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### FIRA AND THE RULE OF LAW

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*The Foreign Investment Review Act has been a source of controversy since its enactment in 1973. Much of the controversy has to do with the way it has been administered. This article reviews certain problems with the Act's administration and concludes that the application of developing administrative law principles would force the Federal Government to modify or eliminate many of the key policies which are the cause of complaint. In particular, the article explores the relevance of the duty of fairness as it has emerged from recent decisions of the Supreme Court of Canada.*

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*Depuis son entrée en vigueur en 1973, la Loi sur l'examen de l'investissement étranger provoque de vives controverses. C'est surtout l'exécution de la loi qui est source de difficultés. Dans cet article, les auteurs examinent certains problèmes dus à l'exécution de cette loi et en concluent que si l'on appliquait les nouveaux principes de droit administratif, le gouvernement fédéral se verrait forcé de modifier ou même d'éliminer nombre des règles fondamentales qui sont en butte à la critique. Les auteurs se penchent en particulier sur l'obligation d'être équitable et son rôle tel qu'il apparaît dans les jugements récents de la Cour suprême du Canada.*

#### Introduction

Little Canadian legislation has engendered as much controversy about its fundamental aspects as the Foreign Investment Review Act (the "Act").<sup>1</sup>

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<sup>1</sup> S.C. 1973-74, c. 46, amended S.C. 1976-77, c. 52.

This is, in some respects, surprising because many countries regulate foreign investment in one form or another. Indeed, the Canadian approach has been more candid than that in most jurisdictions, which often rely on exchange controls, competition regulation and indirect barriers to screen foreign investment.<sup>2</sup>

On the other hand, the screening of foreign investment under the Act does have very wide ramifications, determining as it does the initial rights of foreign investors to invest in Canada. This is an issue at the heart of the principles of the international economy.<sup>3</sup> It is an issue which is dealt with by international treaties<sup>4</sup> and is vital to Canada's most powerful allies. It is also an issue which affects the rights of Canadians who wish to sell their businesses to foreigners or associate with them in joint ventures.<sup>5</sup> Accordingly, it is perhaps not surprising that the administration of the Act has

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<sup>2</sup> See, for example, the administrative and other complexities of the French laws controlling foreign direct investment discussed by C. Torem & W. Craig, *Foreign Investment in France* (1971), 70 Mich. L. Rev. 285.

<sup>3</sup> The advantages and disadvantages of foreign direct investment is a global issue: see I. Livtak and C. Maule, *The Multinational Firm and Conflicting National Interests* (1969), 3 *Journal of World Trade Law* 309. For an international attempt to draft guidelines in this area, see the O.E.C.D. Declaration on International Investment and Multinational Enterprises (1976).

<sup>4</sup> There is a possibility that the Act could be a breach of some Friendship, Commerce and Navigation treaties between Canada and some of her most powerful allies, e.g. The Convention concerning the Rights of Nationals and Commercial Shipping Matters between Canada and France, signed May 12, 1933, entered into force November 10, 1936, implemented by The Canada-France Convention Act, S.C. 1932-33, c. 30 Article 3(3) of that Convention states:

"Moreover, each of the High Contracting Parties agrees not to impose upon persons, societies or companies, nationals of other High Contracting Party, in respect of property, rights and interests which they legally possess, any measure of disposition, limitation, restriction or expropriation, for reasons of public utility or of general interest, which shall not be applicable under the same conditions to its own nationals or societies."

The administration of the Act was, in 1983, found to constitute a breach of Canada's obligations under the General Agreement on Tariffs and Trade (GATT). See *infra*, footnote 23. If GATT is extended to cover services, an object pursued by the United States, the FIRA process could seriously be in breach of Canada's GATT obligations.

<sup>5</sup> Called by one study of the FIRA process "the forgotten participants in the review process": see R. Schultz, F. Swedlove and K. Swinton, *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act*, Working Paper No. 6 — Economic Council of Canada (1980), p. 123. The same study continues:

"There is the additional problem of the fate of companies whose acquisitions are disallowed by Cabinet. According to one participant, such companies, which may in fact not have participated in the review process, can suffer doubly in that they will be "open to rape", i.e. their value will be discounted to Canadian, and thus non-reviewable purchasers . . . if, in fact, such discounting does occur, the inability of these companies to defend their interests during the review process constitutes a serious disadvantage and hardship for them."

been subjected to intense scrutiny.<sup>6</sup> Furthermore, it would appear that such administration does hold open the possibility of, and has in fact been subject to, abuse of certain fundamental legal principles.

Prior to the enactment of the Act, one of the authors cautioned that the regulation of foreign investment was subject to the basic legal constraints of constitutional and international law.<sup>7</sup> Those constraints remain and are being tested. However, there is another constraint which may have as much, or more, practical significance. We refer to the principles of administrative law, particularly as they have been emerging in recent years.

In this article we will examine the screening process as carried out by the Government of Canada pursuant to the Act. We will attempt to shed some light on the continuing criticism of that process and to demonstrate that some of those criticisms may be valid when viewed in the light of basic principles of administrative law, particularly the emerging duty of fairness and the doctrine of *ultra vires*.

### I. The FIRA Review Process

The essence of the foreign investment review process is a screening of foreign investment proposals by the Canadian Government coupled with a bargaining by the Canadian Government with the foreign investor.<sup>8</sup> To administer this process, Parliament established the Foreign Investment

<sup>6</sup> See R. Schultz, F. Swedlove and K. Swinton, *ibid.*, where the authors make an extremely critical analysis of the foreign investment review process in Canada. The authors conclude at pp. 158-159:

"The foreign investment review process, as it currently exists, has resulted in a situation in which Cabinet has failed dismally to exploit the power of political control mechanisms for the primary purposes for which they were conferred. But it has resulted in a process for which they do not have to give an effective accounting for the actions and decisions they do take. Surely, it is the worst of all systems: political control without meaningful effect and decision-making without answerability . . . True and meaningful accountability requires that all the participants, not just some, have the appropriate resources with which they can assess the behaviour of others. One of, if not, the most important resources is meaningful information. This is denied in the present FIRA process."

See also Canadian Bar Association brief to The Hon. Herb Gray, Minister of Industry, Trade and Commerce on the Foreign Investment Review Act, September 24, 1981.

<sup>7</sup> See E.J. Arnett, *Canadian Regulation of Foreign Investment: The Legal Parameters* (1972), 50 Can. Bar Rev. 212. While most writers accept that the Act is *intra vires* the Parliament of Canada, there is an ongoing controversy as to whether the provinces can restrict foreign investment in areas such as securities regulation and trust company regulation: see E.J. Arnett, *loc. cit.*, at pp. 228-229.

There is also a possibility that the Canadian Charter of Rights and Freedoms will affect the workings of the FIRA process. However this may depend on the courts "interpreting in" the protection of property and contractual rights into the Charter. It is unlikely the Supreme Court of Canada will so interpret the Charter in view of the deliberate political decision to omit the protection of property rights from the Charter.

<sup>8</sup> See works cited in footnote 6 for a more technical description of the FIRA process.

Review Agency ("FIRA"). FIRA, however, does not make any of the decisions. All it does is "advise and assist the Minister in connection with the administration" of the Act.<sup>9</sup> The important decisions are made by the Minister responsible for the administration of the Act (the "Minister")<sup>10</sup> and the Governor in Council.<sup>11</sup>

The process is commenced by the filing of a notice<sup>12</sup> with FIRA by the foreign investor who, in the Act, is defined as a "non-eligible person" ("NEP").<sup>13</sup> Such notice must be filed by any NEP, and any group of persons any member of which is a NEP, who proposes to acquire control of a Canadian business enterprise or proposes to establish a new business in Canada unrelated to any existing business of such NEP or group.

Having filed such notice the NEP (or group) has discharged his legal obligation at that point. He can, if he wishes, proceed to implement the investment proposal. If, however, he implements the investment before the outcome of the review process is known, he runs the risk of the Canadian Government attacking such investment in the courts if the result of the review process is an order-in-council disallowing the investment.<sup>14</sup>

The Act requires FIRA to refer the foreign investor's notice to the Minister for his review for the purpose of assessing whether, in his opinion, the "investment is or is likely to be of significant benefit to Canada".<sup>15</sup> However, it is between the receipt of the notice and the forwarding of it to the Minister that, in the normal case, the screening and negotiation by FIRA in fact takes place.<sup>16</sup> As agent for the Minister, FIRA analyses the information contained in the notice, which is referred to even by FIRA as an "application". FIRA gives a copy of the notice, or a summary thereof,

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<sup>9</sup> S. 7(1). In this and subsequent footnotes a reference to a section should be read as a reference to a section of the Act, unless the contrary is indicated.

<sup>10</sup> Ss. 8-11. The Minister responsible is the Minister of Industry, Trade and Commerce.

<sup>11</sup> S. 12.

<sup>12</sup> S. 8(1).

<sup>13</sup> S. 3(1) defines non-eligible persons. This definition is further expanded in the regulations issued under the Act, see P.C. 1977-606; *SOR/77-266*, amended by P.C. 1978-2309; *SOR/78-589*. Section 3 of those regulations extends the definition of a non-eligible person to Canadian citizens and permanent residents in certain circumstances. Such a definition is arguably a violation of the mobility rights provisions in section 6 of the Charter of Rights and Freedom.

<sup>14</sup> In particular if the Government seeks an order rendering the investment "nugatory" under section 20.

<sup>15</sup> S. 9.

<sup>16</sup> While the following description of the screening and negotiation process is based on first-hand experience and knowledge of one of the authors over a ten-year period, it has been described in a similar fashion elsewhere, see R. Schultz, F. Swedlove and K. Swinton, *op. cit.*, footnote 5, pp. 30-81.

to the governments of each of the Provinces affected by the investment. FIRA also gives a copy to the Director of Research and Investigation of the Bureau of Competition Policy, who administers the Combines Investigation Act.<sup>17</sup> FIRA seeks advice from other departments of the Canadian Government which may have policies or interests relating to the investment proposal or the industry to which it relates. Finally, FIRA is contacted by and listens to Canadian interveners of one sort or another. These interveners may be potential purchasers of the target company (whose intervention may have been solicited by other interested government departments), competitors who would not relish competition from the NEP, trade unions whose members may be affected or members of Parliament or other local politicians with a point of view. However, FIRA is very circumspect in such discussions with interveners in view of the strict confidentiality standards imposed by the Act.

FIRA may meet or communicate with representatives of the NEP for the purpose not only of understanding the proposal, but also of attempting to obtain undertakings from the NEP. Such undertakings normally take the form of binding agreements between the NEP and Her Majesty the Queen in right of Canada. These undertakings may relate to one or more of many areas of FIRA concerns, such as employment, Canadian participation as managers or owners, transfer of technology or sourcing in Canada.

Based upon such undertakings, FIRA's analysis of the proposal, including consideration of the representations made by the Provinces, by the Bureau of Competition Policy or other departments of the Federal Government or, perhaps, by interveners of one sort or another, FIRA places the so-called application before the Minister. It is understood that sometimes the Agency makes a recommendation to the Minister and sometimes it does not. In any event, the Minister assesses whether the investment meets the test of significant benefit to Canada and makes a recommendation to the Governor in Council as to allowance or disallowance of the investment.<sup>18</sup> Ultimately, the Governor in Council has the obligation to consider the Minister's recommendation and summary of proceedings and by order-in-council to allow or disallow the investment "having regard to the factors enumerated in subsection 2(2)" of the Act.<sup>19</sup>

The Minister is given wide powers under section 19 to apply to the courts for injunctive relief, or an order under section 20 rendering an investment "nugatory", where a completed investment has been disallowed or, furthermore, injunctive relief where a proposed investment has not yet been allowed.

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<sup>17</sup> R.S.C. 1970, c. C-23.

<sup>18</sup> Ss. 10, 11.

<sup>19</sup> S. 12.

What are the things that are complained of about this process? Among the most common are the following:<sup>20</sup>

(1). The foreign investor negotiates only with FIRA. He cannot, except perhaps in the most exceptional circumstances, negotiate with the Minister, let alone the Federal Cabinet; yet they make the decision. The FIRA officials do not have the authority to bind the Cabinet or even their Minister. Accordingly, the foreign investor must negotiate with someone who cannot make a commitment. In fact, the FIRA officials will frequently characterize their function as an attempt to assist the foreign investor in presenting the best possible proposal to their Minister. Hence, the foreign investor is in the position of extending an open offer to a hidden offeree who does not disclose his position. In other words, the foreign investor is "shadow boxing".

(2). The foreign investor often has no clear guidance as to where the threshold of significant benefit to Canada lies. FIRA has not set forth policy guidelines nor has it indicated what policies of other federal departments will be enforced. The NEP may be advised by FIRA of the policy "input" of other federal departments and agencies. He may not. He will not be advised, at least by FIRA itself, of the policy "input" of a province. He may or may not be advised if there is an intervener but, if he is, the identity of the intervener and details of its representations will not be disclosed.<sup>21</sup> The foreign investor finds this not only frustrating but unfair.

(3). The decision-making process remains shrouded in secrecy even after the decision is made. If the proposal is disallowed, Cabinet gives no reasons. If the proposal is allowed Cabinet may give public reasons if it

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<sup>20</sup> Again, while the following description of complaints about the screening process is based on practical experience of the FIRA process over a lengthy period by one of the authors, such complaints have been described in a somewhat similar fashion elsewhere; see R. Schultz, F. Swedlove and K. Swinton, *op. cit.*, footnote 5, pp. 85-111.

<sup>21</sup> Historically, FIRA did not advise applicants of interventions by potential Canadian purchasers. Often these interventions were quite elaborate and went so far as to involve the filing of notices by the Canadian intervener as though he were in fact an applicant so that FIRA compared such proposed Canadian acquisition with the foreign proposal being reviewed. In addition, the Federal Department of Industry, Trade and Commerce was often actively involved in promoting the interests of such potential Canadian purchasers and, apparently, promoting disallowance of the foreign proposal. However, it would appear that, as part of the substantial administrative reforms implemented subsequent to the Federal Budget of June 28, 1982, FIRA's policies on intervention were reviewed and it was decided that if a potential Canadian purchaser intervenes then this fact will be disclosed to the applicant, although not more. As to other third party interventions, it is understood that FIRA will now advise the NEP of the fact of such intervention and its general nature, but no details. For a discussion of such administrative reforms see E.J. Arnett, *New Developments in the Application of the Foreign Investment Review Act (1983)*, Representing a Foreign Business Client: Establishing in Ontario; Continuing Legal Education Seminar of the Law Society of Upper Canada. Similarly, FIRA will now often give the applicant an oral précis of relevant policies of other federal departments.

suits Cabinet's purposes. The desire of the foreign investor to know the reasons is disregarded. Accordingly, he tends to suspect an inadequate assessment or improper purpose if his investment is disallowed.<sup>22</sup>

(4). The negotiation of undertakings often causes criticism. It would be one thing if a standard governmental requirement on such matters as Canadian participation or Canadian sourcing were stipulated as a prerequisite of entry into the country. It is another thing to negotiate separate deals with separate investors who may or may not know the treatment accorded fellow investors. Furthermore, it is often argued, of course, that some of these undertakings distort normal patterns of trade and investment and are, indeed, contrary to certain of Canada's treaty obligations.<sup>23</sup>

Accordingly, while the enactment of the Act may have represented a direct and open way of dealing with the admission of foreign investment, the procedure provided for in the Act and the way that the procedure may from time to time be administered contain arbitrary and unfair elements. The recommendation of statutory amendments is not the concern of this article. What is our concern here is that the administration of the Act may be challengeable under existing Canadian legal principles.

## II. *The Statutory Requirements*

Let us turn to an examination of the specific statutory requirements for the exercise of the discretion to allow or disallow an investment proposal under the Act.

The factors to be taken into account in assessing whether a proposed investment by a NEP is or is likely to be of significant benefit to Canada have been specified by Parliament as follows:<sup>24</sup>

- “(a) the effect of the acquisition [of an existing business] or establishment [of a new business] on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada;
- (b) the degree and significance of participation by Canadians in the business enterprise or new business and in any industry or industries in Canada of which the business enterprise or new business forms or would form a part;
- (c) the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

<sup>22</sup> Section 14 of the Act contains strict confidentiality requirements, which FIRA takes very seriously. However, it would appear that these were enacted to protect the foreign investor and not the Government of Canada and should not be relied upon by the latter to keep information from the former.

<sup>23</sup> See, for example, GATT Panel Report; Canada — Administration of the Foreign Investment Review Act (L/5504), which held that Canadian sourcing requirements negotiated by FIRA violated the GATT Treaty.

<sup>24</sup> S. 2(2).

- (d) the effect of the acquisition or establishment on competition within any industry or industries in Canada; and
- (e) the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment''.

Accordingly, Parliament has not accorded to the Minister, or the Cabinet, an absolute discretion as to the grounds on which an investment will be allowed or disallowed. Rather, such allowance or disallowance is to be based on specific factors.

Furthermore, Parliament has specified the information and representations the Minister may review for the purpose of assessing such factors. In the first instance, the Minister, assisted by the Agency, must review:

- (1) the information contained in the notice,
- (2) any other information submitted to him by any other party to the investment.
- (3) any written undertakings given by any party to the investment, and
- (4) any representations submitted to him by a province that is likely to be significantly affected by the investment.<sup>25</sup>

Parliament has not said that the Minister can review representations submitted by another department or agency of the Federal Government or representations of any interveners.

If, on completion of his initial assessment,<sup>26</sup> the Minister is of the opinion that the investment proposal meets the threshold of significant benefit to Canada, then he must recommend allowance to the Governor in Council. If he does not reach such opinion, then he must notify the NEP.<sup>27</sup> Thereupon, the NEP may make further representations and give further undertakings to the Minister.<sup>28</sup> The Minister may also consult with any other party to the investment and, at the request in writing of any party thereto, with any person or authority named in the request.<sup>29</sup> In other words, only at this stage is the Minister authorized to consult with other parties and then only upon the written request of the NEP himself and subject to strict confidentiality requirements.

After such reassessment of the investment proposal, the Minister is obliged to reconsider his opinion in the light of such further representations

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<sup>25</sup> S. 9.

<sup>26</sup> S. 10.

<sup>27</sup> S. 11(1).

<sup>28</sup> S. 11(3)(a).

<sup>29</sup> S. 11(3)(b).

from the foreign investor and consultations with other parties to the investment and other specifically authorized parties. In the light of such representations and consultations he must make his recommendation to the Governor in Council as to whether the proposal meets the threshold of significant benefit to Canada.<sup>30</sup>

On receipt of a recommendation from the Minister, the Governor in Council must consider such recommendation and the summary submitted in connection therewith having regard to the specific factors set forth in subsection 2(2) of the Act. The Governor in Council is instructed that where "having regard to the factors enumerated in subsection 2(2)" he concludes that the investment meets the significant benefit test he shall by order allow the investment, but where he does not reach that conclusion he shall by order refuse to allow the investment. Hence, under the statutory provisions, Cabinet is only authorized to consider the recommendation and other material received by it from the Minister. It is arguable, therefore, that Cabinet is not entitled to consider other information that it may have or other representations that may be made to it or its individual members.<sup>31</sup>

### III. *The Duty of Fairness*

In recent decisions, the Supreme Court of Canada has established that administrative and executive bodies have a duty to follow fair procedures. A breach of such duty will render the administrative practice or decision subject to judicial review. The need to characterize administrative functions as "judicial" or "quasi-judicial" before the duty of procedural fairness arises has been eliminated by such decisions. Rather, the duty imposes on administrative and executive bodies a flexible standard, the requirements of which will vary depending on the nature and circumstances of the function being exercised. In any given case therefore two issues have to be decided: first, is the body in question subject to a duty to act fairly, and second, if it is, what is the scope of that duty. This jurisprudence is of great significance for the administration of the Act.

The first of the Supreme Court decisions was *Nicholson v. Halidman-Norfolk Regional Board of Commissioners of Police*.<sup>32</sup> This case concerned the termination of employment of a probationary police constable. While the Ontario Police Act<sup>33</sup> required a hearing before a non-probationary police officer could be subjected to any penalty, the regulations gave the Police Board the authority "to dispense with the services of any [probationary] constable within 18 months of his becoming a constable".<sup>34</sup> The probationary police constable (Nicholson) was not

<sup>30</sup> S. 11(4).

<sup>31</sup> S. 12(1).

<sup>32</sup> [1979] 1 S.C.R. 311, (1978), 88 D.L.R. (3d) 671.

<sup>33</sup> R.S.O. 1970, c. 351, now R.S.O. 1980, c. 381.

<sup>34</sup> R.R.O. 1970, reg. 680, s. 27(g).

given any kind of hearing or notice before termination of his employment, nor any reasons therefor. He applied for judicial review of the decision.

The Supreme Court of Canada held that even if principles of natural justice did not apply to administrative functions such as the termination of a probationary police officer's services, the general duty to be fair did apply. Laskin C.J.C., giving the majority judgment,<sup>35</sup> stated that while "the appellant clearly cannot claim the procedural protections afforded a constable with more than 18 months' service, he cannot be denied any protection. He should be treated fairly, not arbitrarily".<sup>36</sup> After citing English jurisprudence<sup>37</sup> on the duty of fairness to confirm the court's view that the duty was now a firmly entrenched common law principle, Laskin C.J.C. held that because there was procedural unfairness involved in the termination of Nicholson's employment, the decision of the Police Board should be quashed.

In the opinion of the majority of the Supreme Court the duty to be fair applied even if the statutory function were classified as administrative. Laskin C.J.C. pointed out that:<sup>38</sup>

. . . the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question . . .

Hence, while it must be conceded that the screening process under the Act does not involve judicial or quasi-judicial functions, it would appear that the Minister and the Cabinet may nevertheless have a duty to be fair.

The next major step in this important development of administrative law was the Supreme Court of Canada's decision in *Martineau v. Matsqui Institution Disciplinary Board* (No. 2).<sup>39</sup> This case concerned a decision by a Prison Disciplinary Board to sentence Martineau to 15 days solitary confinement for alleged "flagrant or serious" breaches of prison disciplin-

<sup>35</sup> Ritchie, Spence, Dickson and Estey JJ. concurred with Laskin C.J.C. Martland J.'s dissent was concurred in by Pigeon, Beetz and Pratt JJ. For an analysis of the dissent and the majority opinion see Jones, Administrative Fairness in Alberta (1980), 18 Alta. L. Rev. 351, at pp. 353-355.

<sup>36</sup> *Supra*, footnote 32, at pp. 324 (S.C.R.), 680 (D.L.R.).

<sup>37</sup> *Pearlberg v. Varty (Inspector of Taxes)*, [1972] 1 W.L.R. 534, [1972] 2 All E.R. 6 (H.L.); *Furnell v. Whangarei High Schools Board*, [1973] A.C. 660 (P.C.); *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109, at p. 118 (C.A.); *Regina v. Race Relations Board, ex parte Selvarajan*, [1975] 1 W.L.R. 1686, *sub. nom.*; *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12 (C.A.).

<sup>38</sup> *Supra*, footnote 32, pp. 325 (S.C.R.), 681 (D.L.R.).

<sup>39</sup> [1980] 1 S.C.R. 602, (1979), 106 D.L.R. (3d) 385. An earlier attempt by Martineau to seek judicial review under the Federal Court Act, R.S.C. 1970, 2nd Supp., c. 10 was unsuccessful: see *Martineau v. Matsqui Inmate Disciplinary Board*, [1978] S.C.R. 118, (1977), 74 D.L.R. (3d) 1.

ary rules. Martineau sought an order of certiorari to quash the Prison Disciplinary Board's decision under section 18 of the Federal Court Act.<sup>40</sup> On the preliminary question of law as to whether relief by way of certiorari was available, the Supreme Court reversed the Federal Court of Appeal and held that the remedy of certiorari was available to Martineau under section 18 to remedy a breach of the duty to be fair procedurally when exercising administrative functions.

Pigeon J., speaking for himself and five other judges, stated that, in light of the *Nicholson* decision, there was a common law principle that a general duty of fairness exists, even in the exercise of administrative or executive functions. In a separate concurring judgment written by Dickson J.,<sup>41</sup> with which two other members of the Supreme Court agreed, the necessity of classifying administrative functions as quasi-judicial before the duty of fairness arose was again deemed to be obsolete.<sup>42</sup>

The authorities to which I have referred indicate that the application of a duty of fairness with procedural content does not depend upon proof of a judicial or quasi-judicial function. Even though the function is analytically administrative, Courts may intervene in a suitable case. . .

In my opinion *certiorari* avails as a remedy wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person.

It would seem therefore, that there is an obligation on those administering the Act to accord procedural fairness to foreign investors who have filed notices with them. It may be that foreign investors are not Canadian citizens and have no "rights" to invest in Canada.<sup>43</sup> Nevertheless, as Dickson J. pointed out, the duty of procedural fairness is imposed on administrative bodies even when they are dealing with "privileges" of "any person".

It may however be argued that neither FIRA, nor the Minister nor the Governor in Council are under any duty to act fairly because of the principles enunciated in *Attorney-General of Canada v. Inuit Tapirisat of*

<sup>40</sup> *Ibid.*

<sup>41</sup> Laskin C.J.C. and McIntyre J. concurred with Dickson J.'s separate reasons. For a detailed analysis of Dickson J.'s concurring reasons and the majority decision, see Jones, *loc. cit.*, footnote 36, at pp. 360-364.

<sup>42</sup> *Supra*, footnote 39, at pp. 622-623 (S.C.R.), 405 (D.L.R.).

<sup>43</sup> This is the case both in domestic and international law, apart from any specific treaty obligations. Lord Atkinson, in *A.G. for Canada v. Cain*, [1906] A.C. 542, at p. 546 (P.C.), stated:

"One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interests; Vattel, *Law of Nations*, book 1, s. 231; book 2, s. 125. . ."

*Canada et al.*<sup>44</sup> In that case the Supreme Court of Canada held that subsection 64(1) of the National Transportation Act<sup>45</sup> imposed no procedural requirements on the Governor in Council. That subsection provides:

The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motivation and without any petition or application, vary or rescind any order, decision, rule or regulation of the Commission, whether such order or decision is made inter partes or otherwise, and whether such regulation is general or limited in its scope and application; and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.

Certain interveners in an application by Bell Canada to increase telephone rates had petitioned the Governor in Council to vary the decision of the Canadian Radio Television Commission ("CRTC") allowing the original Bell Canada application. The Supreme Court held that the Governor in Council was not obliged to give the interveners an opportunity to examine or respond to recommendations and submissions from the Ministry of Communications (Canada), from the CRTC, or from departmental officials or even the opportunity to respond to the reply of Bell Canada to the intervener's petition, all of which the Cabinet had relied upon in confirming the CRTC's original decision.

From the *Inuit Tapirisat* case it might be concluded that the duty of fairness does not apply where a statute gives the executive a totally unfettered discretion. However, two important observations must be made.

Firstly, if there are statutory functions to which the duty of fairness does not apply at all, they will be found only where the statutory scheme as a whole indicates a legislative intent to this effect.<sup>45a</sup> The court will not readily construe a statute to make such bald delegation. It may be found in the unqualified delegation of a quasi-legislative function such as in section 64 of the National Transport Act<sup>45b</sup> where the delegation to Cabinet is "to enable them to respond to the political, economic and social concerns of the moment". It will not be found, even where the statutory delegation is unqualified, if the party complaining can show that he has a special and personal stake in the decision. The normal rule is that the executive, "as a statutory authority, [will be] bound to act fairly in relation to an applicant having an economic stake in his decision",<sup>45c</sup> although the substantive requirements of that duty may not be any more formal than advising the person in a general way of the nature of the concern and providing him with an opportunity to respond to it.

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<sup>44</sup> [1980] 2 S.C.R. 735, (1980), 115 D.L.R. (3d) 1.

<sup>45</sup> R.S.C. 1970, c. N-17, as amended.

<sup>45a</sup> *Supra*, footnote 44, at pp. 755-759 (S.C.R.), 15-17 (D.L.R.).

<sup>45b</sup> *Ibid.*, at pp. 755 (S.C.R.), 15 (D.L.R.).

<sup>45c</sup> *T.E. Quinn Truck Lines Ltd. v. Snow* [1981] 2 S.C.R. 657, 129 D.L.R. (3d) 513.

Secondly, even when exercising an unfettered legislative function delegated by statute, the executive (whether it be a Minister or Cabinet) must at the very least consider the relevant issues if it is to keep within its jurisdiction.<sup>46</sup>

Parliament has in s. 64(1) not burdened the executive branch with any standards or guidelines in the exercise of its rate review function. Neither were procedural standards imposed or even implied. That is not to say that the courts will not respond today as in the *Wilson* case *supra* [*Wilson v. Esquimalt and Nanaimo R. Co.* (1921), 61 D.L.R. 1], if the conditions precedent to the exercise of power so granted to the executive branch have not been observed. Such a response might also occur if, on the petition being received by the Council, no examination of its contents by the Governor in Council were undertaken.

Further, having regard to the statutory context, there is a strong argument that the executive exercising such powers must confine itself to relevant considerations, particularly where those considerations have been defined in the enabling statute and the power expressly conditioned, as, for example, it is in sections 9 and 12(1) of the Act.

It could be argued that the imposition of such jurisdictional limits provides as much protection against the exercise of arbitrary conduct by government as does the imposition of a very minimal duty of fairness. Other types of jurisdictional restraints on administrative and legislative powers will be discussed below.

The main principle that flows from the *Inuit Tapirisat* case is that one must examine the wording and structure of the Act which delegates administrative or legislative power to ascertain whether, in any given situation, there has been a breach of the duty of fairness. As Estey J. stated:<sup>47</sup>

The precise terminology employed by Parliament in s. 64 does not reveal to me any basis for the introduction by implication of the procedural trappings associated with administrative agencies in other areas to which the principle in *Nicholson, supra*, was directed. The roots of that authority do not reach the area of law with which we are concerned in scanning s. 64(1).

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<sup>46</sup> *Supra*, footnote 44, at pp. 753 (S.C.R.), 15 (D.L.R.).

<sup>47</sup> *Ibid.*, at pp. 759 (S.C.R.), 19 (D.L.R.). It could be concluded from the *Inuit Tapirisat* case that the duty of fairness does not apply to quasi-legislative functions. It is submitted the better view is that while a duty of fairness applies to all decision-making powers, including quasi-legislative powers such as that in Section 64(2) of the National Transportation Act, that duty will not normally be construed as requiring the procedural trappings applied to administrative or quasi-judicial tribunals when applied in the quasi-legislative regime. It is a matter in each instance of construing the statutory provision delegating the decision-making function. Delegation by Parliament to Cabinet of a largely legislative power will not readily be construed as being subject to the substantive rules of procedural fairness, such as the right to a hearing, the right to be advised of the particular details of adverse submissions or the right to be apprised of governmental policies being applied. It is submitted, however, that the delegation of such powers will be construed by the courts as requiring good faith and the absence of arbitrariness at a minimum.

By contrast with section 64 of the National Transportation Act<sup>48</sup> as interpreted by Estey J., our examination of the Act reveals that Parliament has, indeed, burdened the executive branch with standards and guidelines in the exercise of its foreign investment review function. The main procedural steps in the process are outlined, from the filing of a notice with FIRA to the ultimate issuance of an order-in-council. A statutory test, namely, "significant benefit to Canada" is stipulated as the basis for the exercise of the discretion and the particular factors to be taken into account in assessing significant benefit to Canada have been specified. Accordingly, it is submitted that the courts would impose a duty of fairness on the executive branch in the exercise of its responsibilities under the Act.

This leaves the question of what would be required under such duty of procedural fairness. All three cases that we have referred to stress that the scope of the duty depends on the nature of and the functions being carried out by the body whose conduct is under review. In *Nicholson* the Supreme Court thought it important that Nicholson should have been told why he was being dismissed. Laskin C.J.C. stated:<sup>49</sup>

In my opinion, the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond . . . Once it had the appellant's response, it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith.

In *Martineau Pigeon J.* again emphasized that the nature of the administrative or executive function should be looked at closely to ascertain the exact content of the duty. Speaking specifically of the circumstances of that case, he said:<sup>50</sup>

It is specially important that the [judicial] remedy be granted only in cases of serious injustice and that proper care be taken to prevent such proceedings from being used to delay deserved punishment so long that it is made ineffective, if not altogether avoided.

And in the *Inuit Tapirisat* case Estey J. made some useful observations on the content of the duty to be fair:<sup>51</sup>

The arena in which the broad rules of natural justice arose and the even broader rule of fairness now performs is described by Lord Denning, M.R. in *Selvarajan v. Race*

<sup>48</sup> *Supra*, footnote 45.

<sup>49</sup> *Supra*, footnote 32, at pp. 328 (S.C.R.), 682-683 (D.L.R.).

<sup>50</sup> *Supra*, footnote 39, at pp. 637 (S.C.R.), 392 (D.L.R.).

<sup>51</sup> *Supra*, footnote 44, at pp. 747-748 (S.C.R.), 10-11 (D.L.R.), Estey, J. also concludes at pp. 758 (S.C.R.), 19 (D.L.R.) that "it may be said that the use of the fairness principle as in *Nicholson, supra*, will obviate the need for the distinction in instances where the tribunal or agency is discharging a function with reference to something akin to a *lis* or where the agency may be described as an 'investigating body' as in the *Selvarajan* case, *supra*".

There is little doubt that the Minister and his agent body, the Agency, act as investigating bodies under the Act.

*Relations Board* [[1976] 1 All.E.R. 12], where his Lordship, after enumerating a number of authorities dealing with tribunals generally concerned with a *lis inter partes* in a variety of administrative fields, said at page 19:

In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.

Accordingly, it is submitted that, in the administration of an "application" by a foreign investor pursuant to the Act, the duty of fairness would at least accord the foreign investor the right to know the case he has to meet and afford him an opportunity of meeting it. This would mean at least that he must be told the nature of the concerns against his application including the nature of any interventions against him. Whether he must be told of any national or provincial policies being applied is less clear. If the Minister is of the opinion that he cannot recommend allowance on his initial assessment of the application, so that he sends out a notice under subsection 11(1) of the Act, then we think that at that time the Minister would have to tell the applicant the case he has to meet. The extent to which the Cabinet itself must accord the foreign investor this courtesy is also unclear under these developing administrative law principles. If the Cabinet were to consider matters not previously considered by the Minister then an argument can be made that the Cabinet would at least have a duty to apprise the foreign investor of those additional considerations and give him an opportunity of answering them.<sup>52</sup>

If the Act were administered in this fashion, it is submitted that much of the international, and even domestic, criticism of the foreign investment screening process would evaporate. The concerns about the arbitrary and secretive nature of the decision-making process would be substantially eroded.

#### IV. *Ultra vires*

Administrative law is based on two fundamental principles:<sup>53</sup>

<sup>52</sup> In considering what requirements the duty of fairness will impose upon the decision-making power of Cabinet under s. 12 of the Act, the court will look at the scheme of the Act and the statutory qualifications to that power. Notwithstanding the permissive "may" in s. 12(2) of the Act, it is submitted that s. 12(2) constitutes an unusual and significant qualification upon the discretion of Cabinet in disallowing an investment. In construing the requirements of the duty of fairness as applied to the function in s. 12, this qualification, it is submitted, provides a substantial basis for the court requiring Cabinet to give the NEP the opportunity of making the representations contemplated in s. 12(2) in circumstances where the Minister has recommended allowance but where Cabinet on the basis of matters not considered by the Minister, intends to disallow the investment.

<sup>53</sup> S.A. de Smith, *Judicial Review of Administrative Action*, (4th ed., 1980), pp. 93-96 and pp. 108-113; see also Jones, *Discretionary Refusal of Judicial Review in Administrative Law* (1981), 19 *Alta L. Rev.* 483.

- (1) within constitutional limits Parliament is supreme; and
- (2) all administrative, executive or legislative bodies to whom Parliament has delegated its powers must act strictly within their statutory jurisdiction.

Estey J., in the *Inuit Tapirisat* case, succinctly describes the consequences of these principles:<sup>54</sup>

However, in my view the essence of the principle of law here operating is simply that in the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the superior court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorized by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respond to a duty assigned to it by statute.

The second of these principles lays the basis for the concept that someone exercising power delegated to him by Parliament will be found to have acted *ultra vires* if, during his decision-making process, he commits any of the following significant jurisdictional errors:<sup>55</sup>

- (1) he relies upon or takes into account irrelevant evidence,
- (2) he acts for an improper purpose or in bad faith, or
- (3) he breaches the rules of natural justice<sup>56</sup> or exceeds the scope of his delegated function.

It is submitted that in taking into account the representations of interveners or, indeed, the views of other federal departments while assessing significant benefit to Canada, the Minister and Governor in Council are taking into account irrelevant evidence and are therefore acting *ultra vires*. The same might be said if Cabinet were to take into account other government policies, such as cultural or social policies, in addition to the material presented to it by the Minister.<sup>57</sup>

<sup>54</sup> *Supra*, footnote 44, at pp. 752 (S.C.R.), 14 (D.L.R.).

<sup>55</sup> See S.A. de Smith, *op. cit.*, footnote 53, pp. 115-116. The jurisdictional errors listed do not compromise an exhaustive list. Other types of jurisdictional errors are described by R. Reid and H. Davis, *Administrative Law and Practice* (2nd ed., 1978), pp. 207-209.

<sup>56</sup> The Supreme Court of Canada in *Harekin v. University of Regina*, [1979] 2 S.C.R. 561, (1979), 96 D.L.R. (3d) 14, (in a four to three decision) held that a breach of the rules of natural justice does not necessarily render a decision by an inferior tribunal void. This ruling goes against over a century of Anglo-Canadian jurisprudence. It is submitted that the dissenting view expressed by Dickson J. (with which Spence and Estey JJ. concurred) would likely prevail if the issue came to court today. For a critical analysis of the case, see *Jones, supra*, footnote 53.

<sup>57</sup> A recent "controversy" illustrates the point. On September 4, 1982 the Globe and Mail, Toronto, described how opposition party spokesmen in Parliament deplored the way Communications Minister Francis Fox was trying to use the Foreign Investment Review Agency to block acquisition of the Canadian operations of Columbia Pictures Industries

An argument against this would, of course, be that the criteria of significant benefit contained in section 2(2) of the Act<sup>58</sup> are very broad and vague. It could be argued that, for example, taking into account intervenor bids or representations is not irrelevant because the assessment of significant benefit to Canada has to be made by reference to the potential economic consequences of the investment proposal as opposed to the potential economic consequences if the investment were disallowed and aborted. In assessing the latter, it might be argued that the possibility that others, particularly those who are not NEPs, might wish to acquire the target company is relevant. However, while the wording of section 2(2) is broad, the wording of section 9 limits the information which the Minister can use to assess significant benefit in the first instance. As stated above,<sup>59</sup> he can only use:

- (1) information contained in the notice,
- (2) any other information submitted to the Minister by any party to the proposed or actual investment to which the notice relates,
- (3) any written undertakings given by any party to the investment, and
- (4) any representations submitted to the Minister by a province that is likely to be significantly affected.

Section 11 provides that, on a reassessment by the Minister, information gained in consultation with other parties to the investment and, *if authorized by the NEP*, in consultation with third parties, may be used.

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Inc. by Coca-Cola Co. FIRA acceded to the Communications Department's request in Mr. Fox's name for a full review of the transaction, although it would normally go through the more expeditious small business procedure. The Globe and Mail asserted that documents in its possession indicate the Department's goal was to force a sale by Coca-Cola to Canadian buyers of a 51% interest in Columbia Pictures. The Globe and Mail further asserted that Department letters and a memo obtained by it indicated that the Minister of Communications wanted to block the acquisitions, apparently to support Mr. Fox's political policies. A letter by a special adviser to the Minister stated "the Columbia case represents a vital opportunity for Mr. Fox not only to demonstrate the firmness of his articulated intentions, but also to achieve important advances on behalf of Canadian distributors and producers. Further, a Department memo to the Minister stated: "Forcing a change in ownership of one of the U.S. major subsidiaries in Canada will have a profound effect on how the other majors perceive the Government's intentions regarding distribution in Canada and can only enhance the possibilities for successful implementation of the policies being developed for your cultural industries strategies paper."

Finally, the newspaper stated that Mr. R. Schultz of McGill University's Centre for the Study of Regulated Industries, one of the authors of the Economic Council of Canada paper described in footnote 5 above, described the methods demonstrated in the documents as "government by wink and nod, rather than government by law".

<sup>58</sup> *Supra*, p. 127.

<sup>59</sup> *Supra*, p. 128.

It could also be argued that the Minister and the Canadian Cabinet in the exercise of their political function have the implied authority to take into account virtually anything, including cultural or social policies of the government. Indeed, it might be argued, that was Parliament's intent in vesting the decision-making in the executive rather than in an independent tribunal. As against this, however, there is the argument that Parliament has specified what the executive is to consider, and must have intended something by such specificity.<sup>60</sup> Furthermore, section 2(1) sets out the purpose of the Act as follows:

This Act is enacted by the Parliament of Canada in recognition by Parliament that the extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their *economic environment* is a matter of national concern, and that it is therefore expedient to establish a means by which measures may be taken under the authority of Parliament to ensure that, in so far as is practicable after the enactment of this Act, control of Canadian business enterprises may be acquired by persons other than Canadians, and new businesses may be established in Canada by persons, other than Canadians, who are not already carrying on business in Canada or whose new businesses in Canada would be unrelated to the businesses already being carried on by them in Canada, only if it has been assessed that the acquisition of control of those enterprises or the establishment of those new businesses, as the case may be, by those persons is or is likely to be of significant benefit to Canada, having regard to all of the factors to be taken into account under this Act for that purpose.<sup>61</sup>

Accordingly, it is absolutely clear that concern about control over the "economic environment" was at the heart of the decision to enact the Act. This might be contrasted, for example, with the far broader range of concerns which were apparently at the heart of Parliament's concern in legislating foreign ownership restrictions in the Broadcasting Act:<sup>62</sup>

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<sup>60</sup> One of the major rules of statutory interpretation is to implement the intention of Parliament as specified by the language, because "the draftsman knows what is the intention of the legislative initiator. . .": Lord Simon, *Ealing London Borough v. Race Relations Board*, [1972] A.C. 342, at p. 360, [1972] 1 All E.R. 105, at p. 113 (H.L.); "In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.": Lord Watson, *Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22, at p. 38 (H.L.). See generally R. Cross, *Statutory Interpretation* (1976), pp. 34-40.

<sup>61</sup> Emphasis added.

<sup>62</sup> R.S.C. 1970, c. B-11, s. 2(6). (Emphasis added). This sub-section lays the basis for Direction to the CRT (Eligible Canadian Corporation), C.R.C. 1978, c. 376. These preliminary sections of Acts can generally be regarded as preambles in which the mischief to be remedied and the scope of the Act is stated. See R. Cross, *op. cit.*, footnote 54, pp. 108-111 on the use of preambles to interpret statutes, in particular the discussion of *Attorney-General v. Prince Ernest Augustus of Hanover*, [1957] A.C. 436, [1957] 1 All E.R. 49 (H.L.). In that case, Lord Norman stated, at pp. 467-468 (A.C.), 58 (All E.R.): "The courts are concerned with the practical business of deciding a *lis*, and when the plaintiff puts forward one construction of an enactment and the defendant another, it is the court's business in any case of some difficulty, after informing itself of what I have

It is hereby declared that the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada . . .

The courts of this country have consistently held that where an administrative body bases its decisions on irrelevant considerations, the practice or decision will be subject to judicial review. Thus the Supreme Court of Canada in *Smith & Rhuland Ltd. v. The Queen ex Rel Andrews et al.*<sup>63</sup> held that an order of mandamus was properly issued by the lower court against the Nova Scotia Labour Relations Board, and that the Board's decision was rightly quashed where it refused to certify a union which had satisfied all statutory conditions precedent under the then Nova Scotia Trade Union Act.<sup>64</sup> The reason for the board's refusal to certify was that one of the officers of the union who had made a statutory declaration in support of the certification application was a communist and occupied a dominant position in the union. The majority judgment of the Supreme Court, delivered by Rand J., held that the Board had acted outside the limits of discretion conferred on it by the statutes in examining and basing its decision on irrelevant considerations. Such considerations concerning the political views and associations of an officer could not be used to deprive a union and its members of the advantages of certification, unless there was evidence that, with the acquiescence of the members, the union was being directed "to ends destructive of the legitimate purposes of the union".<sup>65</sup>

Similarly, it is submitted that the Minister and Governor in Council would be acting outside the limits of the discretion conferred on them by the Act in examining and basing their decision on the irrelevant consideration of an intervener representation or representation of another department concerning social or cultural implications. It is submitted that such considerations could not be used to deprive a NEP or, indeed, a Canadian vendor, of their contractual rights.

In *Re Dallinga and City of Calgary*<sup>66</sup> the Alberta Court of Appeal held that, in an application to a Development Appeal Board under the Alberta

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called the legal and factual context including the preamble, to consider in the light of this knowledge whether the enacting words admit of both the rival constructions put forward. If they admit of only one construction, that construction will receive effect even if it is inconsistent with the preamble, but if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the preamble may be preferred."

It is submitted that the authors' view of the objects and policy of the Act fits the preamble wording in section 2(1) of the Act, and excludes an implied authority on the part of the Minister or the Federal Cabinet to consider any government policy they wish, in the exercise of their political functions under the Act.

<sup>63</sup> [1953] 2 S.C.R. 95, [1953] 3 D.L.R. 690.

<sup>64</sup> S.N.S. 1947, c. 3, re-enacted S.N.S. 1949, c. 66.

<sup>65</sup> *Supra*, footnote 63, at pp. 100 (S.C.R.), 695 (D.L.R.).

<sup>66</sup> (1976), 62 D.L.R. (3d) 433, [1976] 1 W.W.R. 319 (Alt. App. Div.).

Planning Act for a development permit, the introduction of character evidence to create prejudice was an irrelevant consideration, and a decision based on such evidence could be set aside. The court was also unanimous in its view that where a board acted on a combination of relevant and irrelevant considerations, the decision would be set aside. Similarly, even if the recommendation of the Minister, or the decision of the Governor in Council, to disallow an investment proposal were only in part based on irrelevant considerations, such recommendation or decision could be set aside.

The taking into account of, in particular, an intervener bid by the administrators of the Act may also form the basis of an argument that regard is being had to an improper purpose and that therefore any action taken is *ultra vires*. The improper purpose might be found if, in considering interveners' representations or, indeed, even soliciting them, the government were using the Act to pursue in private with a select few some undisclosed industrial, economic or political strategy.<sup>67</sup>

In the landmark Supreme Court of Canada decision in *Roncarelli v. Duplessis*<sup>68</sup> Rand J. discussed the improper exercise of discretionary administrative powers in regard to the licensing of liquor sales in this manner.<sup>69</sup>

The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are compatible with the purpose envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express

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<sup>67</sup> For an example of where a Minister not even connected with the administration of the Act attempted to block a takeover in pursuit of an unannounced cultural industries strategy, see *supra*, footnote 57. However, there was nothing in the documents revealed by the Globe & Mail that indicated the Minister had an alternative Canadian purchaser in mind for the Canadian assets of Columbia Pictures. If there had been intervener bids from "eligible" Canadian companies, one wonders whether the Minister would have pursued his unannounced cultural policy with them?

<sup>68</sup> [1959] S.C.R. 121. (1959). 16 D.L.R. (2d) 689. For an example of a more recent case concerning the pursuit of improper purposes by an inferior tribunal, see *Campeau Corporation v. Council of City of Calgary* (1979), 7 Alta. L.R. (2d) 294 (Alt. App. Div.). The court held, *inter alia*, that the Calgary City Council could not use its statutory powers under the Alberta Planning Act for the improper purpose of freezing development on land, thus diminishing its value through the manipulation of land classification guides.

<sup>69</sup> *Ibid.*, at pp. 140-141 (S.C.C.), 705-706 (D.L.R.).

language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the Legislature cannot be so distorted.

To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred.

In the absence of legislation a NEP would be free to invest in Canada and a Canadian would be free to sell his assets to a NEP. It is a matter of vital importance that any process, such as that under the Act, which restricts those *prima facie* legitimate activities should be conducted with complete impartiality and integrity. It might be that the Government would be found to fall short of this standard if it based its decision on considerations such as intervenor bids, or irrelevant policy considerations, which are not economic in nature. This would be even more obviously the case if it took into account matters such as the partisan political ramifications of an investment.

Likewise, the Ontario High Court in *Re Doctors Hospital and Minister of Health*<sup>70</sup> held that even the orders-in-council issued by the Lieutenant-Governor in Council made pursuant to a discretion conferred by statute can be subject to judicial review if the discretion is not exercised in accordance with the objects and policy of the statute. Cory J., giving the judgment of the court, stated:<sup>71</sup>

In the absence of clear words in the statute, the discretion granted to the Lieutenant-Governor in Council could only be used to pursue the policy and objects of the act, which are to be determined according to the standard canons of construction and to that extent, at least, reviewable by the Courts. That we take to be the view of Mr. Justice Lacourcière expressed in *Multi-Malls* p. 18 of his reasons, where he in turn was relying upon and to a certain extent interpreting the speech of Lord Reid in *Padfield et al. v. Minister of Agriculture, Fisheries, & Food et al.*, [1968] A.C. 997. At p. 1030, Lord Reid stated:

'It is implicit in the argument for the Minister that there are only two possible interpretations of this provision — either he must refer every complaint or he has an unfettered discretion to refuse or to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and object of the Act: the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run

<sup>70</sup> (1976), 68 D.L.R. (3d) 220, (1976), 12 O.R. (2d) 164 (Ont. Div. Ct).

<sup>71</sup> *Ibid.*, at pp. 231-232 (D.L.R.), 175-176 (O.R.).

counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.'

We have then determined from a review of the *Public Hospitals Act* and its history that it is regulatory in nature. Section 4(5) was not designed or intended to be used as a means of closing hospitals for financial or budgetary considerations.

It was apparent from material before us, that the decision of the Lieutenant-Governor in Council to revoke the approval of the hospitals was based upon financial considerations. The Lieutenant-Governor in Council was acting, not pursuant to royal prerogative, but by the statutory authority contained in section 4(5) of the *Public Hospitals Act*.

We repeat and emphasize that the court would not and could not *per se*, review a decision made pursuant to royal prerogative. However, in the absence of clear words to the contrary in the Act in question, the Court can review the decision of the Lieutenant-Governor in Council to ensure that the discretion to revoke had only been exercised in pursuance of the objects and policy of the Act.

Since the Lieutenant-Governor in Council in its decision took into account financial considerations, it considered extraneous matters that were beyond the objects and policy of the *Public Hospitals Act*.

Similarly, Parliament must have conferred the discretion on the Governor in Council with the intention that it should be used to promote the policy and object of the Act. The policy and object of the Act must be determined by construing the Act as a whole. Our review of the Act indicates that it was enacted because of Parliament's concern about the ability of Canadians to maintain effective control over their economic environment. It was not designed or intended to be used as a means of influencing the cultural, political or social fabric of Canada. Accordingly, if the Governor in Council, in disallowing an investment proposal, takes into account such extraneous matters, his order-in-council may be quashed by the courts.

This issue can also be approached from the standpoint of the jurisprudence which calls for judicial review where administrative decisions are tainted by bias. The prohibition of bias or the apprehension of the likelihood of bias is one of the so-called "rules of natural justice". The traditional view of the court has been that because the rules of natural justice do not apply to purely administrative functions neither does the bias rule.<sup>72</sup> However, this view may not have survived the recent jurisprudence of the Supreme Court of Canada. Dickson J. in *Martineau* stated his view that:<sup>73</sup>

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<sup>72</sup> See e.g. *Re York Township By-law*, [1942] 4 D.L.R. 380, [1942] O.R. 582 (Ont. C.A.); *Re Low and Minister of National Revenue*, [1967] 1 O.R. 135 (Ont. C.A.), aff'g. [1966] 2 O.R. 455 (Ont. H.C.), *West End Service (Innisfail) Ltd. v. Council of the Town of Innisfail* (1958), 11 D.L.R. (2d) 364 (Alt S.C.). See generally Reid and Davis, *op. cit.*, footnote 55, at pp. 246-248.

<sup>73</sup> *Supra*, footnote 39, at p. 629 (S.C.C.), pp. 410-411 (D.L.R.). However Dickson J. felt compelled by the Federal Court Act, *supra*, footnote 39 to make the distinction for the purposes of reviewing the activities of federal decision makers.

The fact that a decision-maker does not have a duty to act judicially, with observance of formal procedure which that characterization entails, does not mean that there may not be a duty to act fairly which involves importing something less than the full panoply of conventional natural justice rules. In general, courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between the duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework.

Thus, consultation with a select few interveners could taint any decision or recommendation with bias and make them subject to judicial review.

The solicitation by FIRA of undertakings concerning Canadian sourcing also raises questions of *ultra vires*. It has recently been held that FIRA's solicitation of undertakings to purchase goods of Canadian origin, or goods from Canadian sources, is inconsistent with Article III:4 of the General Agreement on Tariffs and Trade according to which contracting parties must accord to imported products treatment no less favourable than that accorded to like products of national origin in respect of all internal requirements affecting their purchase.<sup>74</sup> FIRA had, historically, developed the practice of seeking undertakings that Canadian sourcing would be preferred provided that it was competitive with the foreign sourcing. In addition, FIRA had been known to solicit undertakings that Canadian sourcing would be preferred even if somewhat uncompetitive. Indeed, FIRA had gone so far as to solicit undertakings that a foreign investor would source his own domestic requirement from Canada. However, it would appear that as a result of the GATT finding, FIRA has recently modified its practice so as to seek only undertakings that the applicant will give full and fair opportunity to Canadian suppliers and will actively encourage them.

Consideration should be given to the principle that:<sup>75</sup>

. . . wherever possible, statutes are not to be interpreted as violating international conventional law, even in the absence of domestic legislation passed to give effect to the Treaty.

The only specific reference to Canadian sourcing in the Act is that contained in subsection 2(2) which provides that one of the factors to be taken into account in assessing significant benefit to Canada is:

The effect of the acquisition or establishment on the level and nature of economic activity in Canada, including . . . the effect upon . . . the utilization of parts, components, and services produced in Canada . . .

Hence, it is clear that the effect on Canadian sourcing is relevant but this does not necessarily imply that Parliament wished the Governor in Council to favour discriminatory practices. In fact, it is submitted that a court would interpret the Act as requiring the executive to consider sourcing in Canada

<sup>74</sup> See *supra*, footnote 23.

<sup>75</sup> M. Cohen and A. Bayfeskay, *The Canadian Charter of Rights and Freedoms and Public International Law* (1983), 61 *Can. Bar Rev.* 265, at p. 298.

only to the extent consistent with Canada's treaty obligations. Since that would appear, at the time of writing this article, to be the new policy of FIRA, it would appear that as a practical matter the matter is being resolved for the immediate future at least. However, it does leave open the question of the numerous undertakings in existence that were negotiated under the old policy. It is submitted that existing undertakings will be of questionable enforceability to the extent that they contravene the GATT since their solicitation by FIRA was *ultra vires*.

### V. Conclusion

Many of the criticisms of the foreign investment review process in Canada have to do with the way in which the Act is administered. They have to do with frustration and a sense of unfairness rather than with Canada's underlying right to regulate foreign investment. These concerns are the stuff of administrative law and it is submitted that our law can meet the need.

The hoary distinction between judicial or quasi-judicial functions and administrative functions has disappeared. The executive has been impressed with a duty to act fairly in exercising a discretion. Furthermore, there remains the elementary principle that the executive can only exercise authority that has actually been delegated to it. Together, these two concepts can provide a formidable check on abuse of executive power. As applied to the administration of the Act, they mean, it is submitted that:

- (1) before the Minister recommends disallowance of an investment proposal, he must advise the foreign investor of the case he has to meet;
- (2) the foreign investor must be given an opportunity to meet that case;
- (3) the Cabinet may not be entitled to consider information other than that received from the Minister but, in any event, if it does, before disallowing an investment because of such further information Cabinet (perhaps through the Minister) may well be obliged to advise the foreign investor of such further case he has to meet;
- (4) if so, the foreign investor should be given an opportunity to meet that further case; and
- (5) the Minister and the Cabinet cannot take into account matters, such as intervenor bids, which are extraneous because of their source or matters, such as social or cultural policies, which are extraneous because of their nature.

It is not the purpose of this article to speculate on the various ways in which these issues might arise, or the remedies which might be appropriate in specific cases. The arguments suggested here might be raised as a defence to an action by the Minister to render an investment nugatory. It

might be more difficult to use them in an attempt to force the hand of the Minister or the Governor-in-Council during the review process. The point, however, is that the principles are at hand to the Canadian legal profession.

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