] 4 D.L.R. 26 (N.S.S.C.); *re Dyke and McEachern*, [1950] 4 D.L.R. 602 (Ont. C.A.); *Rex ex rel Lee* v. *Estevan*, [1952] 1 D.L.R. 362 (Sask.H.C.), confirmed by the Supreme Court in [1953] 1 D.L.R. 656; *Acme Farmers Dairy Ltd.* v. *Hamilton* (1958), 11 D.L.R. (2d) 109 (Ont. C.A.).

[162] *Childrens' Aid Society of the Catholic Archdiocese of Vancouver* v. *Salmon Arm*, *supra*, footnote 13. But compare Lord Sumner's comments as to the significance of a complete lack of evidence in the *Nat Bell* case, *supra*, footnote 11. See *Dauphin* v. *Director of Public Welfare* (1956), 5 D.L.R. (2d) 274 (Man. C.A.).

[163] See *Municipal Spraying & Contracting Ltd.* discussed, *supra*, footnote 38.

[164] See the *Perepolkin* case, *supra*, footnote 9.

[165] Per Rand J. in the *Globe Printing* case, *supra*, footnote 10, at p. 573. In that case, Rand J. defined the issue before the court as that of determining the boundaries of the contemplated scope of action within which the legislature intended the statutory body to act.

[166] *Re Sunshine Valley Co-operative Association*, [1949] 1 D.L.R. 234 (B.C.S.C.). The Municipal Act provided that a council "may, by the unanimous vote of all the members present, refuse in any particular case to grant the request of the applicant for a [trade licence]." Wilson J. granted mandamus to compel the council to issue the licence when he found it had improperly refused to do so. The decision was reversed on appeal, *supra*, footnote 161, when the Court of Appeal found the council had exercised its discretion properly and reasonably, but the Court of Appeal did not indicate any disagreement with the principles enunciated by the trial judge.

[167] *Supra*, footnote 50.

shown that a discretion was exercised arbitrarily, or on improper grounds, then it will not be permitted to stand.[168] Although a Board was authorized to refuse to grant a licence, in its discretion, without giving any reasons, it was required to grant a licence when it appeared to the court likely that the Board had failed to give the applicant a proper hearing.[169]

The area of discretion must, of course, be determined by reference to the enactment bestowing discretion, and the courts, while repeating that they will not review the merits of a decision, are careful to qualify that position by maintaining that the exercise of a statutory discretion will not be interfered with, (a) so long as the exercise of discretion is not governed by irrelevant considerations,[170] (b) so long as there is no evidence of lack of good faith,[171] and (c) no bad faith is shown,[172] and (d) unless manifest injustice results.[173]

In *re Workmen's Compensation Board ex p. Kennedy*,[174] the words "Where it is made to appear to the Board" were construed to mean "where there are reasonable grounds for making a decision", and the propriety of the decision was held to be subject to review and to correction by mandamus. Words obviously intended to confer a discretion are judicially interpreted to take away any discretion. The statute under consideration in *The Queen ex rel. F. W. Woolworth Co. Ltd. and Slabick et al.* v. *Labour Relations Board of Saskatchewan*[175] not only gave the Board exclusive authority to determine the matter in issue, but it also contained an absolute prohibition against judicial intervention. The Saskatchewan Court of Appeal ignored the privative clause and declared that the Board's finding was against the evidence. The court also thought the Board had considered evidence of extraneous matters. The decision is of doubtful value to a student of the principles governing judicial review of administrative proceedings. One judge said the Board's order should be quashed for error in law. Another said the Board was bound by the definition of "employee" contained in the Act, and thus the

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[168] Compare *Roncarelli* v. *Duplessis*, [1952] 1 D.L.R. 680 (Que.), affd. (1958), 16 D.L.R. (2d) 689 (S.C.C.).

[169] *Ross* v. *Board of Police Commissioners of Toronto*, [1953] 3 D.L.R. 597 (Ont. H.C.).

[170] *Re Hammond*, *supra*, footnote 161.

[171] *Re Dyke and McEachern*, *supra*, footnote 161.

[172] *Rex ex rel Lee* v. *Estevan*, *supra*, footnote 161 affd. without reasons by S.C.C., [1953] 1 D.L.R. 656.

[173] *C.P.R. Express* v. *Kindzierski et al.*, [1954] 2 D.L.R. 715 (Man. C.A.).

[174] [1954] 2 D.L.R. 426 (N.B.C.A.).

[175] [1954] 4 D.L.R. 359 (Sask. C.A.).

Board's finding must be reversed. A third disagreed with the majority on the effect of the evidence, and said that even if the Board's finding was in error, mandamus would not lie to reverse the decision, because the Board, acting judicially, did in fact hear and determine the matter.[176] Even in the odd case where the courts find the discretion to be unfettered and the person or body exercising the discretion entitled to apply a subjective standard in coming to a decision, the way is still left open for intervention in the case of bad faith.[177]

V. *Review Compared with Appeal.*

The courts have assumed a far wider power of control over administrative bodies in their so-called "supervisory capacities" by means of the prerogative writs than would be possible on appeal, for they readily admit fresh evidence on questions said to be of jurisdiction, and on questions of natural justice and error of law going to jurisdiction. So long as observance of the law, substantive and procedural, is regarded as a condition of jurisdiction, there is no logical limit to the court's power of review, for an administrative body will only be within its jurisdiction, and therefore immune from review, if its findings successfully anticipate those of a majority in the final court of appeal. Indeed, although lip service is still paid to the notion that the courts do not sit in appeal on any point within the inferior tribunal's jurisdiction, the weight of precedent is now such that little attempt is made to disguise the appellate jurisdiction assumed. In *Major* v. *Beauport*,[178] an application to the Supreme Court for leave to appeal was dismissed. In giving judgment for the court, Taschereau J. said: "The proper remedy available to the appellant, who raises the question of the validity of a provincial law and of a municipal by-law, is by way of prohibition to restrain the Magistrate from proceeding in the matter, or by certiorari, to have the judgment *revised*."

Cases in which decisions have been quashed for defect of jurisdiction arising from a breach of the rules of natural justice, must be criticized on the same reasoning applicable to error of

[176] In the Supreme Court of Canada, [1955] 5 D.L.R. 607, the Court of Appeal was upheld. Locke J. also felt that the Board's findings of fact were contrary to conclusive evidence.

[177] See *Calgary Power Ltd.* v. *Copithorne*, *supra*, footnote 144, where it was held that a minister in exercising certain powers was answerable only to the legislature "apart from bad faith". And see also the reference to bad faith in the *Nakkuda Ali* case, *supra*, footnote 85. The courts have not indicated what kind of action they might take in such a case, if bad faith were shown.

[178] [1951] 1 D.L.R. 586, at p. 588 (S.C.C.).

law cases, for, a failure to observe the *audi alteram partem* rule, or to act in good faith, is no more than an error committed during the exercise of jurisdiction, and cannot be said to remove from the area of judicial authority a subject within that area.[179]

Aspects of "defective" jurisdiction

The object of this article is not to describe the law as it ought to be, but to ascertain the law as it is. If one accepts, however, as the law, the various reasons assigned by the judges for the conclusions they have reached, it is apparent that endless confusion and uncertainty must result. The various theories put forward as aspects of the concept of want of jurisdiction have all been attempts to justify the appellate jurisdiction assumed by the courts over administrative bodies performing functions of a different kind to those with which the courts have become familiar. The jurisdiction ascribed to administrative bodies, and implicit in the case law is one involving discretion only to be right, to continue to be right, and to do what the courts think proper, in a manner approved by the judges. Any examination of the nature of that jurisdiction is avoided, as it must result in a recognition of the conflict in terms that is involved.

The fallacy of the theory that procedural error and error in law can in some way destroy jurisdiction has led to some ingenious rationalizations. Thus we have the concept of "small defects of jurisdiction",[180] which may or may not constitute grounds for prohibition, depending on how serious a view the court takes of the defect. It is submitted that, if it is in the discretion of the court to issue prohibition or to withhold it, depending on the court's view of the importance of the defect, then the court, in granting the remedy, may be said to be destroying a nearly complete jurisdiction; and in denying the remedy to be perfecting an otherwise incomplete jurisdiction. In other words, a superior court can create or destroy jurisdiction, in its discretion.

[179] In *White* v. *Kuzyck*, [1951] 3 D.L.R. 641, the Judicial Committee of the Privy Council declared that bias and prejudice in the tribunal and a denial of natural justice did not affect jurisdiction. See also *Jurak et al.* v. *Cunningham et al. supra*, footnote 47. *Cf.* Lord Goddard C.J. in *Regina* v. *Paddington North and St. Marylebone Rents Tribunal ex p. Perry*, [1956] 1 Q.B. 229, at p. 237: " . . . if a justice is biased, he is, in effect, a judge in his own cause, and, as no one can be a judge in his own cause, certiorari will be granted because, the justice had no jurisdiction, as he was sitting in a matter in which he was interested."

[180] See D.C.M. Yardley, *op. cit.*, *supra*, footnote 8, at p. 343, where he suggests that if the jurisdictional objection is sufficiently material, the superior court will allow prohibition to issue, but otherwise, it is likely to refuse the remedy within its discretion.

Similarly, we have the concept of a "contingent jurisdiction" that may rest on acquiescence of a party. It is submitted that jurisdiction can never be contingent on the act or omission of a party, but depends solely on the terms of the enactment creating the jurisdiction, and the proper question is not whether or not a contingent jurisdiction has been made complete, but whether the subject matter of the inquiry is within the area of power expressed or implied by the statute. Neither can an uncertain jurisdiction be validated by consent, for the area of judicial power does not depend on the parties in any way but on the statute creating that power. There can be no mid-point between jurisdiction and want of jurisdiction.

Judicial function —the key to control

It is submitted that the grounds for certiorari and prohibition are separate and distinct and can be grouped under three general headings: defect of jurisdiction, breach of natural justice, and error of law on the face of the record; and that neither the second nor the third ground can properly give rise to the first. Once jurisdiction is established, any misuse of jurisdiction is error only. It is submitted that, while this view accords with principle and authority, the weight of precedent is now such that some change in principle may be required, or at least a modified terminology adopted. In dealing with labour boards, immigration officers, and other administrative bodies, the courts have not acknowledged that these bodies are essentially different from courts of law. According to authority, certiorari lies only to a body exercising a function of a judicial kind. Before granting certiorari, the courts first find the function in question to be judicial in nature.[181] Having so found, it is difficult to delimit the extent of the bodies' judicial function to which certiorari is applicable, and in fact any such demarcation must be purely arbitrary.[182]

[181] In *re Securities Act: Duplain* v. *Cameron et al.*, *supra*, footnote 107. Proctor J. A. said at p. 214 *et seq*: "I see no necessity of entering on an inquiry, however interesting such an inquiry might be, as to whether the commission, in making the order complained of, were exercising a judicial or an administrative function. Whatever the decision on that question might be, the order made and questioned herein, in my opinion, was within the jurisdiction of the Board and is not reviewable by this Court on a certiorari application."

[182] The reasoning is quite circular: no hearing was afforded by the body to a person affected by a decision. In a judicial proceeding, a person to be affected is entitled to notice and a hearing. As the person was affected, he should have had a hearing. Therefore, the proceeding was a judicial one and must be quashed for failure to act judicially.

In fact, the courts do exercise a large measure of control over administrative authorities, and there appears to be no good reason for preserving

VI. *Conclusion.*

The purpose and function of administrative authority differ basically from those of judicial authority.[183] If the courts are to exercise a degree of supervision, the applicable principles should be ascertainable, and a measure of consistency should obtain. If traditional remedies are to be relied on in the exercise of judicial supervision, there is a need for a restatement of basic principles in order that present uncertainties may be resolved. The former Chief Justice of the Supreme Court of Canada has described as absurd an attempt by the Quebec legislature to prevent judicial interference with the proceedings of a statutory tribunal.[184] With respect, that attempt is no more out of harmony with reason than is the argument by which it was circumvented; that is, that the manner in which a statutory body exercises its jurisdiction can cause that jurisdiction to evaporate. Notwithstanding the reasons given by the courts to justify this interference with administrative proceedings, it is apparent that many "defective jurisdiction" cases have turned not on a question of jurisdiction, but on a denial of natural justice or an error of law rationalized into a defect of jurisdiction, because "the judicial mind is outraged by seemingly arbitrary, if not irrational treatment of questions raised".[185]

Prevailing uncertainties in judicial review can be resolved by defining "jurisdiction" as the area of authority. The decision of an administrative body is a nullity only if its jurisdiction has not been invoked, or if it has purported to act beyond the area of its authority. A void decision cannot be quashed, for it amounts to nothing, but any act or refusal to act founded on such void decision, can properly be prohibited or compelled, or brought to nothing. A decision made by a body acting within its area of authority, but made in error of law appearing on its face, or after a procedural defect or denial of natural justice, is voidable only, and must bind unless and until quashed. It is to be hoped that the Supreme Court of Canada will take the opportunity to restate these principles.

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the myths that such control extends only to proceedings of a judicial nature. Griffith and Street, Principles of Administrative Law (2nd ed., 1957), p. 231 describe the position aptly in these words: "The courts have readily held that these orders [in Canada the writs of certiorari and prohibition] can lie to administrative tribunals deciding issues of law and fact between parties. They have, however, usually said that only 'judicial' acts can be supervised by them. At the same time, they have wished to control as many forms of administrative action as possible. The result is a strained and still imprecise interpretation of 'judicial'."

[183] This proposition is not unversally accepted. See comment in (1956-57), 3 Br. J. of Ad. L. 37.

[184] Rinfret C.J.C. in the *Alliance* case, *supra*, footnote 2.

[185] Per Rand J. in the *Globe Printing* case, *supra*, footnote 10, at p. 573.