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# THE JURISDICTIONAL FACT DOCTRINE IN THE SUPREME COURT OF CANADA: BELL V. ONTARIO HUMAN RIGHTS COMMISSION

P. W. HOGG\*

## *The facts of Bell v. Ontario Human Rights Commission*

The Ontario Human Rights Code, 1961-1962<sup>1</sup> is designed, speaking generally, to prohibit discrimination on the basis of race, creed, colour, nationality, ancestry or place of origin with respect to housing, employment and public facilities.<sup>2</sup> Section 3 (as amended in 1967) provides as follows:

- 3 No person . . . shall,  
(a) deny to any person or class of persons occupancy of any . . . self-contained dwelling unit; . . . because of the race, creed, colour, nationality, ancestry or place of origin of such person or class of persons.

The administration of the Code is entrusted to the Ontario Human Rights Commission, a body which is responsible to the Minister of Labour. By s.12 the Commission is empowered to "inquire into the complaint of any person that he has been discriminated against contrary to this Act", and to "endeavour to effect a settlement of the matter complained of." Section 13 then provides:

- 13 (1) If the Commission is unable to effect a settlement of the matter complained of, the Minister may on the recommendation of the Commission appoint a board of inquiry composed of one or more persons to investigate the matter . . . .  
(2) The board has all the powers of a conciliation board under section 28 of The Labour Relations Act.  
(3) The board shall give the parties full opportunity to present evidence and to make submissions and, if it finds that the complaint is supported by the evidence, it shall recommend to the Commission the course that ought to be taken with respect to the complaint. . . .  
(6) The Minister, on the recommendation of the Commission, may issue whatever order he deems necessary to carry the recommendations of the board into effect, and such order is final and shall be complied with in accordance with its terms.

Section 14 makes the contravention of the Code or of an order made under the Code an offence punishable on summary conviction by a fine of

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<sup>1</sup> S.O. 1961-1962, c.93; as amended by S.O. 1965, c.85; S.O. 1967, c.66; S.O. 1968, c.85; S.O. 1968-1969, c.83.

<sup>2</sup> Three studies of the Code have been published: T. M. Eberlee and D. G. Hill, *The Ontario Human Rights Code* (1964), 15 U.T.L.J. 448; W. S. Tarnopolsky, *The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada* (1969), 46 Can. B.R. 565; T. C. Hartley, *Race Relations Law in Ontario* [1970] Public Law 20 (Part 1), 175 (Part 2).

(since the 1968 amendment) not more than \$500 in the case of an individual or \$2000 in the case of an organization; but s.16 provides that no prosecution shall be instituted except with the consent of the Minister of Labour.

The facts of *Bell v. Ontario Human Rights Commission* (1971)<sup>3</sup> were these. A black Jamaican named Carl McKay answered a newspaper advertisement which announced that a "flat" was available for rent. He went to the address to apply for the flat and was told by the landlord, a white Canadian named Kenneth Bell, that it had been taken. This was untrue, as McKay discovered later in the day when his girl friend enquired after the same flat and was told by Bell that it was still available.

McKay filed with the Ontario Human Rights Commission a complaint in which he stated that he was "a Black man from Jamaica", and that he considered that his failure to obtain the accommodation "was determined by factors of race, colour and place of origin". The Commission, after investigating the complaint, wrote to Bell, the landlord, requesting a meeting "to discuss possible terms of settlement and conciliation". Bell, now advised by a solicitor, denied that he had contravened the Code. He argued that if the Commission had found evidence that he had contravened the Code the Commission's proper course was to prosecute him in the courts, and not to attempt to negotiate a "settlement" of the contravention. The Commission's response to these submissions was to appoint Walter S. Tarnopolsky, dean of the law school at the University of Windsor, as a board of inquiry under s.13 of the Code; and to advise Bell of the appointment, together with details of the time and place at which the board would hold a hearing.

The board of inquiry duly convened at the appointed time and place, and was immediately met with a submission by Bell's solicitor that the board lacked jurisdiction on the ground that the premises in question were not a "self-contained dwelling unit" within s.3 of the Code. The board refused to disqualify itself because at that stage it had heard no evidence as to the nature of the premises. After this ruling, and before any evidence was called, an application for an order in lieu of a writ of prohibition was served on the board, and its hearing was adjourned pending disposition by the court of the application.

The application for prohibition was supported by an affidavit sworn by Bell, in which he described the flat which was for rent. He said that the flat had its own kitchen, bathroom, living room and bedrooms, but had no separate entrance. It consisted of the upper two floors of a three-storey house, of which the ground floor was occupied by him and his family. Entrance to the stairs leading up to the flat was gained through the same front door and hallway which Bell and his family used to gain entrance to their accommodation on the ground floor, and the hallway and stairs were not enclosed or separated from the ground floor accommodation. Bell added that he had refused to rent to McKay and his companion, not because they were black, but because they were "too young" and "may have been students"; he did

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<sup>3</sup> (1971) 18 D.L.R. (3d) 1. The facts are fully set out in the judgment of Martland J.

not want "young men or students as tenants". He said that he had lied to them that the flat had been taken "because this is the simplest method and avoids discussion and argument". Bell's statements were not contradicted by other evidence (no affidavit was filed in reply), and he was not cross-examined on his affidavit.

Bell's application for prohibition came before Stewart J. of the Ontario High Court; his lordship held that the board of inquiry had no jurisdiction because Bell's flat was not a "self-contained dwelling unit" within the meaning of s.3 of the Code; he therefore granted prohibition.<sup>4</sup> On appeal, the Ontario Court of Appeal reversed; the court held that the application for prohibition was premature, since the board of inquiry had not had an opportunity to decide for itself whether or not Bell's flat was a self-contained dwelling unit.<sup>5</sup> Bell appealed to the Supreme Court of Canada which by a majority reversed the Court of Appeal and restored Stewart J.'s judgment at first instance.<sup>6</sup> And so Bell succeeded in the end in preventing the board of inquiry from considering McKay's complaint.

### *The civil liberties issue*

Bell's solicitor, in correspondence with the Commission, asserted that the Commission's procedures violated "fundamental principles of justice". Stewart J. accepted this view, and in his judgment he criticized not only the Commission's procedures but also the legislative scheme as a whole. He conceded that the Code was "well-intentioned",<sup>7</sup> but he criticized the Code's grant of powers to administrative agencies and officials. This was "contrary to the principles set forth by the Honourable J.C. McRuer's advice in his learned and practical report concerning civil rights."<sup>8</sup> The judge even took the unusual step of calling a press conference to publicize his criticisms. After the decision in the Supreme Court of Canada, an editorial in *The Globe and Mail* repeated the criticisms made by the judge, and applauded Bell's ultimate victory as a triumph for justice.<sup>9</sup>

There is nothing improper in a lawyer seeking to elevate his client's case into the realm of high principle. Nor is there anything improper in a newspaper siding with one of the parties to litigation when it is satisfied that a question of principle is involved. Nor is it possible, as a general

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<sup>4</sup> *R. v. Tarnopolsky; Ex parte Bell*, [1969] 2 O.R. 709, (1969) 6 D.L.R. (3d) 576 (Ont. H.C.).

<sup>5</sup> *R. v. Tarnopolsky; Ex parte Bell*, [1970] 2 O.R. 672, (1969) 11 D.L.R. (3d) 658 (Ont. C.A.). The members of the unanimous court were Gale C.J.O., Schroeder, Kelly, Evans and Laskin J.J.A.; Laskin J.A. wrote the judgment of the court.

<sup>6</sup> (1971) 18 D.L.R. (3d) 1. The court comprised seven judges. The judgment of Martland J. was concurred in by Fauteux C.J., Judson, Ritchie and Spence J.J., who formed the majority. Abbott and Hall J.J. delivered dissenting judgments. Abbott J. based his dissent on a point which is referred to in note 61, *infra*. Hall J. agreed with Laskin J.A. in the Ontario Court of Appeal, who had based his judgment on the timeliness of review, a point which is discussed *infra*.

<sup>7</sup> [1969] 2 O.R. 709 at 718, 6 D.L.R. (3d) 576 at 585.

<sup>8</sup> *Id.*, at 714 and 581; the reference is to the McRuer Commission, *Inquiry into Civil Rights* (Report #1, vol. 1, 1968).

<sup>9</sup> *The Globe and Mail*, 4th February 1971, editorial.

proposition, to condemn judicial criticism of the law. But it must be said that Stewart J.'s avowed hostility to the Code did cast doubt on his capacity to construe its terms with judicial impartiality. It will be argued later in this article that the values articulated by Stewart J. influenced his decision, and that of the majority of the Supreme Court as well. The argument will be that their decisions gave to the Code an unduly restrictive interpretation.

In the rhetoric about justice and civil liberties a number of considerations seem to have been overlooked. One is the position of McKay, the black man who alleged that Bell had discriminated against him on the basis of his race, colour or national origin. There is no way of knowing whether this allegation was true, because Bell refused to discuss it with the Ontario Human Rights Commission or to allow the board of inquiry to consider it. In his affidavit before the court Bell did admit to lying to McKay about the availability of the flat, but he denied that his action was motivated by considerations of race, colour or national origin. It is true that even if McKay was correct in his allegation of discrimination, the allegation would have no legal significance unless the flat in question was found by the appropriate tribunal to be a self-contained dwelling unit, but my argument will be that no such finding was ever made in this case. It seems to me that the concern for the white landlord who wants to rent his house to whom he pleases free of official interference must at least be balanced with a countervailing concern for the black tenant who cannot find accommodation.

Another relevant consideration is that, in the absence of an applicable bill of rights, it never falls to Canadian courts to find unaided that delicate balance between the clashing policies of freedom to dispose of one's own property on the one hand and freedom from racial discrimination on the other: it is the duty of the courts to give effect to whatever statute the appropriate legislature has enacted on the question. In this case the legislature had enacted the Ontario Human Rights Code, which not only prohibited racial and other forms of discrimination in the letting of a self-contained dwelling unit, but also established a procedure for the resolution of complaints of discrimination. The objections to the Code which were voiced by Bell's solicitor, by Stewart J. and by the press were addressed to the procedure established by the Code for the resolution of complaints. Bell's solicitor insisted from the beginning that if there was evidence of a violation of the Code by his client then the only proper course for the Commission was to prosecute him and have the charge determined by a summary conviction court. This was also the gravamen of Stewart J.'s criticisms of the Code. And the editorial writer of *The Globe and Mail* characterized Bell's final victory as a belated granting of "his day in court".<sup>10</sup>

One defect in these criticisms is that they do not explain why Bell's "day in court" has to be a day in one of the ordinary courts. One can readily agree that it would be objectionable for the Commission to have the final say as to Bell's guilt or innocence, for the Commission also has the role of investigator — and the tenor of at least one of the letters sent to Bell by the Commission did give ground for fear that the Commission had accepted

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<sup>10</sup> *Id.*

McKay's complaint as the truth.<sup>11</sup> But the same objection is not applicable to the board of inquiry appointed by the minister to investigate the complaint. The Code instructs the board of inquiry to "give the parties a full opportunity to present evidence and make submissions";<sup>12</sup> and the Code gives to the board the power to compel the attendance of witnesses, the giving of evidence and the production of documents which are necessary to ensure a genuine opportunity to be heard.<sup>13</sup> If the minister purported to appoint as a board of inquiry a person whose impartiality was suspect, whether because of a prior connection with the investigation or for any other reason, then the board's right to decide would presumably be impeachable for bias. In fact, Dean Tarnopolsky, who was appointed as the board of inquiry in this case, could not have been accused of incompetence or bias and he had had no prior role in the investigation of the complaint.<sup>14</sup> In these circumstances Bell's insistence on his day in court takes on an unreasonable aspect. Why did he not give evidence before the board to prove that his flat was not a self-contained dwelling unit?

Of course, Bell and the other critics of the Code take their stand on a point of principle. And the point is this: that matters such as the complaint against Bell should be determined not by an administrative agency but by a court. According to this view, the way in which a problem should be attacked by statute is by prohibiting the conduct which causes the problem and by imposing a penalty for breach of the prohibition. When a statute takes this form, violations are a matter for the criminal courts — and traditional notions about the rule of law are undisturbed. But this is not the method which the legislature has chosen for the administration of the Ontario Human Rights Code. The Code establishes the Ontario Human Rights Commission and expressly instructs it to investigate any complaint made to it and to "endeavour to effect a settlement."<sup>15</sup> If the Commission is unable to effect a settlement, the Act authorizes the minister on the recommendation of the Commission to appoint a board of inquiry.<sup>16</sup> The board's power is to "recommend to the Commission the course that ought to be taken with respect to the complaint."<sup>17</sup> The Minister is then empowered, on the recom-

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<sup>11</sup> It has been suggested that even the function of settlement should be separated from that of investigation: Tarnopolsky, (1968), 46 Can. B.R. 565, 577.

<sup>12</sup> Section 13 (3).

<sup>13</sup> Section 13 (2), incorporating the powers conferred on a conciliation board under s.28 of the *Labour Relations Act*.

<sup>14</sup> The Code does not lay down qualifications for appointment, but the practice has been to appoint either a county court judge or a university law teacher: Hartley, [1970] Public Law 175, 180. A point of criticism is perhaps the fact that, under s.13 of the Code, the board of inquiry is appointed by the minister on the recommendation of the Commission, i.e., in effect, by one side only. It might be preferable for the board to be a tripartite tribunal, like the tribunals employed in Canadian labour relations and, occasionally, in commercial and international controversies: see Note, *The Use of Tripartite Boards in Labor, Commercial and International Arbitration* (1954), 68 Harv. L.R. 293; H.W. Arthurs, *The Three Faces of Justice—Bias in the Tripartite Tribunal* (1963), 28 Sask. Bar Rev. 147.

<sup>15</sup> Section 12.

<sup>16</sup> Section 13 (1).

<sup>17</sup> Section 13 (3).

mendation of the Commission, to "issue whatever order he deems necessary to carry the recommendations of the board into effect".<sup>18</sup> The Minister is not confined, as a summary conviction court would be, to ordering the payment of a fine: he could make other orders more appropriate to the facts, such as the payment to the complainant of expenses incurred as the result of the failure to obtain accommodation, and an offer of the next available accommodation.<sup>19</sup> Contravention of such an order is an offence punishable by a fine.<sup>20</sup>

To be sure these are large powers, but that is not a sufficient reason to condemn them. Criticism involves more than simply considering their effect on landlords; it involves an evaluation of alternative methods of combating the difficult problem of racial discrimination. Those studies which have been made suggest that the legislature is right in its rejection (or postponement) of the criminal process. The evidence suggests that the continuous work of an expert body, receiving and investigating complaints, attempting to conciliate and settle individual grievances, acquiring experience and information and spending a good portion of its budget on education (as the Commission does) will do more to meet the problem than the occasional prosecution, conducted in public in the ordinary courts in accordance with an adversary system which may have the effect of polarising the very attitudes which the statute seeks to soften and change.<sup>21</sup> The Code does make contravention of its provisions (or of an order made thereunder) a criminal offence triable in a summary conviction court, but the Code makes clear that prosecution is intended as a remedy of last resort, for it cannot be instituted without the consent of the Minister.<sup>22</sup>

Given this legislative structure it is unreasonable to insist on immediate prosecution of any complaint which, in the Commission's opinion, raises a *prima facie* case of a violation of the Code. The Code plainly envisages prior attempts by the Commission to reach a voluntary settlement, and if this is not possible, a hearing by a board of inquiry which may culminate in a recommendation to the Minister that he order a remedy which may differ substantially from a fine. In reviewing the work of a board of inquiry (or of the Commission) it is obviously no part of the court's role to take away powers which the legislature has confided, even if the court believes that the powers are capable of abuse or that they are better exercised by the courts.

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<sup>18</sup> Section 13 (6).

<sup>19</sup> The Commission by letter of 14 January 1969 advised Bell in this case that: "Typical terms of settlement would include a written expression of apology to the complainant from Mr. Bell as well as the offer of the next available accommodation, and remuneration to the complainant for monies expended as a result of his failure to obtain accommodation at 30 Indian Road": (1971) 18 D.L.R. (3d) 1, 10. In fact the great majority of cases are concluded by settlement, and there have been few orders: Hartley, [1970] Public Law 175, 179; and for general discussion of the terms of settlements, see *Id.*, 189-192.

<sup>20</sup> Section 14 (but by s.16 no prosecution shall be instituted except with the consent of the minister).

<sup>21</sup> Articles cited, *supra*, note 2.

<sup>22</sup> Section 16. There have in fact been very few prosecutions; they are discussed by Hartley in [1970] Public Law 175, 182-186.

*The jurisdictional fact issue*

The question for the court is what, on a fair interpretation of the Code, is the extent of the powers conferred upon a board of inquiry appointed under the Code. It will be recalled that s.13 of the Code empowers the board "to investigate" a complaint that a person has been discriminated against contrary to the Code. Section 3 makes it an offence to deny occupancy of a "self-contained dwelling unit" because of (inter alia) race, colour or national origin. Bell's argument before the board of inquiry was that the board had no jurisdiction even to commence to investigate the complaint against him because it concerned premises which were not a self-contained dwelling unit within s.3. This is the argument which was accepted by Stewart J. at first instance and by the majority of the Supreme Court of Canada. The result was to stop the board from even considering the question whether Bell's flat was a self-contained dwelling unit, let alone the question whether Bell had been guilty of illegal discrimination.

It is implicit in the decision of the Supreme Court of Canada (and of Stewart J.) that the board of inquiry had no jurisdiction to determine conclusively whether the premises which were the subject of complaint were a self-contained dwelling unit. In the jargon of administrative law, the existence of a self-contained dwelling unit was a "jurisdictional fact" (or a "collateral fact"). A jurisdictional fact is one which must exist "objectively" before a tribunal has jurisdiction. A jurisdictional fact is to be contrasted with a "fact within jurisdiction" (or a "fact in issue"). A fact within jurisdiction is one which a tribunal has jurisdiction to find conclusively. Presumably, under the Code, the question whether a landlord had denied accommodation because of race, colour or place of origin would be one which the board of inquiry would have jurisdiction to determine conclusively in a case which concerned a self-contained dwelling unit; that is to say, the existence of discrimination would be a fact within jurisdiction.<sup>23</sup>

In Anglo-Canadian administrative law the distinction between a jurisdictional fact and a fact within jurisdiction is crucial. If an adjudicating tribunal makes an "error" as to the "existence" of a fact within jurisdiction, the error does not affect the validity of the tribunal's decision, and the decision is unreviewable by the courts (or any other agency).<sup>24</sup> But if a tribunal makes an error as to the existence of a jurisdictional fact, the error makes the tribunal's decision invalid (or void) and therefore reviewable by the courts. The theory is that in the former case the tribunal is acting within the jurisdiction conferred upon it by statute, while in the latter case the tribunal is acting outside its jurisdiction.

This is the textbook law, but concealed within its apparently inevitable reasoning lie some of the most intractable difficulties of administrative law. The difficulties start with the fact that no system of law can attach a legal

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<sup>23</sup> The terms "jurisdictional fact" and "fact within jurisdiction" include findings of law as well as fact, a point which is explained in the text accompanying notes 46-50, *infra*.

<sup>24</sup> The decision will of course be reviewable if the legislature has provided a right of appeal. It will also be reviewable by certiorari (but not by any other remedies) if there is an error of law on the face of the record. See *infra* note 47.



consequence to the "objective" existence of any fact; the most that is possible is to attach a legal consequence to the existence of a finding of fact by a particular court or other tribunal.<sup>25</sup> Nor is it strictly accurate to speak of "error" as if error could ever be objectively ascertained; any error by a court or other tribunal to which a legal consequence attaches must be a finding of error made by another court or tribunal. When it is said that a jurisdictional fact must exist "objectively" before a tribunal has jurisdiction, what is meant is that the reviewing court must decide whether or not the fact exists; that is to say, the fact must exist in the opinion of the reviewing court. When it is said that an "error" by a tribunal as to the existence of a jurisdictional fact makes its decision invalid, what is meant is that the opinion of the reviewing court is the opinion to which the law accords authority. It follows that the question whether a fact is "jurisdictional" or not is a question whether the authoritative finding is to be the finding of the tribunal or of the court. In other words, the question requires the respective roles of tribunal and court to be marked out. And since, under Anglo-Canadian constitutional theory, the question is answered by interpreting the statute which confers power on the tribunal, the role of the legislature is also in issue.

The most important scholarly contribution to discussion of the jurisdictional fact doctrine has been made by D. M. Gordon, a Canadian practising lawyer, who over a period of nearly forty years has written a series of articles on the topic.<sup>26</sup> These articles are so clear, forceful and original, and are so thoroughly documented, that they must rank as one of the outstanding contributions to periodical literature in any field of the law. They consist of an uncompromising rejection of the jurisdictional fact doctrine, which the author regards as an illegitimate device developed by the courts to enable them to review decisions which the legislature intended to be unreviewable. Applied to the provisions of the Ontario Human Rights Code, Gordon's argument could be briefly summarized as follows. If the existence of a "self-contained dwelling unit" is treated as a jurisdictional fact, then a board of inquiry has power to make a decision as to whether premises are a self-contained dwelling unit which will be binding if correct (i.e., correct in the opinion of the reviewing court), but void if incorrect (i.e., incorrect in the opinion of the reviewing court).<sup>27</sup> But Gordon argues that the concept of jurisdiction, if it is to make any sense at all, requires that the board of inquiry either has the power to decide the question conclusively either way, or has no power to decide it at all. Since the board of inquiry plainly does

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<sup>25</sup> H. Kelsen, *General theory of law and State* (trans. by A. Wedberg; Cambridge, Mass.: Harvard U.P., 1949) 136: "In the world of law, there is no fact 'in itself,' no 'absolute' fact, there are only facts ascertained by a competent organ in a procedure prescribed by law". The same point is emphasized by D.M. Gordon, *The Relation of Facts to Jurisdiction* (1929), 45 L.Q.R. 459, 460.

<sup>26</sup> The principal article is *The Relation of Facts to Jurisdiction* (1929), 45 L.Q.R. 459; the others are *The Observance of Law as a Condition of Jurisdiction* (1931), 47 L.Q.R. 386, 557; *Excess of Jurisdiction in Sentencing or Awarding Relief* (1939), 55 L.Q.R. 521; *Title Redemption Commission v. Gwynne* (1944), 60 L.Q.R. 250; *Conditional and Contingent Jurisdiction of Tribunals* (1960), 1 U.B.C. L.R. 185; Book Review (1960), 76 L.Q.R. 306; Book Review (1966), 82 L.Q.R. 263; *Jurisdictional Fact: an Answer* (1966), 82 L.Q.R. 515.

<sup>27</sup> The term "binding" may appear inappropriate to this particular example because the board of inquiry only has power to make recommendations: cf. *infra* note 61. But it seems best to stick to Gordon's terminology, which is of course perfectly appropriate to the general run of cases, e.g., those referred to in note 35, *infra*.

have to decide the question before it can exercise its powers,<sup>28</sup> it follows that the board can decide the question conclusively either way. The same analysis is applicable to all so-called jurisdictional facts; they all offend Gordon's concept of jurisdiction. In support of his concept of jurisdiction Gordon reviews the cases in which facts have been held to be jurisdictional. He demonstrates that in none of them did the statute in question give any basis for the court's distinction between jurisdictional facts and facts within jurisdiction, and in none of them did the court succeed in developing a rule or a principle which explains how the two kinds of facts are to be distinguished. That there is "no acid test for recognising collateral or jurisdictional facts", and that the cases are "doubtful", is conceded even by supporters of the doctrine.<sup>29</sup> Gordon seizes on the concession with these words:

But to many the conclusion must be irresistible that if a so-called distinction between types of fact is so indefinite that it cannot be described, if no principle for identifying jurisdictional fact can be found, if there is no test for recognizing what is claimed to be jurisdictional fact, then the concept is a fiction, with no basis in reality. Then there are no borderline cases, and all attempted distinctions are worse than "doubtful". There is no reason for believing in jurisdictional facts except that those who want to have tribunals' findings reviewable would like to have such facts exist.<sup>30</sup>

It follows, in Gordon's view, that all facts which have to be found by a tribunal are intended by the legislature to be treated the same way — as facts within jurisdiction. On this view, the correctness of all findings by a tribunal is unreviewable in the courts unless the legislature expressly confers a right of appeal. The withholding of a right of appeal makes clear that the intention of the legislature is that its tribunal's findings should not be reviewable on the ground that they are incorrect.<sup>31</sup>

Gordon has often reiterated his argument since he first published it in 1929,<sup>32</sup> and it has never been rebutted.<sup>33</sup> Yet it seems to have had little effect on the textwriters or on the courts.<sup>34</sup> The jurisdictional fact doctrine has continued to be accepted as a mainstay of administrative law.

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<sup>28</sup> In the *Bell* case the Supreme Court of Canada did not even allow the board of inquiry to do this, but the board obviously would not seek prior court clearance to embark on an inquiry in most cases, and the Supreme Court's decision on this point is in any case probably wrong: see text, *infra*.

<sup>29</sup> H.W.R. Wade, *Anglo-American Administrative Law: More Reflections* (1966), 82 L.Q.R. 226, 231, and see works cited, note 33, *infra*.

<sup>30</sup> (1966), 82 L.Q.R. 515, 520.

<sup>31</sup> Of course review would be available on other grounds, e.g., abuse of discretion, unauthorized delegation, breach of natural justice: see text, *infra*.

<sup>32</sup> *Supra* note 26.

<sup>33</sup> For disagreement on policy grounds (see text, *infra*), but not rebuttal, see H.W.R. Wade, *Anglo-American Administrative Law: More Reflections* (1966), 82 L.Q.R. 226, 232; S.A. de Smith, *Judicial Review of Administrative Action* (London: Stevens, 2nd ed., 1968) 96-98; A. Rubinstein, *Jurisdiction and Illegality* (Oxford: Clarendon, 1965) 212; cf. L. Jaffe, *Judicial Review: Question of Fact* (1956), 69 Harv. L.R. 1020; *Judicial Review: Constitutional and Jurisdictional Fact* (1957), 70 Harv. L.R. 953; *Judicial Control of Administrative Action* (Boston, Mass.: Little, Brown, 1965) chs. 15, 16.

<sup>34</sup> It comes as no surprise to find, for example, that the articles are not referred to in the relevant section of the recently published Canadian text, R.F. Reid, *Administrative Law and Practice* (Toronto: Butterworths, 1970) 188-192.

Apart from *Bell*, the most recent of many examples<sup>35</sup> of its application in the Supreme Court of Canada is *Metropolitan Life Insurance Co. v. International Union of Operating Engineers* (1970),<sup>36</sup> a case concerning the certification power of the Ontario Labour Relations Board. The certification power was conferred by s.7(3) of the Labour Relations Act in these terms:

. . . if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit.

The International Union of Operating Engineers applied to the Board for certification as the bargaining agent for the maintenance workers in Metropolitan Life's Ottawa office. The union presented uncontradicted evidence that more than 55 per cent of the employees in the bargaining unit had applied for membership of the union, had paid an initiation fee, and had been accepted by the union as members. The employer opposed certification on the ground that the employees in the bargaining unit were maintenance workers, and the constitution of the union provided only for membership by operating engineers. Apparently this kind of problem had arisen in other certification applications before the Board, and the Board had "a long-standing policy" to meet the problem. The Board's policy was to ask whether the employees would in fact be accorded all the rights and privileges of members. If the evidence indicated that they had applied for membership and paid the initiation fee, and that the union would in fact accord them all the rights and privileges of members, then the Board's policy was to treat them as "members" for the purposes of s.7(3), even if they did not satisfy the eligibility requirements of the union constitution. In this case the Board found that its criteria of membership were satisfied by the requisite 55 per cent of the employees in the bargaining unit. The Board therefore certified the union. The employer applied for certiorari to quash the Board's certificate. This was refused by the High Court of Ontario and, on appeal, by the Court of Appeal.<sup>37</sup> But the Supreme Court of Canada reversed, issuing certiorari to quash the certificate.<sup>38</sup> In effect, the court decided that the existence of the requisite number of "members" was a jurisdictional fact, and that the Board had erred in finding that employees who were not eligible for membership according to the union constitution were "members". This error deprived the Board of jurisdiction, and made its decision void and reviewable on certiorari.

*Metropolitan Life* is a particularly extreme example of the application of the jurisdictional fact doctrine. All of Gordon's general criticisms are of course applicable to the decision, but they are reinforced by several provisions of the Labour Relations Act which indicate rather clearly that the legislature did not intend the Board's finding to be reviewable. In the first place, s.7(3) is framed in subjective terms: "if *the Board is satisfied that more than 55*

<sup>35</sup> E.g., *Toronto Newspaper Guild v. Globe Printing Co.* [1953] 3 D.L.R. 561; *Jarvis v. Associated Medical Services* (1964) 44 D.L.R. (2d) 407; *Re Galloway Lumber Co. Ltd.* [1965] S.C.R. 222. Each of these cases concerned statutory provisions similar to those in the *Metropolitan Life* case, and the criticism of that decision which is offered in the text, *infra*, is nearly all applicable to these cases as well.

<sup>36</sup> (1970) 11 D.L.R. (3d) 336.

<sup>37</sup> [1968] 2 O.R. 32, (1968) 68 D.L.R. (2d) 109 (Ont. H.C.); (1968) 2 D.L.R. (3d) 652 (Ont. C.A.). The judgment of the Court of Appeal was delivered by Laskin J.A. for a court which also comprised McLennan and Evans J.J.A.

<sup>38</sup> (1970) 11 D.L.R. (3d) 336.

per cent of the employees in the bargaining unit are members of the union . . .".<sup>39</sup> Secondly, s.79(1) (h) of the Act (which was not referred to by the Supreme Court, although it was referred to by the Court of Appeal) expressly states that the Board "has exclusive jurisdiction" to decide "whether a person is a member of a trade union", and "the decision of the Board thereon is final and conclusive for all purposes." Finally, s.80 of the Act is a sweeping privative clause which states that "no decision . . . of the Board shall be questioned or reviewed in any court" and no certiorari or other remedy shall be issued "to question, review, prohibit or restrain the Board or any of its proceedings". In the face of all these provisions, how could the court justify its decision to review the Board's finding? The judgment does not enlighten us.<sup>40</sup>

It is fair to conclude that the terms of a statute establishing a tribunal never support the jurisdictional fact doctrine, and are often (as in *Metropolitan Life*) inconsistent with it. What then is the reason for the doctrine's continued existence? The only reason which the courts ever offer in support is concern about the risk that a tribunal will "extend" its jurisdiction.<sup>41</sup> A quotation often given in this context is a dictum by Farwell L. J. in *R. v. Shoreditch Assessment Committee*: "It is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure".<sup>42</sup> Another typical dictum is that of Cartwright J. in *Jarvis v. Associated Medical Services Ltd.*: "the Board cannot by an erroneous interpretation of any section or sections of the Act, confer upon itself a jurisdiction which it otherwise would not have."<sup>43</sup> These dicta and their many variants are guilty of circularity: they assume what they set out to prove. They are meaningful only if the jurisdictional fact doctrine is accepted. If, for example, a Labour Relations Board has been given jurisdiction (in Gordon's sense) to decide whether or not a person is a "member" of a union, then in deciding that question the Board is exercising the jurisdiction which has been conferred upon it by the legislature. It is not determining the limit of its own jurisdiction, let alone conferring upon itself a jurisdiction which it otherwise would not have.<sup>44</sup>

The concern about "extension" of a tribunal's power which underlies the dicta which have been quoted must be placed in perspective. If the Labour Relations Board has no jurisdiction to decide whether or not a person is a "member" of a union, then who has? The answer of course is the court. When a tribunal defines "member" (or "self-contained dwelling unit") in a way which the court thinks is wrong, the court charges that the tribunal has

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<sup>39</sup> My italics.

<sup>40</sup> The court did not offer one word of reasoning to justify its decision that the existence of the requisite number of members was jurisdictional, or to justify its decision that the Board's deliberate and carefully reasoned interpretation of the word "members" was incorrect; all the court said was that the Board had asked itself "the wrong question": see (1971) 11 D.L.R. (3d) 336, 343-345. The decision has been aptly criticized by P. C. Weiler in "The Slippery Slope of Judicial Intervention", p. 1 of this issue.

<sup>41</sup> This is the feature of Gordon's "pure theory of jurisdiction" (to use de Smith's phrase) which troubles de Smith, Rubinstein and Wade in the works cited, *supra* note 33.

<sup>42</sup> [1910] 2 K.B. 859, 880.

<sup>43</sup> (1964) 44 D.L.R. (2d) 407, 411.

<sup>44</sup> See Gordon, (1966), 82 L.Q.R. 515.

extended its jurisdiction. It is never suggested that the court may be unjustifiably extending *its* jurisdiction. And yet that charge could be levelled against the court with more reason than it is levelled against the tribunal. After all, the statute compels the tribunal to decide the question; it says nothing about the court doing so.

In the end we are always forced back to the same fundamental question: where a statute confers upon a tribunal a power of decision which is premised on the existence of certain facts, is the power to find those facts conferred upon the tribunal or the court? D. M. Gordon's view that the power has been conferred upon the tribunal seems compelled by a strict reading of such statutes. Gordon in fact rests his case on his rigorous analysis of the statutes. But even if one allows that the courts have more freedom in statutory interpretation than Gordon would be prepared to concede, it is still difficult to justify the jurisdictional fact doctrine, because the relevant policy considerations usually tend to reinforce Gordon's condemnation of the doctrine.

When the legislature enacts a regulatory scheme which requires the exercise of adjudicatory functions, the legislature has to decide whether those functions are to be exercised by the ordinary courts or by an agency outside the courts. Sometimes the choice goes one way, and sometimes the other. What are the reasons which lead the legislature to choose an agency for some kinds of adjudication? Of course they vary from statute to statute, but some or all of the following considerations will undoubtedly be influential. The legislature may want the decisions to be made by an expert body, a body whose experience of the regulated area will be relatively continuous and whose members have, or will acquire, more knowledge and understanding of the area than would be possessed by a judge. If the regulatory scheme is new and experimental, the legislature may assign the adjudication to a body which can develop new policies and remedies free from the limitations which traditionally constrain curial adjudication. If adjudication will be required frequently, the legislature may be concerned that the volume of cases would cast an unacceptable burden on the courts. The legislature may also want adjudication to be informal, speedy and cheap.

If the correctness of an agency finding is re-triable in the courts, the opinion of a judge is substituted for that of the agency. What then is the value of the agency's experience, knowledge and expertise, and its familiarity with the purposes and policies of the regulatory scheme? And, of course, judicial review of an agency finding means that a question which has been litigated once before the agency has to be litigated all over again before the court, and then the question may go on appeal up the hierarchy of courts. What is the effect of this on the workload of the courts and — more importantly — on informality, speed and cheapness?

It could perhaps be argued that the formalities, delays and expenses involved in re-trying jurisdictional facts are worth putting up with in order to secure a second (and sometimes third and fourth) opinion on questions coming before the agency. This assumes of course that there is some likelihood that the second, third, or fourth opinions (in the courts) will be wiser than the first (in the agency), a dubious assumption to say the least. But the short answer to this argument is that it is for the legislature to decide whether or not another opinion is desirable. It is always open to the legislature to

provide for an appeal. The appeal will allow a more rational review because it will not be confined to jurisdictional findings — those findings which Gordon has aptly stigmatized as the unimportant ones.<sup>45</sup> An appeal can allow review of all the findings, if the legislature so chooses. When the legislature makes no provision for appeal in a statute establishing an agency, it is reasonably clear that the legislature did not consider that a second opinion would be desirable. It may have considered that no appellate body would be as competent as the agency itself, or it may have given a high priority to speed, informality and cheapness, or it may have had some other reason. But whatever the reason it is not the role of the courts to substitute their judgment for that of the legislature.

Discussion of the jurisdictional fact doctrine has probably been impeded to some extent by the inadequacy of the terminology. The term "jurisdictional fact" (or "collateral fact") is unsatisfactory for the excellent reason that it is not confined to matters of "fact". The question whether premises are a "self-contained dwelling unit", or whether a person is a "member" of a trade union, each involves the interpretation of words in a statute, as well as findings of fact. It is a matter of controversy whether such questions should be classified as questions of "law" or of "fact" or (and perhaps this is the most accurate) of "mixed law and fact."<sup>46</sup> Fortunately, in the context with which we are concerned, the classification makes no difference: our problem, which is whether the question is to be decided by the agency or the court, is exactly the same however the question is classified.<sup>47</sup> There is merit in the terminology of the McRuer Commission which prefers the terms "preliminary matter" and "collateral matter";<sup>48</sup> and in the terminology of Reid's recent textbook which prefers "jurisdictional issue" and "collateral issue".<sup>49</sup> The neutral terms "matter" and "issue" avoid any suggestion that the thorny distinction between law and fact needs to rear its ugly head in this connection.<sup>50</sup> However, the term jurisdictional fact has probably the widest currency; and that is why I continue to use it.

<sup>45</sup> (1929), 45 L.Q.R. 459, 478.

<sup>46</sup> McRuer Commission, *Inquiry into Civil Rights* (Report #1, vol. 1, 1968), 25; H. Whitmore, *O! That Way Madness Lies: Judicial Review for Error of Law* (1967), 2 Fed. L.R. 159. There is an extensive American literature on these questions: e.g., L. Jaffe, *Judicial Review: Question of Law* (1955), 69 Harv. L.R. 239; *Judicial Review: Question of Fact* (1956), 69 Harv. L.R. 1020; *Judicial Review: Constitutional and Jurisdictional fact* (1957), 70 Harv. L.R. 953; *Judicial Control of Administrative Action* (Boston, Mass.: Little Brown, 1965) chs. 14, 15, 16; K.C. Davis, *Administrative Law Treatise* (St. Paul, Minn.: West, 1958) vol. 4, ch. 30.

<sup>47</sup> The distinction between fact and law, while not central to Canadian administrative law, is relevant in two (or possibly three) contexts. In the first place, certiorari will lie for error within jurisdiction only if the error appears on the face of the record, and is one of law. Secondly, a statutory appeal which is confined to error of law will sometimes be granted from the decision of an agency to another agency or a court. In each of these cases the error must be classified as one of law before it can be corrected. A third context in which the classification has been offered as decisive arises from the theory that s.96 of the B.N.A. Act impliedly insists that the decisions of provincial agencies be reviewable in the courts on matters of law; this theory, which would transform Canadian administrative law, is probably not good law: Laskin, Note, (1963), 41 Can. B.R. 446.

<sup>48</sup> McRuer Report, 75, 81.

<sup>49</sup> R. F. Reid, *Administrative Law and Practice* (Toronto: Butterworths, 1971) 188.

<sup>50</sup> Wade, (1966), 82 L.Q.R. 226, 241, suggests that the term "jurisdictional law" should be used to supplement the term "jurisdictional fact", but he makes the point that "there is nothing to be gained by pursuing this point, since the characterization makes no difference to the fundamental rule".

The jurisdictional fact doctrine, although it is concerned with findings of law or fact (or mixed law and fact), is not the basis of all judicial review of agency decisions; and the arguments which I have directed against the doctrine are not directed against judicial review generally. Judicial review is available, for example, if an agency improperly delegates its powers, or if an agency is biased or fails to provide to the parties an adequate opportunity to be heard. These are essentially procedural matters, where the judgment of a court is likely to be particularly wise and well-informed.

Judicial review is also available where an agency abuses its discretion by acting in bad faith or for an improper purpose or on the basis of extraneous considerations. These abuse-of-discretion doctrines are distinct from the jurisdictional fact doctrine in that they purport to apply to exercises of discretion by agencies, rather than to findings of law or fact by agencies. But the concepts of discretion, law and fact each shade into the others, and clear demarcation is impossible. The important point for our purpose is that the abuse-of-discretion doctrines insist upon a measure of deference to the agency. In effect, they require serious error, error which amounts to a distortion of the statutory scheme. Only the jurisdictional fact doctrine openly permits an agency decision to be overturned simply because the court disagrees with one of the agency's findings. To be sure, the abuse-of-discretion doctrines are vague, and can therefore be used as devices to accomplish the same result as the jurisdictional fact doctrine. But this is recognized as an illegitimate technique. When it occurs it occurs covertly.<sup>51</sup> It is neither acceptable nor typical. The jurisdictional fact doctrine, by contrast, is routinely and openly employed to review findings which the court believes to be erroneous, without regard for whether the "error" is serious or trivial, clear or arguable, within or without the special competence of the agency.

It is presumably too late in the day to make the jurisdictional fact doctrine go away. It has continued to prosper despite the fact that it defies all logic and policy, except the policy which argues that the more judicial review the better.<sup>52</sup> What then can be feasibly urged as the proper course for the law to take? The answer — vague, unsatisfactory and unenforceable though it may be — is that the courts should exercise restraint in the application of the doctrine. They can do this in two ways. The best way is to classify facts as within jurisdiction rather than as jurisdictional, thereby eliminating the doctrine in practice and perhaps eventually in theory. This course is open in every case because (as we have noticed) there are no rules or principles which compel the classification of any fact as jurisdictional, and because (as we have noticed) the classification of a fact as within jurisdiction can always be supported by strict statutory interpretation and by some or all of the policy considerations which have been mentioned. The second way

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<sup>51</sup> The *Metropolitan Life* case is an illustration of this technique. The court said that if the Board had asked itself the right question its decision (even if wrong) would have been unreviewable; but the court held that the Board had in fact asked itself the wrong question: see *supra* note 40.

<sup>52</sup> For the reasons outlined above I believe this policy to be mistaken. I have to concede, however, that there is a climate of opinion in favour of more rather than less judicial review. In addition to the Supreme Court's decisions in *Bell* and *Metropolitan Life*, it is to be seen in the recommendations of the McRuer Commission and in the new Federal Court Act. These developments are discussed by Reid, chs. 22 and 23, who aptly criticizes them as adding up to "judicial overkill of the tribunals". See *supra* note 41.

in which restraint may be exercised is to continue to classify some findings as jurisdictional, but to attach considerable weight to the view taken by the agency. The reviewing court does not have to declare void every agency decision made on the basis of a jurisdictional finding which the court thinks is erroneous. If the point is reasonably arguable, then the court could decide to respect the agency's expert view, even if the court would have reached a different view had the matter been at large. This approach would go a long way to mitigate the severity of the jurisdictional fact doctrine.<sup>53</sup>

If self-restraint is the best course for the courts to follow in reviewing agency findings of law and fact, the decisions in *Bell* and *Metropolitan Life* represent the limits of self-indulgence. In each case facts were classified as jurisdictional: in *Bell* even before the agency had had an opportunity to make a finding (this point is discussed below), and in *Metropolitan Life* in the face of several statutory indications that judicial review was intended to be excluded. In neither case was the classification justified by one word of reasoning; it was simply assumed to be so. In my view the result of each case was wrong, and the judicial technique for reaching the result was deplorable.

#### *The definition of a "self-contained dwelling unit"*

Let us assume, contrary to the argument in this article, that in *Bell* the court was justified in classifying the existence of a "self-contained dwelling unit" as a jurisdictional fact. On the facts of the case the decision to issue prohibition against the board of inquiry is still open to two subsidiary points of criticism.

The first point of criticism concerns the meaning of the term "self-contained dwelling unit." The court's decision to issue prohibition depended on its holding that Bell's flat was not a self-contained dwelling unit. One would expect discussion of this holding to be particularly convincing when it is recalled that the Supreme Court's opinion on the point differed from that of the Ontario Human Rights Commission which had pressed McKay's complaint on to the appointment of a board of inquiry in the face of Bell's argument that it lacked jurisdiction. It should also be recalled that the Supreme Court's finding was made on the basis solely of the facts contained in the affidavit filed by Bell in his own behalf. Out of Bell's own affidavit it emerged that the flat in question had its own separate kitchen, bathroom and sitting

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<sup>53</sup> See P. Brett and P. W. Hogg, *Cases and Materials on Administrative Law* (Australia: Butterworths, 2nd ed., 1967) 205-229, and references, *supra* note 46.

Where an agency whose task is to regulate, but not to adjudicate, has to interpret its enabling statute, there is not the same reason to defer to its decision, for its decision will not have been reached as the result of hearing and argument. Thus an agency with power "to make regulations respecting the sale of fish" must expect the court to interpret the word "fish" if regulations respecting the sale of, say, whalemeat are challenged. But even here, if the agency's interpretation is defensible, it seems to me that the court should be very reluctant to upset it.

<sup>54</sup> (1971) 18 D.L.R. (3d) 1, 14. This step in the reasoning, although in my view it does not much assist in reaching a conclusion (see *infra*), seems sound in that earlier formulations of s.3 spoke of "any apartment in any building that contains more than [six, later reduced to three] self-contained dwelling units." There is no case law on the interpretation of the current or earlier formulations. There is some U.K. case law defining the word "self-contained", but it springs from contexts which are very different from the Code, and is not useful; it is discussed by Martland J. at p. 13.



room, as well as bedrooms; and that the only feature which the flat shared with Bell's own accommodation was the front door and hallway to the stairs. The hallway and stairs were, in Bell's words, "not closed or separated from my living quarters". In the Supreme Court's view these facts were enough to classify the flat as not self-contained.

What is the purpose of excluding dwelling units which are not self-contained from the prohibition against racial discrimination? Undoubtedly, it is a legislative recognition that some householders are racially prejudiced and that they should not be compelled to share accommodation with persons of the disliked race or colour. So the Code does not seek to compel a householder to take in a lodger whose race or colour is offensive to the householder. But is the exclusionary provision intended to exclude from the Code a flat in which the tenants cook separately, eat separately, bathe separately and indeed live separately in every respect except for an occasional meeting at the front door or in the hall?

The Supreme Court took the view that, having regard to the legislative history, the term "self-contained dwelling unit" meant "self-contained premises similar to an apartment in an apartment house."<sup>54</sup> The court then simply asserted that Bell's flat was not similar to an apartment in an apartment house.<sup>55</sup> But why not? An apartment in the typical apartment house shares an exterior door, entrance hall, elevator, stairs and corridors with the tenants of the other apartments. The only difference is that each apartment can be closed up and locked so as to exclude access from the parts of the building shared in common, whereas Bell asserted that the hallway and stairs giving access to the upstairs flat were "not closed or separated from my living quarters." Is this difference material? The tenant of the upstairs flat may have no physical impediment to entering Bell's accommodation, but any such entry would be illegal because it would be unauthorized by the terms of the lease. An encroachment on Bell's accommodation would be a trespass. It seems overly technical to hold that the presence or absence of a door which can be closed and locked converts a dwelling unit which is undoubtedly self-contained according to the terms of the lease into one which is not self-contained. Would it not be more consonant with the purpose of the exclusion to hold that a dwelling unit is self-contained so long as it includes all the normal living facilities and does not share any of them with the tenants of other units?<sup>56</sup> On this basis Bell's upstairs flat would be a self-contained dwelling unit. If there are reasons for rejecting this approach they are not to be found in the Supreme Court's reasons for judgment, which include nothing to justify the crucial step in the court's reasoning that Bell's upstairs flat was not "similar to an apartment in an apartment house".

### *The timeliness of judicial review*

Would Dean Tarnopolsky, the board of inquiry, have done a worse job of interpretation than the court? We shall never know because he was not given the opportunity to try. And this is the second subsidiary point of

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<sup>55</sup> (1971) 18 D.L.R. (3d) 1, 14.

<sup>56</sup> Accord, Hartley, [1970] Public Law 20, 29, citing a case where a board of inquiry held that a unit was self-contained although a staircase and bathroom were shared with other tenants.

criticism of the Supreme Court's decision, which is that on these facts judicial review was premature. It will be recalled that Bell applied for prohibition at the very beginning of the board of inquiry's hearing — before the board had heard any evidence. In support of the application for prohibition Bell swore and filed in court an affidavit setting out facts designed to establish that the flat in question was not a self-contained dwelling unit. It was on the basis of this affidavit alone that the Supreme Court of Canada held that the premises were not a self-contained dwelling unit, and therefore that the board lacked jurisdiction.<sup>57</sup> The Supreme Court reversed the decision of the Ontario Court of Appeal, which, in a judgment delivered by Laskin J.A., had held that review was premature.<sup>58</sup> It is submitted that the Court of Appeal's decision was the better one.

It has already been demonstrated that the jurisdictional fact doctrine rests on insecure conceptual foundations. This is so when the doctrine is used in the usual way, which is to empower the court to review the correctness of findings of law or fact *which have been made initially by an agency*. But when the court uses the doctrine to empower it to make the findings initially for itself, as a matter of first impression, the court carries the dubious reasoning behind the doctrine to an absurd length. The court has in effect converted a doctrine which has traditionally been a device of review into a device of "clearance in advance".<sup>59</sup>

As a practical matter, the course taken by the Supreme Court in *Bell* denied to it the benefit both of a record of evidence taken before the agency and of a reasoned decision by the agency. The board of inquiry intended to hold a hearing in which the evidence would be given orally and would be subject to cross-examination. The board had power to subpoena witnesses, to require the production of documents and (probably) to enter and view the premises.<sup>60</sup> In other words the board had the powers necessary to con-

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<sup>57</sup> Neither McKay nor anyone else filed an affidavit in reply to Bell's application or sought to cross-examine Bell upon his affidavit. McKay was not represented in the proceedings before the court. One can only conjecture as to the reason, but he may have been discouraged by the expense, or he may simply have lost interest. In any case since he had no familiarity with the interior of Bell's house he would not have been in a position to contradict Bell's assertions as to the layout of the house.

<sup>58</sup> [1970] 2 O.R. 672, (1969) 11 D.L.R. (3d) 658.

<sup>59</sup> *Id.*, 679 and 665. The Supreme Court discovered two other cases in which a court had made a finding of "jurisdictional fact" before the agency had been allowed an opportunity to make the finding. These cases are exceptional and I would argue that they are wrongly decided for the reasons given in the text. However they are certainly not as clearly wrong as I argue the *Bell* case is. In the first case the issue was whether a person was "a party to a contract". The court was careful to point out that this was "a perfectly simple, short and neat question of law ... not depending upon particular facts": *R. v. Tottenham and District Rent Tribunal* [1957] 1 Q.B. 103, 107. In the second case the issue was whether an award by a conciliation commissioner was one "altering ... the standard hours of work in an industry," but this phrase occurred in a provision which expressly denied to a conciliation commissioner the power to make an award altering the standard hours of work in an industry: *R. v. Galvin; Ex parte Metal Trades Employers' Association* (1949) 77 C.L.R. 432. In the first case the "purely legal" nature of the question, and in the second case the express denial of power to decide the question, provided a justification for immediate judicial determination of the question which is not present on the facts of the *Bell* case. Cf. *Re Colonial Coach Lines Ltd.* (1967) 63 D.L.R. (2d) 198, where the timeliness of review on prohibition is discussed, but note that that case does not concern "jurisdictional facts".

<sup>60</sup> Ontario Human Rights Code, 1961-1962, s.13 (2), incorporating the powers conferred on a conciliation board under s.28 of the Labour Relations Act.

duct a serious inquiry into the facts. The court on the other hand had before it only Bell's affidavit as to the nature of his premises. It is obvious that the court was in a worse position to find the relevant facts than the board would have been if it had been permitted to proceed. And it is equally obvious that the court could only have been assisted in defining the term self-contained dwelling unit if the court had before it the opinion of the board of inquiry, reached after full argument and consideration.<sup>61</sup>

An argument could perhaps be constructed to the effect that Bell should not have to submit to an inquiry which is doomed in any case to be disqualified for want of jurisdiction. But the argument would not be persuasive. No doubt the mere holding of an inquiry into McKay's allegation could be prejudicial to Bell's reputation. But precisely the same injury would have been risked if Bell had been prosecuted in court for a violation of the Code; it will be recalled that this is the course which he urged upon the Commission. And his application for prohibition certainly attracted plenty of publicity — publicity which inevitably repeated McKay's allegation of discrimination. From Bell's point of view there was no sufficient reason for his refusal to give evidence before the board of inquiry. If he had permitted the hearing to proceed, the board would have had to decide the jurisdictional point. If the board agreed with Bell's submission that the flat was not self-contained, there would be an end of the matter. If the board disagreed with Bell's submission, then review in the courts would not be excluded.<sup>62</sup> The board could also have minimized the prejudice to Bell by trying the jurisdictional question separately at the beginning of the hearing on the footing that no evidence of the allegation of discrimination would be let in until the board was satisfied that the flat was self-contained.<sup>63</sup>

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<sup>61</sup> The timeliness issue has another aspect, which formed the basis of Abbott J.'s dissent in the Supreme Court. The board of inquiry, under s.13 of the Code, has no power to make a final adjudication. Its power is simply to recommend. Abbott J. decided that its action was therefore unreviewable. There is a line of authority to the effect that mere recommendations or reports are unreviewable: see e.g., *Guay v. Lafleur* (1964) 47 D.L.R. (2d) 226 (S.C. Can.); *R. v. Ont. Labour Relations Board; Ex parte Kitchener Food Market Ltd.* (1966) 57 D.L.R. (2d) 521 (Ont. C.A.); cf. *R. v. Botting* (1966) 56 D.L.R. (2d) 25 (Ont. C.A.). The Americans rightly perceive that this kind of case raises an issue of the timeliness of review; and their administrative law includes doctrines of "primary jurisdiction", "exhaustion of administrative remedies" and "ripeness for review", each of which is concerned with an aspect of the timeliness of review: see Davis, vol. 3 chs. 19, 20, 21.

<sup>62</sup> This proposition depends of course on the assumption that the existence of a "self-contained dwelling unit" is a jurisdictional fact. Stewart J., whose judgment at first instance depended on this assumption, said that if the board were permitted to make the finding "there would be no possible appeal from such finding": [1969] 2 O.R. 709 at 716, (1969) D.L.R. 576 at 582. Technically this is correct — there would be no "appeal" — but in context the statement seems intended to mean that there would be no "review" of any kind; the press attributed this broader meaning to it and used it to bolster its criticism of the code: *The Globe and Mail*, 4 February 1971, editorial.

<sup>63</sup> I am grateful to my colleagues, Professors Maurice Cullity and Paul Weiler, for helpful suggestions and criticisms made to me while I was writing this article.