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Jurisdiction, Fairness and Reasonableness

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I. Introduction

Jurisdiction has long been a central concept of administrative law. The traditional view was that judicial review would be granted where there was jurisdictional error and not otherwise.¹ However, jurisdiction was given a broad meaning and, in judicial matters was held to include violations of natural justice. In *Anisminic v. F.C.C.*² Lord Reid said at 213.

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity.

Fairness is a relatively new concept dating from the 1960's³ and, in Canada the 1970's.⁴ Its main effect was to destroy the outmoded and dangerous theory that procedural requirement of justice existed only in matters definable as quasi-judicial within the meaning of *R. v. Electricity Commissioners*⁵ as interpreted in the period 1930-1965⁶ and in Canada until 1979 or so.⁷

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1. Save for error of law on the face of the record if there is not a privative clause. See *R. v. Northumberland; exp. Shaw*, [1951] 1 K.B. 711, [1951] 1 All E.R. 268. See also Jones & de Villars, *Principles of Administrative Law* (Carswell, 1985).

2. *Anisminic v. F.C.C.*, [1969] 1 All E.R. 208 (H.L.).

3. *Re H.K.* [1967] 2 Q.B. 617, [1967] 2 W.L.R. 962 (C.A.); *R. v. Gaming Board Ex parte Benaim*, [1970] 2 All E.R. 528 (C.A.); *Wiseman v. Borneman*, [1969] 3 W.L.R. 706, [1969] 3 All E.R. 275 (H.L.).

4. See the seminal essay Mullan, *Fairness: The New Natural Justice* [1975], U.T.L.J. 281. See also *Nicholson v. Haldimand-Norfolk Regional Bd. of Commrs. of Police*, [1979] 1 S.C.R. 311; *Martineau v. Matsqui Institution No. 2*, [1980] 1 S.C.R. 311; *Martineau v. Matsqui Institution No. 2*, [1980] 1 S.C.R. 602; Grey, *The Duty to Act Fairly after Nicholson* (1980), 25 McGill L.J. 598; and *Can Fairness be Effective?* (1982), 27 McGill L.J. 360.

5. *R. v. Electricity Commissioners*, [1924] 1 K.B. 171, [1923] All E.R. Rep. 150 (C.A.).

6. See especially *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66, 94 Sol. Jo. 516 (P.C.)

7. See *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24 and the Federal Court judgment of *Martineau v. Matsqui Institution No. 2*, [1978] 1 F.C. 312 reversed at [1980] 1 S.C.R. 602.

Reasonableness is, like jurisdiction, an old concept. Courts were always ready to strike something unreasonable.⁸ This concept is, however, undergoing a new revival⁹ and is particularly frequently being invoked by some to restrict judicial review.¹⁰

These concepts have become the central ones in administrative law.¹¹ There are other important issues — the *Charter*,¹² remedies, state liability.¹³ Furthermore, it is still useful to consider the separate categories of judicial review such as bias, “no evidence”, *audi alteram partem*, error of law and so on. However with the concepts of jurisdiction, fairness and reasonableness (which is closely connected to the exercise of discretion) one can rationalize almost all of the voluminous jurisprudence and one can justify most of it in policy terms.

Administrative law has at times been considered obtuse and obscure. Recently, Vallerand J. A. wrote.¹⁴

Le droit administratif, en ce qu'il régit le pouvoir de surveillance et de réforme des cours de juridiction supérieure, est devenu — qu'on me pardonne ma férocité — incohérent. Les nuances d'appoint viennent “parfaire” les distinctions ponctuelles et, soit dit avec tous égards et autant d'admiration à l'endroit de ceux qui s'y retrouvent encore, on ne s'y retrouve plus guère. C'est qu'on a, je pense, laissé se perdre le caractère essentiel du recours qui est de la nature d'une supplique adressée à la Cour de droit commun pour l'inviter, dans les cas qui le méritent, à réprimer les abus de pouvoir, à faire prévaloir la règle des hommes, à assurer le respect de la justice naturelle, bref et essentiellement à faire intervenir une conscience judiciaire indignée.

There is no doubt that in the days of procedural refinements, arbitrary distinctions¹⁵ and uncertainty as to the purpose of judicial review¹⁶, the subject was exceedingly complicated and unnecessarily subtle. With the new dominance of relatively simple concepts, and more obvious policy

8. See *Roberts v. Hopwood*, [1925] A.C. 578; *A-G v. Tynemouth Union*, [1930] 1 Ch. 616.

9. *Secretary of State for Educ. and Science v. Tameside Metropolitan Borough Council* (1977), A.C. 1014 (C.A.).

10. See *Blanchard v. Control Data Canada Limited* (1984), 55 N.R. 194.

11. Along with the concept of “discretion” discussed by this author at length in *Grey, Discretion in Administrative Law* (1979), 17 Osgoode Hall L.J. 107. See also Jones & de Villars, *supra*, note 1 at c. 7 and Pépin & Ouellette, *Précis de Contentieux Administratif* (Editions Yvon Blais Inc. 1982).

12. See Jones & de Villars *supra*, note 1 at 435. Of course, the *Charter* cannot meaningfully be separated from any issue in public law.

13. “Fashionable” issues change from decade to decade.

14. *Per Vallerand J. Celanese Canada Inc. v. Mathieu et al.*, [1983] R.D.J. 397 at 400 (Que. C.A.).

15. Esp. judicial v. administrative decisions.

16. See Hogg, *Judicial Review How Much Do We Need?* (1974), 20 McGill L.J. 157 and Angus, *The Individual and the Bureaucracy: Judicial Review — Do We Need It* (1974), 20 McGill L.J. 177.

goals, we may reduce the subject to a wholesome simplicity, so that both the government and the citizens can know and understand their rights. To do so, we have to consider the fundamental concepts¹⁷ one by one, and then apply them to recent jurisprudence and to the policy of modern administrative law.

II. *Jurisdiction*

Jurisdiction can be defined as the right usually coupled with a duty to make a decision on an issue.¹⁸ The decision may be right or wrong, but it is final unless there is an appeal provided by statute, the decision-maker commits an error of law on the face of the record¹⁹ or jurisdiction is exceeded or lost.

All jurisdiction is presumed to be vested in the superior or high court, which is the general court of the land.²⁰ This means that in order to show that another body has jurisdiction or to rebut the presumption of jurisdiction in the superior court, one has to show clear statutory authority.²¹ Even then the superior court's jurisdiction cannot be ousted entirely.²²

It follows, that any administrative or judicial body other than the superior court of a province must show a statutory source for its jurisdiction. One possible reason for finding a decision *ultra vires* is the absence of such statutory authorization or, in other words, of *ab initio* jurisdiction.

A decision made without *ab initio* jurisdiction is utterly void and of no effect²³ just as a decision outside the legislative limits of the provinces or the federal government would be utterly void.²⁴ This was made clear in *Re Syndicat des Employés and C.L.R.B.*²⁵ where Beetz J. said:²⁶

17. Except discretion where this writer would have little to add to his 1979 essay, *supra*, note 11, save insofar as discretion and reasonableness are related.

18. There may be situations where there is no "duty" and where the decision-maker has an option of declining jurisdiction. For instance, private international law has the concept of "forum non conveniens". However in the vast majority of cases jurisdiction implies a duty to decide. See Grey, *Discretion*, *supra*, note 11 at 110.

19. See *supra*, note 1. A privative clause will prevent review of this type of error *Labrecque v. A.G. Que.*, [1980] 2 S.C.R. 1057.

20. See *Board v. Board*, [1919] A.C. 956 (P.C.). *Three Rivers Boatman Ltd. v. CLRB* (1970), 12 D.L.R. (3d) 710 (S.C.C.). The fact that the jurisdiction is presumed to be vested in the superior court is, along with the fact that legislative power is presumed to be usable in Parliament, the basic principle of the British constitutional system.

21. See *Board v. Board*, *supra*, note 20.

22. *Crevier v. A.G. (Que)* (1981), 2 S.C.R. 220; *CLRB v. L'Anglais* (1983), 1 S.C.R. 147. Some element of judicial review must remain as it is constitutionally entrenched.

23. *Hareldkin v. University of Regina*, [1979] 2 S.C.R. 561.

24. Hogg, *Constitutional Law of Canada* (2nd ed. Toronto: Carswell 1985).

25. *Re Syndicat des Employés and C.L.R.B.* (1984), 14 D.L.R. (4th) 457 (S.C.C.).

26. *Id.* at 479-480.

Once a question is classified as one of jurisdiction, and has been the subject of a decision by an administrative tribunal, the superior court exercising the superintending and reforming power over that tribunal cannot, without itself refusing to exercise its own jurisdiction, refrain from ruling on the correctness of that decision, or rule on it by means of an approximate criterion. This is why the superior courts which exercise the power of juridical review do not and may not use the rule of the patently unreasonable error once they have classified an error as jurisdictional.

Even where it exists at the start, jurisdiction can be lost in the course of decision-making, either for faulty procedure²⁷ or for untenable results.²⁸ Where jurisdiction is lost in that way there results only a relative nullity²⁹ which means that the decision may yet be saved for discretionary reasons, such as undue delay, acquiescence, the conduct of the aggrieved party and so on.

It is thus clear that the view expressed in *Anisminic* that the word "jurisdiction" stands for two concepts is still correct.³⁰ One is the lack of jurisdiction at the outset which leads to absolute nullity similar to that in constitutional law, the other is caused by procedural error such as bias, improper hearing and other types of unfairness and leads to relative and flexible nullity.³¹

One, as yet unanswered question is whether the *L'Anglais*³² case applies to all radically null decisions even if they do not have a "purely" constitutional side³³ to them. Can one attack such a decision in the

27. For example unfairness.

28. For example unreasonableness.

29. *Harelkin*, *supra*, note 23. This matter was the subject of considerable debate. Articles by Prof. Wade in (1967), 83 L.Q.R. 499 and (1968), 84 L.Q.R. 95 suggested that the nullity is absolute. See also *Wade Administrative Law* (5th ed.) at 310-313. In *Harelkin* itself, Mr. Justice Dickson's eloquent dissent illustrates the intensity of the debate. See also Jones' comment on *Harelkin*, *Discretionary Refusal of Judicial Review* (1980), 19 Alta. L.R. 483.

Initially, this writer was tempted to agree with the dissent. However, with time he has come around to the utility of the distinction. Where jurisdiction exists *ratione materie* at the outset the resulting nullity is surely not as serious as where a body invades an area of endeavor where it has no business. If a losing party accepts the results and acts in accordance with it or waits indefinitely there is no reason to annul it later. On the other hand where the power simply does not exist it would be a grave risk to allow a decision to stand and thus to encourage straying outside one's area.

30. *Anisminic v. FCC*, *supra*, note 2. The court was right in suggesting that different terminology as to differentiate between the concepts would have been unfair and confusing at this point, given the long tradition of use of the same terms.

31. It has not been determined which type of nullity results from unreasonable decisions; the author will argue below that it is relative.

32. *CLRB v. L'Anglais*, *supra*, note 22. One must note Beetz J.'s words in *Re Syndicat des Employées* *supra*, note 25 at 481: Further, I do not see why different rules would be applied in this regard depending on whether it concerns judicial review of an administrative or quasi-judicial jurisdiction or judicial review of legislative authority over constitutional matters.

33. For example if no issue of division of power is present.

superior courts even in matters normally submitted to the Federal Court? The logical answer would seem positive since it is ultimately the superior court's role to uphold the law and to determine what are the limits of *ab initio* jurisdiction of all bodies in its jurisdiction. On the other hand, where the issue is error of law, natural justice or fairness only, the *Federal Court Act* can act as a successful privative clause, revoking judicial review and then resuscitating it in a slightly different form.³⁴

It is finally useful to note in analyzing the concept of jurisdiction that where jurisdiction is lost in the course of decision-making, one of the other basic concepts such as unfairness or unreasonableness³⁵ must be invoked for judicial review. Where there is an *ab initio* problem, the concept of jurisdiction suffices by itself.

The differences between the concepts of *ab initio* jurisdiction and that of loss of jurisdiction are so striking that one could usefully make a linguistic distinction by calling the one "error as to jurisdiction" and the other "jurisdictional error" or perhaps "error affecting jurisdiction".³⁶ In other words, the first type is error about the extent of one's jurisdiction, and the other is not about jurisdiction at all, but it makes one lose it.

We conclude that jurisdiction, which is probably the most important idea in administrative law,³⁷ is one which has to be employed with care and which can hide significant nuances. No explanation of the subject matter can be achieved without a consistent and sensible employment of it.

III. *Fairness*

Fairness in the modern context includes all that used to be called natural justice as well as the "procedural fairness" in "administrative matters" that became accepted as a result of judicial activity in the 1960's and 1970's.³⁸

It had always been accepted that superior courts had the duty to quash lower judicial and quasi-judicial decisions tainted by violations of natural justice which was usually decomposed further into "*audi alteram partem*" and "bias". This was so even in the period 1920-1965 when judicial review was unfashionable save among very conservative circles.³⁹ What

34. See Grey, *Sections 96 to 100: A Defense* (1985), 1 Admin. L.J. 3. Because of *Crevier v. A.G. Que.*, *supra*, note 22 it would probably be impossible to remove judicial review without providing it somewhere else.

35. Or some more specific concept such as no evidence, bias etc.

36. See *supra*, note 2 discussion of *Anisminic v. FCC* where Lord Reid expressed regret at the confusing and varied use of the word "jurisdiction".

37. And constitutional law as well.

38. See *supra*, note 3 and 4.

39. Because Canada was so much more conservative than Britain, it can be argued that this

the courts of that period wanted to shelter from judicial review was the so-called “administrative decisions” to which procedural safeguards had no application.

The “procedural fairness” doctrine and jurisprudence⁴⁰ introduced “fairness” to administrative decisions. Initially, it was intended to provide a lesser degree of procedural review for decisions which were *prima facie* peremptory. Thus, Chief Justice Laskin spoke of a “half-way house” between full natural justice and the previous absence of all review.⁴¹ However, the attempt to maintain the old distinction between quasi-judicial and administrative decisions as a rigid borderline between two standards was soon abandoned.

Even before *Nicholson*,⁴² natural justice had been flexible. In *Q.L.R.B. v. Canadian Ingersoll-Rand*,⁴³ the Supreme Court had said that *audi alteram partem* did not always mean a right to an oral hearing. The right to cross-examine witnesses and to be represented by attorney had been recognized in some contexts and not in others.⁴⁴

Once the doctrine of fairness was accepted, it was inevitable that the idea of a clear-cut boundary be abandoned in favour of an infinitely variable standard, in other words, a continuum. Different decisions would require different degrees of fairness based on factors too numerous to enumerate.⁴⁵ This position was admirably expressed by Dickson, J. as he then was in *Coopers and Lybrand v. MNR*⁴⁶:

Administrative decision does not lend itself to rigid classification of function. Instead, one finds realistically a continuum. As paradigms, at one end of the spectrum are rent tribunals, labour boards and the like, the decisions of which are eligible for review. At the other end are such matters as the appointment of the head of a Crown corporation, or the

intellectual current did not fully arrive here until the 1950's and especially the *Copithorne* decision, *supra*, note 7 and that it did not disappear until the late 1970's. See Grey *The Ideology of Administrative Law* (1983), 13 Man. L.J. 35 for this author's view of the evolution of administrative law.

40. See *supra*, note 3 and 4.

41. *Nicholson*, *supra*, note 4 at 321.

42. *Nicholson*, *supra*, note 4.

43. *Q.L.R.B. v. Canadian Ingersoll-Rand*, [1968] S.C.R. 695; *C.C.S.U. v. Minister for Civil Service*, [1985] 1 A.C. 374 (H. of L.).

44. See *Pett v. Greyhound Racing Association*, [1968] 2 W.L.R. 1471 (Eng. C.A.).

45. Some of these factors would clearly be the peremptory or judicial nature of the decision; the type of power (i.e. emergency or security powers may be treated with greater deference), see *C.C.S.U. v. Minister for Civil Service*, *supra*, note 43; the legislative context (that is, did the legislator wish to shelter this provision?) and especially the consequences of the decision. That is why in *Kane v. The Board of Governors of the University of B.C.* (1980), 31 N.R. 214, Mr. Justice Dickson said at 221: “A high standard of justice is required when the right to continue in one's profession or employment is at stake. [. . .] A disciplinary suspension can have grave and permanent consequences upon a professional career.”

46. *Coopers and Lybrand v. MNR* (1979), 1 S.C.R. 495 at 505.

decision to purchase a battleship, determination inappropriate to judicial intervention. The examples at either end of the spectrum are easy to resolve, but as one approaches the middle the task becomes less so. One must weigh the factors for and against the conclusion that the decision must be made on a judicial basis. Reasonable men balancing the same factors may differ, but this does not connote uncertainty or *ad hoc* adjudication; it merely reflects the myriad administrative decision-making situations which may be encountered to which the reasonably well-defined principles must be applied.

The effect of this statement is to eliminate for most purposes the distinction between administrative and quasi-judicial functions and therefore between fairness and natural justice⁴⁷ and to replace it with a continuum of different standards ranging from near unreviewability to the requirement of a full trial.⁴⁸ Of course the old distinction remains and indeed is applied in *Coopers and Lybrand*⁴⁹ for purposes of the *Federal Court Act* where it is enshrined in s. 28. However, it is no longer a question of availability of judicial review, only of determining its forum.

The flexibility of fairness means the disappearance of technical distinctions in this area of law. Fairness is common sense and solomonic justice. The question asked is whether the procedure followed was right in the circumstances. In that way, fairness is a vastly superior concept to “natural justice” as we once knew it, which bristled with technical refinements and which could only apply to quasi-judicial decisions. It is also much simpler.

The problem of review of procedural error has been complicated somewhat by the appearance of a new expression — fundamental justice. This expression is not only used with increasing frequency, it is also entrenched in s. 7 of the *Canadian Charter of Rights* and is found in the *Bill of Rights*. It is too early to give an exhaustive definition of fundamental justice, but early jurisprudence has made it look very much like fairness under another name.⁵⁰ In particular, in *Singh v. MEF*⁵¹ Mr.

47. This had been foreshadowed in Canada in *Scott v. Nova Scotia Rent Review Board* (1977), 81 D.L.R. 3rd 530 (N.S.C.A.).

48. The identity of natural justice and fairness is well illustrated by the famous statement that “natural justice is but fairness writ large” in *Furnell v. Whangarei High School Board*, [1973] A.C. 660 (P.C.).

49. *Coopers and Lybrand v. MNR*, *supra*, note 46.

50. See *Jamieson and The Queen* (1982), 70 C.C.C. (2d) 430 (Que. S.C.); *Kindler et al.*, Federal Court of Canada (F.C.T.D.) T-945-85, 1985-07-23. However, the recent case *Re s. 94(2) of the Motor Vehicle Act of British Columbia* SCC Dec. 17, 1985 makes it clear that s. 7 protects more than procedure, however, broadly interpreted (esp. at 15, 33 per Lamer J. and at 17 per Wilson J.). This seems to confirm the correctness of *Re Mia and Medical Services Commission of British Columbia* (1984), 17 D.L.R. 4th 385. *Re s. 94(2) was applied with respect to parole condition in Litwack v. National Parole Board* Fed. C.T.D. 2080-85 Feb. 27 1986 (Walsh J.). Obviously, fundamental justice covers natural justice and more besides.

51. *Singh v. MEL*, [1985] 1 S.C.R. 177.

Justice Beetz introduces a continuum very similar to the one accepted with respect to fairness.⁵²

Although the content of fairness and fundamental justice is not constant, certain basic principles are well defined since *Nicholson*.⁵³ Firstly, it is essential to inform a person affected by a decision of the possibility that such a decision will be taken, of the reasons for it and to give the person a reasonable opportunity to make representation. To these principles may be added the self-evident one that the decision-maker must keep and appear to keep an open mind until he has heard the representations. The continuum means that "reasonable opportunity" or the degree of detail of information provided may vary from case to case. However, the presence of this function is a constant feature of fairness.⁵⁴

It is obvious that lack of fairness need not amount to a total denial of opportunity to make representations. It suffices that a person be prevented from knowing a large portion of the case against him⁵⁵ or from presenting a sufficiently large portion of his case⁵⁶ for the subsequent decision to be subject to quashing. If this were not so, nothing would be easier to evade than the duty to act fairly.

*Harelkin*⁵⁷ made unquestionable in Canada the assertion that a breach of natural justice or fairness make a decision voidable only and therefore may lead to a discretionary refusal of review.⁵⁸ This is reasonable since

52. *Singh v. MEI*, *supra*, note 51. He concluded that an application for refugee status requires at least one oral hearing. This would not necessarily be so for matters with less serious consequences.

53. *Nicholson*, *supra*, note 4 where Laskin C.J. said: "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. The Board itself, I would think, would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination. 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 presuming good faith. Such a course provides fairness to the appellant, and it is fair as well as the Board's right, as a public authority to decide, once it had the appellant's response, whether a person in his position should be allowed to continue in office to the point where his right to procedural protection was enlarged. Status in office deserves this minimal protection, however brief the period for which the office is held."

See also *Radulesco v. Canadian Human Rights Commission*, [1984] 2 S.C.R. 407.

54. The strength of the *Nicholson* formulation can be seen from the constant references to it in subsequent jurisprudence. See for instance *Martineau no. 2*, *supra*, note 4. *A.G. Que. et al. v. Pierre Miller*, 500-09-000298-844, CAM, 7 May 1985 (Que. C.A.). The last case quotes at length and is based totally on *Nicholson*. See also Grey, *The Duty to Act Fairly After Nicholson* (1980), 25 McGill L.J. 598.

55. *Radulesco*, *supra*, note 53; *Kane*, *supra*, note 45.

56. *Roberval Express Limited v. Union des Chauffeurs de Camion* (1982), 1 R.D.J. 3 (S.C.C.); *Tribunal — Avocats-3*, [1981] D.D.C. 517 (Que. Trib. des Professions); *Brethour v. Law Society of British Columbia*, [1951] 2 D.L.R. 138 (B.C.C.A.).

57. *Harelkin*, *supra*, note 23.

58. This applies to bias as well as failure to hear. See *P.P.G. Industries A.G. Canada*, [1976]

the error is in the procedure used and does not amount to a total usurpation of power. It also increases the already considerable discretionary power of the courts. It means that the courts have a mandate to do justice and the positive law cannot become as large as impediment to that goal as it used to be.

IV. Reasonableness

In addition to being within jurisdiction and being reached fairly, a decision must be reasonable. Otherwise, a biased or unfair decision-maker would only have to follow a prescribed ritual and his misuse of power would never be discovered or quashed.⁵⁹ This point was made eloquently in Australia in *Minister of Immigration and Ethnic Affairs v. Pochi*⁶⁰ and now appears beyond doubt.⁶¹

The definition of unreasonable is often held to be the one given by Lord Diplock in *Tameside*.⁶²

In public law "unreasonable" as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.

The adjective "unreasonable" can refer to either law or fact as Lamer J. pointed out recently.⁶³

In looking for an error which might affect jurisdiction, the emphasis placed by this court on the dichotomy of the reasonable or unreasonable nature of the error casts doubt on the appropriateness of making, on this basis, a distinction between error of law and error of fact. In addition to the difficulty of classification, the distinction collides with that given by the

2 S.C.R. 739; *Harelkin, supra*, note 23; *R. v. Aston University Senate, exp. Roffey* (1969), 2 Q.B. 538 (Eng. Div. Ct.).

59. See Grey, *Can Fairness be Effective?* (1982), 27 McGill L.J. 360 where this writer wrote:

If the external forms of procedure were scrupulously observed it would still be possible for grossly unfair decisions to be made. The fact that one side is given the chance to speak does not mean that the other side is listening. It is certain that someone who is biased or determined to take a particular course of action will often bend over backwards to appear even-handed or indeed well-disposed. It would be sad if the sole effect of the growth of fairness was a proliferation of manuals written to help officials clothe their decisions in the garb of fairness . . .

It follows that in order to prevent fairness from becoming a sham there must be some provision for review of questions of substance and not only procedure.

60. *Minister of Immigration and Ethnic Affairs v. Pochi* (1981), 44 F.L.R. 41 (F.C. Aust.).

61. Especially since the *Re s. 94(2)* case *supra*, note 50 gave "fundamental justice" a substantive meaning.

62. *Secretary of State for Education and Science v. Tameside Metro Borough Council, supra*, 9 at 1064.

63. *Blanchard v. Control Data Canada, supra*, note 10 at 215-216.

courts to unreasonable errors of fact. The distinction would mean that this error of law is then protected by the privative clause unless it is unreasonable. What more is needed in order that an unreasonable finding of fact, in becoming an error of law, becomes an unreasonable error of law? An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.

Not only is the distinction between error of law and of fact superfluous in light of an unreasonable finding or conclusion, but the reference to error itself is as well. Indeed, though all errors do not lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact, or a combination of the two), which is unreasonable.

If a decision is unreasonable in law, in fact, or as a result of a mixture of the two, it is subject to judicial review. This is clear even in cases which are frequently cited to restrain judicial review such as *CUPE*⁶⁴ and *Blanchard*.⁶⁵ What remains is to decide when a decision is classified as unreasonable under the definition reproduced above.⁶⁶ One can see three types of situations where a decision could be unreasonable:

- A) error of law
- B) error of fact
- C) misuse of discretion

The first case is simple. It is settled that a ruling of law is unreasonable when no one could have reasonably interpreted a statute or other document in the way in which it was done. In other words if the reviewing court is *certain* of the correct interpretation, the opposite one is unreasonable. If it merely leans one way or the other, it will hold neither position to qualify as "unreasonable". A recent example of unreasonable interpretation of law can be found in *Miriam Homes v. CUPE*.⁶⁷ It is obvious that plain errors of law are not rare. Lower courts make them and are corrected by higher ones; a fortiori we can expect administrative tribunals to make them and to be corrected. A number of recent examples can be cited of this type of error being reviewed.⁶⁸

In dismissing an application for review in *Ventes Mercury des*

64. *CUPE v. N.B. Liquor Corporation* (1979), 26 N.R. 341.

65. *Blanchard v. Control Date Limited*, *supra*, note 10.

66. See *Tameside*, *supra*, note 62.

67. *Miriam Homes v. CUPE*, [1985] 1 S.C.R. 137. The word "patently" is often used to modify "unreasonable". One can wonder if it adds much. See *infra*, note 202.

68. *Commission Scolaire Jerome Le Royer v. Michael H. Cain et al*, [1984] C.S. 1103; *Service des Affaires Sociales de La Ville de Montreal et al v. Jacques St. Pierre et al*, [1983] C.A. 25 (leave to appeal to S.C.C. refused).

Laurentides v. Bergevin,⁶⁹ Hannan J. set out the test with great lucidity at 465:

The sections of the Act with which Bergevin was concerned have been interpreted so as to provide at least two distinct schools of thought . . . As in the *New Brunswick liquor Corporation* case, there is no one interpretation which may be said to be right, either school may be rationally supported by the texts in question. These considerations might be sufficient to dispose of the petition by dismissing it.

Even if doubtful cases are not reviewed,⁷⁰ there is still a large scope for judicial review of unreasonable findings of law.

It is far harder to persuade a court that findings of fact are unreasonable. In part, this is simply an extension of the general rule that a trial judge is master of the facts and that his findings will not lightly be disturbed.⁷¹ On the other hand, if a theory of curial deference is established on issues of fact that goes beyond the ordinary appeal practices, this will be an error. Surely error of fact is to be viewed in the same light as error of law. If two views are rationally defensible, there should be no review; but if any reasonable man would have decided differently from a decision-maker, his decision should fall. Given the relative ease with which errors of law can be reviewed if they are plain, it would be regrettable if equally plain and therefore equally unjust errors of fact remained without remedy.

It is not possible to limit review to situations where there is absence of evidence. Absence of evidence is an error of law⁷² and Mr. Justice Lamer has made it clear that unreasonableness can apply to issues of fact.⁷³ Rather the superior courts can quash determinations of fact where there is some evidence but where a serious and well-advised decision-maker would not have made that decision on that basis.⁷⁴

It is pointless to try to list adjectives used for unreasonable determination. Arbitrary, absurd, manifestly unjust, capricious,⁷⁵ have been used. One can also suggest “irrational”, “manifestly unfounded”,

69. *Ventes Mercury des Laurentides Inc. v. Bergevin*, [1983] C.S. 463.

70. Unless the error leads to a total lack or excess of jurisdiction.

71. See *Métivier v. Cadorette*, [1977] S.C.R. 371 and *Landry v. Lapointe* (1980), 35 N.R. 91 for illustrations of this principle.

72. *Labrecque v. A.G. Que.*, *supra*, note 19; *Kuziomko v. Commission des Affaires Sociales* (1985), 2 C.S. 566 (Que. S.C.).

73. *Supra*, note 63.

74. But Wade, *Administrative Law*, (5th ed., Oxford) at 287 quoted with approval in *Kuziomko*, *supra*, note 72, suggests “no evidence” can be expanded to situations where there is some but clearly insufficient evidence. Thus, as in most areas of law, the distinction between error of law and error of fact is quite blurred.

75. See for instance *Boulis v. MMI*, [1974] S.C.R. 875; *Blanchard* *supra*, note 63; *Villaroel v. MMI* (1980), 31 N.R. 50 (F.C.A.) esp. in note 6.

“perverse” and some others. Perhaps the best way to summarize the adjectives is to say that judicial review is possible whenever the conclusion reached was not reasonably open to the decision maker.⁷⁶

Some of the confusion may come from Mr. Justice Lamer’s statement at 214 in *Blanchard* with respect to unreasonableness.⁷⁷

This is a very severe test and signals a strict approach to the question of judicial review.

“Severe” is, of course, a subjective word. Certainly the definition of unreasonableness precludes judicial review from being an appeal. It never was that, and the courts have made it very clear that they will not act as courts of appeal from administrative action.⁷⁸ On the other hand, on issues of law, unreasonableness is not a rare finding. On questions of fact, it is more rare,⁷⁹ but it should still not be given such a “hard” interpretation as to be of no practical effect.

It would be unfortunate if instead of the adjectives suggested above words like “wild”, “insane”, “incoherent” and “dishonest” were substituted. Fortunately, most administrative tribunals do not make that sort of finding. To limit review to wild or insane findings would be to restrict it to a few cases in each century. Moreover, wild or insane findings would normally affect jurisdiction in the stricter sense; one would not need to worry about unreasonableness.

Therefore, while it is obvious that findings of fact or credibility should not lightly be disturbed on grounds of unreasonableness, one should define “unreasonableness” as something that regularly, if infrequently occurs, not as a completely unlikely and utterly scandalous finding that a lawyer might expect to encounter once in a lifetime.⁸⁰

The third type of unreasonable decision is the misuse of discretion.⁸¹ The difference between it and the two previous types is that here the result is not “wrong” because discretion means that there is no right or wrong answer. The problem is not “error” by the decision-maker in the

76. See *Surujpal v. MEI* (1985), 60 N.R. 73 and *Rajudeen v. MEI* (1984), 55 N.R. 73 recent cases in which this test was applied with respect to refugee status and in which the Federal Court precluded another unfavourable finding by stating that the only conclusion open was that the applicant in each case was a refugee.

77. *Blanchard*, *supra*, note 10.

78. *Boulis v. MMI* *supra*, note 75; *Blanchard*, *supra*, note 10. In a recent case *Société Radio-Canada v. Lussier* C.S. 500-05-003410-857, 15 October 1985 Lesyk J. underlined the distinction between review and appeal.

79. See Wade, *Administrative Law* at note 1. See also Jones & de Villars, *supra*, note 1.

80. E.g. the events of *Gershman v. Manitoba Vegetable Marketing Board*, [1975] 65 D.L.R. 3d 181 (Man. Q.B.) *aff'd* in [1976] 69 D.L.R. 3d 114 (Man. C.A.)

81. See Grey, *supra*, note 11. Of course, this type of unreasonableness often coincides with the previous type and cannot readily be isolated.

result, but rather the making of the decision on improper, irrelevant or illegal consideration.

In *Oakwood Development Ltd. v. Rural Municipality of St. Xavier*⁸² the Supreme court reaffirmed the importance of this ground for judicial review. Madame Justice Wilson wrote at 17-18:

All the evidence supports the finding that the Council refused to hear any information whatsoever regarding the potential flooding problem and therefore failed to take proper account of factors relevant to its statutory mandate. This finding leads inevitably to the conclusion that the respondent failed to exercise its discretion in accordance with proper principles.

This is not essentially different from *Smith and Rhuland v. The Queen*⁸³ or *Leong Ba Chai*.⁸⁴ It has as always been clear that discretionary decisions will be quashed if derived from improper considerations. It is evident that decisions so derived are an illustration of a particular type of unreasonableness and, like all unreasonable decisions, cannot be sustained. They are different from other unreasonable decisions in that the result may not be *per se* unreasonable and may well be open to the well-instructed decision-maker, so long as he makes it on a relevant basis. The effect is that, in many cases, the result will be the same after the decision-maker has made a new determination.⁸⁵ This, however, does not take away from the initial position that a decision made on incorrect consideration will not stand.

The consequences of an unreasonable decision have never been discussed at great length. Is the situation akin to a breach of natural justice with the result that the error is voidable or is it rather an error of jurisdiction?

Despite the dearth of jurisprudence, it is now quite clear that an unreasonable decision is voidable only. In *Re Syndicat des Employés and C.L.R.B.*,⁸⁶ Beetz, J. said at 463:

An error of this kind is treated as an act which is done arbitrarily or in bad faith and is contrary to the principles of arbitral justice.

At 481 of the same judgment we read:

Conversely, when the court applies the patently unreasonable interpretation rule it is always with respect to an error which an

82. *Oakwood Development Ltd. v. Rural Municipality of St. Xavier*, S.C.C. 17017, 1985.09.19.

83. *Smith and Rhuland v. The Queen*, [1953] 2 S.C.R. 95.

84. *R. v. Leong Ba Chai*, [1954] S.C.R. 10.

85. Unless the irrelevant ground is the only possible motive for the decision as in *Smith and Rhuland*, *supra*, note 83.

86. *Re Syndicat des Employés de Production and C.L.R.B.*, *supra*, note 25.

administration tribunal may have made in deciding a question considered as falling within the limits of the jurisdiction.

Thus, unreasonable decisions will be subject to acquiescence, undue delay and all the myriad other reasons why judicial review may be refused in cases of breach of the duty to act fairly.⁸⁷ The result is a sensible one, since the error will have occurred in an area where the tribunal did have power to act. It would not amount to a total usurpation but rather to a misuse of power. Where there is total usurpation, it is difficult to see how a decision could be saved without a threat to the integrity of our political system; however, in a case of misuse, it is possible to see other considerations outweighing the need for review.⁸⁸

V. *Application of the basic concepts to recent jurisprudence*

Once we have defined jurisdiction, fairness and reasonableness it is necessary to show how they are used by the courts in current administrative law. Before considering the cases, however, we must place the whole area of law in a context.

Some judges and commentators have seen in the developments since *CUPE*⁸⁹ a restriction and reduction in judicial review. *Dicta* in certain Supreme Court decisions lend strength to this theory. In *Heustis v. N.B. Electric Power Commission*⁹⁰ Dickson, J. said at 781:

There is a very good policy reason for judicial restraint in fettering adjudicators in the exercise of remedial powers. The whole purpose in establishing a system of grievance adjudication under the Act is to secure prompt, final and binding settlement of disputes.

This was textually quoted and emphasized in *Blanchard*.⁹¹ Moreover, in *Syndicat des Professeurs du Collège Lévis-Lauzon*⁹² Beetz, J. said at 14:

. . . the principle of judicial restraint and the description of the procedure that should be avoided if it is to be followed apply to an arbitration matter and are still entirely relevant. This judgment⁹³ is frequently cited, and the policy stated recording limitation by judicial intervention has recently been applied by the decision of this Court in *Syndicat des Employés de production du Québec v. C.L.R.B.*⁹⁴

87. See *Harelkin*, *supra*, note 23.

88. Of course the more serious the misuse, the less likely it is that it will be allowed to remain. For instance, bad faith vitiates almost anything. See *Landreville v. Town of Boucherville* (1978), 22 N.R. 407 (S.C.C.).

89. *CUPE v. N.B. Liquor Corporation*, *supra*, note 64.

90. *Heustis v. N.B. Electric Power Commission*, [1979] 2 S.C.R. 768.

91. *Blanchard*, *supra*, note 10 at 209.

92. *Syndicat des Professeurs v. CEGEP de Lévis-Lauzon*, [1985] 1 R.C.S. 596.

93. *CUPE v. N.B. Liquor Corporation*, *supra*, note 64.

94. *Supra*, note 25.

It is this writer's thesis that, although the principle of a certain judicial restraint cannot be doubted after these Supreme Court pronouncements, nothing in any of these areas reduces the scope of judicial review hitherto available or calls for a greater degree of restraint.

If any "reduction" took place, it would certainly be with reference to *ab initio* jurisdiction rather than the other two concepts. The following words of Dickson, J. in *CUPE*⁹⁵ at 347 (N.R.) may be taken to have this effect:

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

In other words, the opinion of an arbitrator or other administrative decision-maker on the extent of his jurisdiction will have some influence, at least where the answer is not clear.⁹⁶ In the past, it had often been said that no one (except the superior court) can determine or influence the scope of his jurisdiction.

Arguably, this extends the principle of judicial restraint to minor or uncertain questions of *ab initio* jurisdiction. However, a more convincing explanation of the *dictum* and the subsequent decisions based on it, is the court's desire to get rid of the technical and unnecessary terminology of "collateral or preliminary questions". This terminology once had great vogue.⁹⁷ This was at a time when other technical distinctions⁹⁸ were commonly made in administrative law, and when procedural questions were allowed to intrude upon the result.⁹⁹ We now operate from different premises; hence the need to remove the old distinctions.

The "collateral or preliminary question" became shaky after *In re Jacmain*.¹⁰⁰ In *CUPE*¹⁰¹ Mr. Justice Dickson was more direct at 374:

With respect, I do not think that the language of "preliminary or collateral matter" assists in the inquiry into the Board's jurisdiction.

An even stronger statement appears in *Syndicat des Professeurs du Collège de Lévis-Lauzon*¹⁰² at 12-13.

95. *CUPE v. N.B. Liquor Corporation*, *supra*, note 64.

96. *Re Syndicat des Employés and C.L.R.B.*, *supra*, note 25, puts beyond dispute the proposition that where the excess of jurisdiction is clear, nothing in the decision, however reasonable, will prevent judicial review.

97. In *Re Lunenburg Sea Products Ltd.*, [1947] 73 D.L.R. 195; *Parkhill Bedding v. International Molders* (1961), 26 D.L.R. (2d) 589.

98. Notably the one between administrative and quasi-judicial decisions stemming from *R. v. Electricity Commissioner*, *supra*, note 5.

99. See *Vachon v. A.G. Que.* [1979], 1 S.C.R. 555, for the end of this type of thinking.

100. *Jacmain v. A.G. Can. et al.* (1977), 18 N.R. 361.

101. *CUPE v. N.B. Liquor Corporation*, *supra*, note 64.

102. *Syndicat des Professeurs v. CEGEP de Lévis-Lauzon*, *supra*, note 89.

First, it seems to me that by unnecessarily and, in my opinion, wrongly separating the preliminary jurisdiction of the arbitration tribunal from its general or full jurisdiction, which when the grievance is not prescribed consists in the power of hearing the grievance on the merits, the Court of Appeal is actually impairing the integrity of the arbitration tribunal's jurisdiction taken as a whole. It seems wrong to say that the full jurisdiction of the arbitration tribunal consist in hearing the grievance when it is not prescribed. Rather it seems to me that the arbitration tribunal's full jurisdiction consist in the power to dispose of grievances before it by applying the relevant provisions of the collective agreement or the law. It has jurisdiction to allow or dismiss these grievances, and its jurisdiction is not placed in question because it allows or dismisses them in accordance with one rather than another of the provisions of the collective agreement.

By the dichotomy which it sets up between the initial jurisdiction of the arbitration tribunal and its general jurisdiction, the Court of Appeal is artificially transforming the question of prescription of the grievance into one of conferring or, depending on the circumstances, divesting jurisdiction, but only jurisdiction in the narrow sense of the power to dispose of the grievance on one ground rather than on another. As I have just indicated, in my opinion the arbitrator's jurisdiction is wider than that.

Moreover, the method used by the Court of Appeal which, in the case at bar, consists of considering the question of prescription of the grievance as a preliminary matter on which the arbitration tribunal's jurisdiction depends is one which has attracted some support but against which this Court finally warned the courts in *C.U.P.E. v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227.

This means that "*a priori* jurisdiction" means not questions that must in fact be settled before the merits of a matter are heard, but rather questions which *could* be settled at the outset if posed. As Dickson, J. said in *CUPE*¹⁰³ speaking of the distinction he was in essence disapproving:

Underlying this sort of language is, however, another, and in my opinion, a preferable approach to jurisdictional problems, namely that jurisdiction is typically to be determined at the outset of the inquiry.

If jurisdiction is not to be decided at the outset of an inquiry on arid and arbitrary distinctions, it must be connected to some rational policy objectives. *CUPE*¹⁰⁴ puts forward an immediately appealing one:¹⁰⁵

The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating

103. *CUPE v. N.B. Liquor Corporation*, *supra*, note 64 at 347.

104. *CUPE v. N.B. Liquor Corporation*, *supra*, note 64. *Heustis*, *supra*, note 90 expresses the same idea. It is not surprising that both judgments were written by the same judge in the same year.

105. *CUPE v. N.B. Liquor Corporation*, *supra*, note 64 at 344.

labour relations. In the administration of that regime, a board is called upon not only to find facts, decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

It follows that whether or not a board exceeds its *a priori* jurisdiction is to be decided not on any technical formula for determining jurisdiction but rather with reference to the Board's purpose, specialization and experience. One should ask not whether a question is collateral or preliminary but rather whether it is, in Dickson, J.'s language,¹⁰⁶ "at the heart of the specialized jurisdiction confided to the Board." If it is, and if the Board has special competence and experience to answer it, the Courts should show restraint and quash only decisions which are manifestly untenable. If, on the other hand, a question has nothing to do with the Board's special functions, no restraint is necessary.

The latter principle is well-illustrated whenever an administrative decision-maker is called upon to interpret laws of general application not forming part of his specialized area and potentially affecting his jurisdiction. The leading case is *McLeod v. Egan*.¹⁰⁷ At 518-519 Laskin, C.J.C. said:

Although the issue before the arbitrator arose by virtue of a grievance under a collective agreement, it became necessary for him to go outside the collective agreement and to construe and apply a statute which was not a projection of the collective bargaining relations of the parties but a general public enactment of the superior provincial Legislature. On such a matter there can be no policy of curial deference to the adjudication of an arbitrator . . .

That this is still the state of the law is evident from *Re Service Employees International Union*¹⁰⁸ and *Re Retail, Wholesale and Departmental Store Union*.¹⁰⁹ In both of these cases, Canadian courts of appeal denied any broad protection from review to labour arbitrators or labour relations boards construing the general provisions of the law as opposed to their narrow areas of special knowledge. It follows that courts will not hesitate to grant judicial review where the decision-maker has misapplied public statutes, human rights charters¹¹⁰ or even the common law. However,

106. *CUPE v. N.B. Liquor Corporation*, *supra*, note 64 at 350.

107. *McLeod v. Egan*, [1975] 1 S.C.R. 517.

108. *Re Service Employees International Union and Local 204 et al.* (1984), 13 D.L.R. (4th) 220 (Ont. C.A.).

109. *Re Retail, Wholesale and Department Store Union* (1982), 137 D.L.R. (3d) 524 (Sask. C.A.).

110. We are speaking of the provincial unentrenched charters and the *Bill of Rights*. It goes without saying that since the *Canadian Charter of Rights* is part of the Constitution, any violation of it is illegal and presumably gives rise to a remedy under s. 24. In *Howard v. Stony*

they will be reluctant to interfere with arguably jurisdictional errors that are within the administrator's special area and presumably special knowledge.

Viewed in this manner, *CUPE*¹¹¹ is less a restriction than a clarification of judicial review. It is easy to understand that, in submitting problems to adjudicators other than superior court judges, the legislator intends a quick solution by experts in the area, rather than the slower, purely legal solution that the court would bring. As long as the experts stay within their field, review will be possible only for *clear* excess of jurisdiction, unfairness or unreasonableness. Once the decision-maker goes outside his field, there is no rationale for deferring to his views. The best expert in law is the court. If the error is strictly non-jurisdictional, it may yet be overlooked or may amount only to error of law on the face of the record.¹¹² But if the decision-maker decides a jurisdictional question and has no special skill on that issue, his decision will be upheld only if the court agrees with him. In any other case, it will be entitled to quash.¹¹³

It follows that the debate on this type of issue has been radically altered. Instead of an arid and legalistic discussion of terms like jurisdiction, the court of judicial review will ask itself a series of questions. It is submitted that these questions can be put as follows:

- a) What is the purpose and the special expertise of the tribunal?
- b) Is the impugned decision a power within that special competence?
- c) If it is not, is it right in law or is the error *clearly* within the Tribunal's jurisdiction? In such cases, it will be upheld.
- d) If it is, is it arguably right in law, or is the error within jurisdiction?¹¹⁴ Again, in such cases, it will be upheld.

In the last case, one will give considerable weight to the decision-maker's view and expertise and that is, perhaps, the one change which tends to decrease the number of successful applications for review. On the other hand, it may be more correct to see this as a rephrasing and not a restriction of review, and as part of the trend away from technicalities in all areas of law and particularly in this one.

The second concept, fairness has, since *Nicholson*,¹¹⁵ been applied with the greatest consistency and clarity. Each decision has its own level of fairness, but that almost invariably includes the duty to acquaint the

Mountain Institution Inmate Disciplinary Court (1985), 57 N.R. 280 (F.C.A.) at 292-293 we see that a denial of a *Charter* right by a prison tribunal cannot be a final adjudication of the right, immune from review.

111. *CUPE v. N.B. Liquor Corporation*, *supra*, note 64.

112. See *Labrecque v. A.G. Que.*, *supra*, note 19 for an example of this.

113. This is so, whether or not the impugned decision is reasonable, arguable or desirable.

114. This is, of course, before we pose questions about the fairness of the procedure or the reasonableness of the result, both of which could, of course, constitute grounds for review.

115. *Nicholson*, *supra*, note 4.

person affected with the issue and the reasons for the possible decision and the duty to give him a reasonable opportunity to dissuade or persuade the decision-maker. As the Supreme Court recently showed,¹¹⁶ this almost always means showing the entire file to the person¹¹⁷ or at least disclosing its substance. In *Daganayasi v. Minister of Immigration*,¹¹⁸ Cooke, J. said:

But, while those implications in favour of the Minister's freedom seem to be called for, I regard it as no less reasonable and no less necessary to the interests of justice and fairness and to make the section work more effectively, to hold that the reports of the appointed referee, or at least the substance of any prejudicial contents, should be disclosed to the appellant or a representative of the appellant before any adverse decision is made. . . . The appellant should have a fair opportunity of correcting and contradicting any relevant statement prejudicial to his or her view.

The same formulation can be found in a recent judgment of the Quebec Court of Appeal in *A. G. Que v. Miller*:¹¹⁹

Il est clair du dossier que l'intimé n'a pas été mis au courant de la preuve qui avait été recueillie contre lui et n'a pas eu, en conséquence, l'opportunité de la contredire.

These principles are not seriously in doubt. They are constantly applied and quoted.¹²⁰ Recently, they have been extended to commissions of inquiry.¹²¹ On the surface, fairness appears well-established, especially if one considers its shaky beginnings in Canada.¹²² Yet some caution and therefore some concern must remain.

The frailty of fairness becomes apparent when one considers the judgment of Marceau, J., fortunately in the minority on that point, in *Lewis v. CEI* where the learned judge questioned the very application of the notion of fairness to the federal civil service.¹²³ One cannot help concluding that the achievement of the duty to act fairly could yet be reversed by one or two restrictive decision. The Federal Court of Appeal

116. *Radulesco v. Canadian Human Rights Commission*, *supra*, note 53. See also *Singh*, *supra*, note 51.

117. Obviously, there may be exceptions (e.g. national security).

118. *Daganayasi v. Minister of Immigration*, [1980] 2 N.Z.L.R. 130 at 143.

119. *A.G. Que. et al. v. Miller*, *supra*, note 54, per Jacques.

120. To cite some recent cases: *Re Prysiazniuck and Regional Municipality of Hamilton-Wentworth* (1985), 51 O.R. (2d) 339; *Re Ladney et al.* (1984), 10 D.L.R. (4th) 612.

121. *Desormeaux v. Côté*, [1985] C.S. 522; *The Canadian Tobacco Manufacturers' Council et al. v. The National Farm Products Marketing Council*, F.C.T.D. T-2014-85 (Cullen, J.). See *infra*, note 140 for this case's subsequent history.

122. See Mullan, *Fairness: The New Natural Justice* (1975), 25 U.T.L.J. 281; Laughlin, *Procedure Fairness: A Study of the Crisis in Administration Law Theory* (1978), 28 U.T.L.J. 215.

123. *Lewis v. Canadian Employment and Immigration Commission* (1985), 60 N.R. 14. See also *Siclait v. MEI*, F.C.T.D. T-5569-78, Sept. 24, 1979.

is particularly conservative in this regard and its jurisprudence, on the whole, lags behind the other Canadian courts.¹²⁴

It follows that despite the constant progress made by advocates of a meaningful doctrine of fairness in recent years, and despite their repeated successes in litigation, it would be dangerous for them to consider their accomplishment irreversible and to rest on their laurels.

The danger is exacerbated by certain recent decisions of the House of Lords. In *C.C.S.U. v. Minister for Civil Service*¹²⁵ and *In re Findlay*,¹²⁶ the right to minimal consultation was declared dependent upon "expectation", that is, whether the person could properly have expected to be consulted. Theoretically, that may be quite acceptable. After all, public law must place some limit on the people entitled to be heard, just as private law must place limits on those entitled to sue in tort or delict.¹²⁷ However, the tone of the House of Lords is distinctly restrictive as to the application of fairness and, given the notion's persistent frailty, it is probably not desirable to dwell on the limits of fairness but rather to stress the strong presumption in its favour.¹²⁸

Other limits on the doctrine of fairness also loom large. Legislative and quasi-legislative powers are often exempted from review on fairness and *Inuit Tapirisat*¹²⁹ is undoubtedly the best-known example. The result may be tempered somewhat by *dicta* in *Operation Dismantle*¹³⁰ at least where *Charter* rights are affected. Nevertheless, much unfairness could be excused under this exception.

Another threat is possible characterization of public functions as

124. There are, of course, some very different judgments, e.g. *Howard v. Stony Mountain Institution Inmate Disciplinary Court*, *supra*, note 110. Mr. Justice MacGuigan, especially has helped to decrease the gap between the Federal Court of Appeal and other Canadian Courts. However, see *Schavernoeh v. FCC No. 2*, F.C.A.D. A- 484-85, and *Wilson v. Minister of Justice* (1985), 60 N.R. 194 for examples of the conservatism and proceduralism no longer common in other Canadian jurisdictions. It must be added, however, that the *Wilson* decision is not conservative in its substantive pronouncements, only in its proceduralism.

125. *C.C.S.U. v. Minister for Civil Service*, *supra*, note 43.

126. *In re Findlay*, [1985] 1 A.C. 318. The doctrine of "legitimate expectation" seems well-established in England. See, for instance, *R. v. Secretary of State for the Home Department, Ex. p. Asif Mahmood Khan* (1984), 1 W.L.R. 1337.

127. Through notions like "duty of care" in common law and directness in civil law.

128. It is important to note that, in both cases, judicial review was denied in order to protect government control over policy — a weak ground, since the application of the doctrine of fairness in no way precludes an exercise of discretion.

129. *A.G. Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735. The Court underlined that there was possible judicial review, but not on grounds of fairness.

130. *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441. Another case which weakens *Inuit Tapirisat* or at least makes it less absolute is *Desjardins v. Bouchard* (1982), 7 D.L.R. (4th) 644 (F.C.A.). This is one of the cases which shows how unreliable generalizing about "conservative" and "liberal" courts can be, since it was rendered by the Federal Court of Appeal.

matters of private law. This happened in *Maligne Buildings*,¹³¹ and less directly in *Re Bondarchuk*.¹³²

It is readily apparent that judges who are not content with the developments in the area of fairness, have numerous ways of distinguishing cases and principles, so only the most inexcusable breaches would be sanctioned.

Nevertheless, in the majority of Canadian courts, unfairness is a leading and perhaps the most established ground for judicial review. In the recent case *Re Bennett*¹³³ the Ontario Court of Appeal quoted an earlier decision, *Re Webb*¹³⁴ as follows:

The Courts are, however, increasingly applying the test of procedural "fairness" by administrative actions of donees of a power and there is understandably and naturally, a predilection towards seeing that everyone is treated "fairly".

A similar attitude is found in numerous other decisions.¹³⁵ The insistence that the principles of fairness be respected is evident, for example, in the reluctance of the courts to hold that a breach makes no difference, since the evidence obtained unfairly did not in fact influence the decision-maker. In *Kane v. UBC*,¹³⁶ Mr. Justice Dickson said at 223 (N.R.):¹³⁷

The court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient that it might have done so.

This was recently applied to commissions of inquiry so long as they had a real effect on the persons involved.¹³⁸ In *In the Matter of SS. 4 and 8 of the Farm Products Marketing Agencies Act*,¹³⁹ Cullen, J. said at 20:

Did the Respondent rely on the study? Whether it did or will is irrelevant and the law is quite clear on that subject.¹⁴⁰

131. *Maligne Buildings Ltd. v. The Queen* (1982), 131 D.L.R. (3d) 704 (F.C.T.D.), But see *Re Pryszniuk and Regional Municipal of Hamilton-Wentworth*, *supra*, note 120.

132. *Re Bondarchuk and Administrator of Yukon* (1981), 127 D.L.R. (3d) 467 (Yukon C.A.; leave for appeal to S.C.C. denied). This case is based on *dicta* in *Ridge v. Baldwin*, [1964] A.C. 40 about offices held at pleasure which should not be reconsidered in view of *Nicholson*, *supra*, note 4.

133. *Re Bennett and Wilfrid Laurier University* (1984), 48 O.R. (2d) 122 (C.A.).

134. *Re Webb and Ontario Housing Corp.* (1978), 22 O.R. (2d) 257 at 261; 93 D.L.R. (3d) 187 at 191.

135. See for instance *Simlotte v. Council of the Association of Professional Engineers Geologists and Geophysicists of Alberta*, [1983] 4 W.W.R. 406; *McCarthy v. A.G. Canada* (1980), 80 C.L.L.C. (Fed. C.A.); *Re Stumbilich and Health Disciplines Board* (1984), 12 D.L.R. (4th) 156 (Ont. C.A.) and *Hoo Foo Tam v. MEI* (1982), 46 N.R. 1 (Fed. C.A.).

136. *Kane v. U.B.C. Bd. of Governors*, *supra*, note 45.

137. See also *Mehr v. Law Society of Upper Canada*, [1955] S.C.R. 344.

138. Until several years ago, inquiries were considered exempt at least in Canada: *Guay v. Lafleur* (1985), S.C.R. 12; *B. v. Commission of Inquiry*, [1975] F.C. 602 (T.D.).

139. *The Canadian Tobacco Manufacturers' Council* *supra*, note 121.

140. Cullen, J. went on to cite *Mehr*, *supra*, note 137. The *Tobacco* case *supra*, note 121, was

By far the most important recent reaffirmation of the doctrine of fairness is found in *Cardinal et al v. The Director of Kent Institution*.¹⁴¹ The case involved the right of a prison director to segregate certain prisoners for security reasons — a discretionary power, par excellence. Nevertheless, Le Dain J. wrote at 12 of the judgment.¹⁴²

This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of legislative nature and which affects the rights, privileges or interests of an individual . . . Although administrative segregation is distinguished from punitive or disciplinary segregation . . . its effect on the inmate in either case in the same and is such as to give rise to a duty to act fairly.

Thus, there should no longer be any problem with the false distinction between “rights” and “privileges”, which the Supreme Court has been criticizing for quite some time.¹⁴³ One cannot *affect* other people, regardless of how one characterizes the nature of their claims, without giving them an opportunity to respond.¹⁴⁴

Another very important aspect of Le Dain J.’s judgment is found at 24.¹⁴⁵

. . . I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

Thus the doctrine of *Kane*¹⁴⁶ is clearly and unambiguously applied to

substantially confirmed in A-785-85 March 6, 1986. The “harder” case of *Re Rohm and Hans* (1979), 91 D.L.R. (3d) 212 (Fed. C.A.) is almost certainly wrong and is in any case distinguishable because of the phrasing of 28.

141. *Real Cardinal and Eric Oswald v. The Director of Kent Institution* (1985), 63 N.R. 353.

142. *Id.* at 358. This paragraph was quoted and applied in *Portnoy v. Mendelson et al* Que. S.C. 500-05-000068-864 (Paradis J.)

143. See *Martineau no. 2, supra*, note 7, per Dickson, J. and *Singh v. MEI supra*, note 51. In each of these cases, *dicta* critical of the distinction were made by a minority of judges (*Martineau No. 2*) or by half (*Singh*). Some judges continued to apply the distinction see (*Siclait v. MEI, supra*, note 123). Now there is a clear judgment of the Supreme Court that fairness is in no way connected to such a distinction.

144. We cannot forget that once we accept the statement of Rand J. in *Roncarelli v. Duplessis*, [1959] S.C.R. 121 that there is no such thing as an untrammelled discretion in our public law, it follows that any “privilege” is at least a “right to be considered.”

145. *Cardinal, supra*, note 141 at 362.

146. *Kane v. U.B.C., supra*, note 45. See also *Re Murphy and Minister of Consumer and Commercial Relations* (1985), 22 D.L.R. (4th) 240 (Ont. Div. Ct.).

administrative decisions unfairly reached and not only to quasi-judicial ones.

Another question which appears to have been answered in a way favourable to judicial review is *who* must observe the duty to act fairly. *Nicholson*¹⁴⁷ itself clearly recognizes that some aspects of fairness may be subdelegated. *Desjardins*¹⁴⁸ points out that it would be unreasonable to expect the Governor-General in person to give oral hearings personally to individuals threatened with the revocation of their pardons. However, all this does not mean that the ultimate duty to act fairly can be subdelegated. The actual decision-maker must give the opportunity to persuade *him* to the person affected, whether they meet eye to eye or not, and the representations made must be considered by the actual decision-maker, not someone else. This was affirmed in *Re Evershed*¹⁴⁹ and is a logical conclusion, since on the opposite view fairness could easily degenerate into a show.

In short, notice has been given to Canadian decision-makers that they must be fair to all parties. If they do not respect this injunction, Courts will not accept their affidavits to the effect that their unfairness did not affect the outcome¹⁵⁰ and will, on the whole, refuse to excuse the unfair conduct unless it *could not have played any role at all*.

Another aspect of the liberalization of fairness and of all of judicial review has been the demotion of procedure and remedies to a minor question.¹⁵¹ This was particularly evident in *Beson et al. v. Director of Child Welfare for Province of Newfoundland*.¹⁵² At 612 Wilson, J. said:

Moreover, an application for judicial review might well have been successful on the ground of the Director's failure to treat the Besons fairly. . . . The Newfoundland Court of Appeal found as a fact that they had been treated unfairly. . . . However, instead of proceeding by way of judicial review the appellant instituted habeas corpus proceedings and the Newfoundland Courts concluded, in my view wrongly, that they were without jurisdiction to deal with the matter, I have concluded that it was open to them to proceed with judicial review in exercise of their "parens patriae" jurisdiction.

147. *Nicholson*, *supra*, note 4.

148. *Desjardins v. Bouchard*, *supra*, note 130.

149. *Re Evershed and the Queen* [1984] 5 D.L.R. (4th) 340 (Ont. Div. Ct.) affirmed in (1985), 17 D.L.R. (4th) 168 (Ont. C.A.).

150. If the opposite result had been reached, judicial review would be impossible save in cases of manifest error and bad faith.

151. See *Vachon v. A.G. Que.*, *supra*, note 90.

152. *Beson et al. v. Director of Child Welfare for Province of Newfoundland et al.* (1982), 44 N.R. 602 (S.C.C.)

A similar lack of concern for procedure appears from *Jimenez-Perez v. MEI*¹⁵³ where the Supreme Court granted a declaration without statement of claim under s. 18 of the Federal Court Act — something which the Federal Court had refused to do.¹⁵⁴

In short, unfairness will not be made good by an opposing attorney's errors or by technicalities. It may be that a party's conduct will lead to the dismissal of an application,¹⁵⁵ but vagaries and uncertainties of the legal systems will not be permitted to have that effect.

The third concept, reasonableness, is the least clearly defined. We have seen that it applies to both questions of fact and questions of law.¹⁵⁶ Indeed, it is the necessary companion of fairness. It is important that fairness not become a dry formula employed by prudent decision-makers who are really not listening. Since there is normally no appeal on the merits, one may think that, after listening to both parties, the decision-maker may do as he pleases. Yet common sense tells us there must be a limit. Reasonableness is that limit. A decision will not be disturbed so long as a reasonable man could have reached it on the basis of the facts and the law before him. However, if it is unreasonable, it must be overturned or we abandon our notion of responsible democracy for capricious despotism.

If courts intervene too readily and call any decision about which they have doubts unreasonable, the administrative process will be destroyed and courts will be running public affairs, a task for which they lack the resources and which in time would destroy the impartiality and affect the respect in which they are held. On the other hand, if they intervene too rarely and set up too many artificial barriers or equate unreasonableness with insanity, the rule of law will no longer be seen to prevail and the courts will not be performing an essential part of their role.¹⁵⁷ It follows that defining the limits of reasonableness requires fine and subtle calibration, and that is what the courts are presently engaged in.

There is no doubt that "wrong" is a different concept from "unreasonable" and that it does not suffice for a decision to be "wrong" for it to be quashed. On the other hand nothing in law and common sense requires that "unreasonable" be given such a narrow meaning as to apply

153. *Jimenez-Perez v. MEI* (1984), 14 D.L.R. (4th) 609. This case did not directly involve fairness.

154. *B. v. Commission of Inquiry*, *supra*, note 138. It follows that the old distinction is now dead.

155. *Harelkin*, *supra*, note 23; *Re Jow and Board of Governors of Regina General Hospital* (1979), 100 D.L.R. (3d) 98 (Sask. C.A.).

156. *Supra*, note 63.

157. It stands to reason that if defeat becomes almost always the fate of an application for judicial review on grounds of unreasonableness, parties will not want to bear the risk of costs and the expense of litigation, and the remedy will fall into disuetude.

only to wild, irrational abuses of power. This problem has been raised before, when the definition of unreasonable only was considered.¹⁵⁸ It must be discussed again to chart the trends of recent jurisprudence, and the importance of the issue justifies giving it prominence several times.

On issues of law, or statutory construction, the definition of unreasonableness appears established. An unreasonable decision is one which is not arguable or cannot rationally be sustained. If two positions are possible, neither one is unreasonable although a court may prefer one over the other. However, if a decision seems clearly and indisputably wrong to a court, it is entitled to interfere.

This type of “unreasonableness” is not rare. The Supreme Court, which has on the whole exercised restraint in quashing decisions in the labour relations field, has nevertheless found it necessary to declare a labour decision unreasonable. In *Miriam Homes*¹⁵⁹ Chouinard, J. quashed an interpretation of a collective agreement which, while not wild or utterly devoid of sense, was one which the words could not bear. Even more significant is the decision *The National Bank of Canada*.¹⁶⁰ While the issue was one of law rather than fact, it involved not the “unreasonable” interpretation of a written instrument, but rather an unreasonable result — something which could be applied to issues of fact. The short judgment of Beetz, J. is particularly instructive. At 31 he writes:¹⁶¹

There is nothing to show that such were in fact their views and sentiments. However admirable the objectives and provisions of the Code may be, no one is obliged to approve of them: anyone may criticize them, like any other statute, and seek to have them amended or repealed, though complying with them so long as they are in effect.

Remedies Nos. 5 and 6 thus force the bank and its president to do something, and to write a letter, which may be misleading or untrue.

This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes. I cannot be persuaded that the Parliament of Canada intended to confer on the Canada Labour Relations Board the power to impose such extreme measures, even assuming that it could confer such a power bearing in mind the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of thought, belief, opinion and expression. These freedoms guarantee to every person the right to express the opinions he may have: a *fortiori* they must prohibit compelling anyone to utter opinions that are not his own.

This last case is rather different from most. However, one can quote a

158. See *supra*, note 72 at note 80.

159. *Centre d'Accueil Miriam v. CUPE*, *supra*, note 67.

160. *Re National Bank and Retail Clerks' Union* (1984), 9 D.L.R. (4th) 10. See comments on this case in *Syndicat des Employés de Production and C.L.R.B.*, *supra*, note 25.

161. *Id.* at 31.

large number of cases where decisions were quashed as unreasonable without being totally absurd.¹⁶² In some cases, the error may be *plain* jurisdictional error reviewable whether or not it is unreasonable.¹⁶³ However, in most cases, we have an untenable construction of a statute or collective agreement. What is important is the fact that an “unreasonable” construction need not be a totally gratuitous, irrational, unjust or capricious one. It is sufficient that it be clearly wrong.

One of the best examples of this, although it does not use the characteristic terminology of labour cases following *CUPE v. New Brunswick Liquor*,¹⁶⁴ is *Blanco v. Rental Commission*.¹⁶⁵ At 830 Beetz, J. said:

Section 17 of the Conciliation Act contains a privative clause which places the administrative and the Rental Commission outside the supervisory power of the Superior Court. They may therefore err in the exercise of their jurisdiction but they may not, by a mistaken interpretation of the law, appropriate jurisdiction which they do not have or decline that which they do have.

No one can doubt these words but as Beetz, J. himself noted,¹⁶⁶ “It is their application to specific case which sometimes gives rise to difficulty”. If one were to apply *Blanchard*,¹⁶⁷ *CUPE*,¹⁶⁸ and *Syndicat des Employés de Production*¹⁶⁹ to *Blanco*,¹⁷⁰ one would conclude that either the error was so clearly jurisdictional *ab initio* that it did not matter how

162. See note 75 above and the discussion around it. See also *British Columbia Telephone Company v. Telecommunications Workers' Union*, [1985] 6 W.W.R. 214 (B.C.C.A.); *Re United Steelworkers of America Local 6204 et al.* (1981), 128 D.L.R. (3d) 715 (Nfld. C.A.); *Re Cornier and Alberta Human Rights Commission et al.* (1984), 14 D.L.R. (4th) 55 (Alta. Q.B.); *Re Dominion Stores et al.* (1981), 128 D.L.R. (3d) 262 (Ont. Div. Ct.); *Lavalin Inc. v. Deslauriers*, [1983] C.S. 470 (Que. S.C.); *Re Queen's University and Fraser* (1985), 19 D.L.R. (4th) 240 (Ont. Div. Ct.); *Commission Scolaire Jérôme Le Royer v. Cain*, [1984] C.S. 1103 (Que. S.C.); *Ville de Broisbriand v. Lefebvre*, [1984] C.S. 666 (Que. S.C.); *Re United Nurses of Alberta and High Prairie General Hospital* (1985), 17 D.L.R. (4th) 532 (Alta. Q.B.). In this context the recent Ontario Court of Appeal judgment of *Ontario Public Service Employees Union et al.* (1985), 52 OR 705 appears very disappointing and inconsistent with most Canadian jurisprudence.

163. See *Re Syndicat des Employés de Production and C.L.R.B.*, *supra*, note 25. However, in all of these cases the decision is one within the special competence of the administrative decision-maker and in none of them is the excess of jurisdiction so striking as to be obvious to anyone reading them.

164. *CUPE v. N.B. Liquor Corporation*, *supra*, note 64.

165. *Blanco v. Rental Commission*, [1980] 2 S.C.R. 827. The terminology is probably not used because *Blanco* is not a labour case and there has been a different treatment given to labour cases as opposed to other public law cases.

166. *Id.* at 830.

167. *Blanchard v. Control Data*, *supra*, note 10.

168. *CUPE v. New Brunswick Liquor*, *supra*, note 64.

169. *Syndicat de Production and C.L.R.B.*, *supra*, note 25.

170. *Blanco*, *supra*, note 165.

reasonable it was or, more plausibly, that because the Rental Commission's interpretation of the law was clearly and indisputably wrong and no reasonable person could have interpreted it that way, it was unreasonable and therefore *ultra vires*.¹⁷¹

If Beetz, J. noted a difficulty with respect to the application of these principles, the difficulty is doubled when the error is one of fact. Facts are traditionally harder to review than law and the trier of fact is given very great latitude.¹⁷² Nevertheless, limits exist, both where the error of fact is clearly jurisdictional¹⁷³ *ab initio* and where the result is capricious and manifestly unacceptable.¹⁷⁴ As *Blanchard*¹⁷⁵ shows us, courts are slow to find that a decision is unreasonable in this sense. They do not feel as comfortable here as in quashing error of law which, after all, are in *their* special expertise. However, unless they do intervene from time to time and not only when the decision is monstrous or in bad faith, an area of law will be left without effective remedy for abuse.

It is submitted that the notion of "no evidence" is one way of correcting unreasonable decisions.¹⁷⁶ If a decision is made without evidence it is unreasonable, even if the same decision could legitimately have been made on proper evidence. The relationship between "no evidence" and "unreasonableness" becomes more obvious when one considers the following statement of Wade:¹⁷⁷

No evidence does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding or where, in other words, no tribunal could reasonably reach this conclusion on that evidence.

171. The consequence — desirable, it is submitted — is that the error in *Blanco*, *supra*, note 165 was voidable in the sense of *Harellkin*, *supra*, note 23 and not void. In other words, if Blanco had come forward years later, the court would have been justified in refusing relief.

172. See Wade, *Administrative Law*, (5th ed.) at 287: These principles are even applicable to Courts of Appeal *vis-à-vis* the first instance triers of fact.

173. *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756.

174. An excellent example of this can be found in *Bandag Canada Ltee v. Syndicat National des Employés de Bandag de Shawinigan* [1986] R.J.Q. 956. 1986 C.A. 200-09-000176-856 Que. C.A. In this case Dubé J.A. said:

Je crois que nous avons ici un exemple concret de ce qu'est une erreur déraisonnable: l'intimé, Paul-Emile Jobin, après s'être fait dire clairement qu'il était mis à la porte, présente un grief contestant son congédiement et sur une simple question de procédure, de jeu de mots, se trouve acculé à un cul-de-sac et se voit placé dans l'impossibilité de faire valoir les droits qu'il prétend avoir à l'encontre de son congédiement; parce qu'on lui dit erronément qu'il s'est trompé de mot en rédigeant son grief il se retrouve sans emploi et incapable de faire valoir ses droits.

175. *Blanchard*, *supra*, note 10.

176. See Elliott, *No Evidence: A Ground of Judicial Review in Canadian Administrative Law* (1972), 37 Sask. Law Rev. 48. See also *supra*, note 72.

177. Wade, *supra*, note 172 at 287.

These principles were applied recently by Halperin, J. in *Kuziomko v. Commission des Affaires Sociales*.¹⁷⁸ That case is a neat illustration of the type of situation where an error of fact¹⁷⁹ is so glaring and so unfair in result as to be beyond the policy of tolerance by the courts.¹⁸⁰ It has been said that such an error of fact amounts to a pure error of law.¹⁸¹ This formulation would leave “mere” errors of fact outside review unless they are clearly jurisdictional. Such verbal gymnastics neither add nor subtract anything to the state of the law.

When we assimilate at least partially unreasonableness and “no evidence” and consider Wade’s words,¹⁸² we see that our law does not differ much from the U.S. “substantive evidence” rule. In Evans et al. *Administrative Law Cases, Texts and Materials*¹⁸³ the rule is described.¹⁸⁴ The writers then go on to say:

There are several reasons why the application of this provision should be treated with reserve as a compelling analogy for the development of a general principle in our law.

They then proceed to list arguments in favour of a lesser degree of judicial review in Canada than in the U.S.A. There is little doubt that American examples must be treated with caution since Canadian Courts often refuse to follow them. However, in this case, the general principle is already established and it is not less generous with respect to review in Canada than in the United States.¹⁸⁵ The restrictive view advocated by Evans does not seem compelling.

In addition to decisions reached without evidence or without a sufficient amount of evidence, decisions based on capricious or arbitrary findings of fact will be quashed. In *Villaroel v. MEI*,¹⁸⁶ in note 6, Pratte, J. pointed out that a totally unjustified refusal to believe an affidavit would be grounds for judicial review. Review of these types of error seems to attract less attention or controversy than “no evidence”. Such review is solidly anchored in our law.

It is a natural corollary of “no evidence”, that decisions based on illegal

178. *Kuziomko v. Commission des Affaires Sociales*, *supra*, note 72.

179. In that case, the interpretation of medical reports.

180. See also the case of *Surujpal v. MEI* and *Rajudeen v. MEI* *supra*, note 76 where a decision of the Immigration Appeal Board was overturned as unreasonable on the facts.

181. See the oft-cited case *R. v. Nat. Bell Liquors*, [1922] 2 A.C. 128 (P.C.). See *supra*, note 72.

182. Wade, *supra*, note 172.

183. Evans, Janisch, Mullan, Risk, *Administrative Law Cases, Texts and Materials*, (Toronto: Edmonton-Montgomery Limited, 1980).

184. *Id.* at 499-500.

185. It follows that *Nat. Bell Liquors*, *supra*, note 185, represents too restrictive a view and is no longer safe authority to rely on.

186. *Villaroel v. MEI*, *supra*, note 75.

evidence¹⁸⁷ or improper and irrelevant considerations¹⁸⁸ be quashed. This is so not only when there is no other evidence, but even where there is other evidence but the illegality could conceivably have hurt one of the parties. It is not necessary to show that it *did* have an effect.¹⁸⁹ It follows that decisions can be classified as “unreasonable” not only when the result is *per se* unreasonable, but when the stake or absence of evidence makes that result unreasonable. On other evidence, the same decisions could be reached and may well be reached if a new hearing is ordered. It was unreasonable only because of the manner in which it was reached.

VI. *Unreasonableness and error of law on the face of the record*

One question that may be legitimately asked, in view of the development and definition of unreasonableness, especially with respect to matters of law, is whether the now venerable concept of “error of law on the face of the record” still has any real purpose. This concept has long been used to describe error of law within jurisdiction which would be subject to review if there was no privative clause, but would yield to a privative clause.¹⁹⁰ The argument against this concept having any future may be phrased as follows. If an error of law is plain so that no dispute is possible about it then it is unreasonable and therefore *ultra vires*; if it is on the other hand doubtful and controversial, then the administrative decision-maker’s view of his jurisdiction will normally prevail and there will be no error at all.

This logical operation is tempting but, it is submitted, incorrect. There are still two circumstances where error of law on the face of the record (i.e. error of law within jurisdiction) may occur.

The first circumstance is where the purpose of the tribunal is precisely to decide questions of law and it errs, but not in such a gross manner as to lose jurisdiction. The principle example are lower courts (e.g. provincial courts) and the leading case is *A. G. Que. v. Labrecque*.¹⁹¹ In

187. E.g. unfairly obtained evidence. See *Re Dallinga and City of Calgary* (1975), 62 D.L.R. (3d) 433 (Alta. C.A.). Clearly, *Charter* protections will apply to administrative tribunals. This principle will not however introduce all of the strict rules of evidence into administrative and quasi-judicial proceedings. It will still be possible to continue to receive evidence which would be inadmissible in an ordinary trial so long as it is not illegal, oppressive or unfair to do so.

188. See Grey, *supra*, note 11 at 114-119. See also *Oakwood v. Municipality of St. François Xavier*, *supra*, note 82; *Shaverno v. FCC No. 1* (1982), 136 D.L.R. (3d) 447 (SCC) as examples of this decided since the Osgoode Hall article.

189. This is the same situation as where there is a breach of the rule to act fairly. See *Mehr*, *supra*, note 137; *Kane*, *supra*, note 45. On this point, as on so many others, the federal court has at times shown a tendency to be more favourable to decision-makers: *Re Rohm and Hans Canada Ltd.*, *supra*, note 140. This case is clearly wrong.

190. *R. v. Northumberland ex. p. Shaw*, *supra*, note 1. See Jones & de Villars, *supra*, note 1 at 273 for an analysis. See also *A.G. Que. v. Farrah et al.*, [1978] 2 S.C.R. 638 per Pratte, J.

191. *A.G. Que. v. Labrecque*, *supra*, note 19.

that case, the Small Claims Court made a plain error of law, but because a court's business is to decide law and because there was a privative clause, no review was possible.¹⁹²

The second situation where error of law on the face of the record may exist is where an error is not totally unjustifiable but, despite the tendency to adopt the decision-maker's views in such cases, the court concludes that the opposite view is correct. There is no conceptual bar against a court choosing a different view than the lower body even where both are arguable. In other words, the judicial restraint is only a principle and not a rule and even where an arguably correct decision is challenged before the courts, it may be found to be wrong. This has been directly stated by the Supreme Court in jurisdictional matters.¹⁹³ It applies also to non jurisdictional ones.

In such cases, if there is a privative clause, there will be no review but if there is not, review will be possible.¹⁹⁴ One can ask oneself, for instance, what would have happened in *CUPE*¹⁹⁵ in the absence of the privative clause. The likely answer is that, in such a case, the Court would have had to go further than it did in deciding the point of law. With the privative clause, the sole question was whether the decision was unreasonable and therefore ultra vires. Without it, the Court would have had to decide whether it was right, even if reasonable, and then the Labour Relations Board's opinion would only have been one among many factors considered by the Court.

It follows that, at least conceptually, error of law on the face of the record still has a place. In reality it may not be very significant, since a court will almost always classify as ultra vires and unreasonable a section of law which it finds intolerable and not pronounce itself on one it finds "reasonable". Only in very special cases will it declare a decision wrong but within jurisdiction.

VII. *Are reasonableness and fairness completely separate and distinct*

It would be neat and esthetically pleasing to say that the concepts of reasonableness and fairness¹⁹⁶ are separate and distinct and that one can always classify any difficulty as pertaining to one or the other. It would also be perilously facile.

192. *Labrecque, supra*, note 19, would probably have been decided differently if the decision emanated from an arbitrator or other quasi-judicial body, rather than a court. It would certainly have been decided differently in the absence of a privative clause.

193. *Syndicat des Employés de production and C.L.R.B., supra*, note 25.

194. However, under 28 of the *Federal Court Act* any error of law is subject to review.

195. *CUPE, supra*, note 64.

196. Jurisdiction, as we have seen, is a word frequently used in connection with both of the others. It, therefore, could not be separated from them.

In fact, it stands to reason that all decisions to exclude evidence which amount to unfairness are also unreasonable. Thus, the cases of *Roberval*¹⁹⁷ and *Tribunal*¹⁹⁸ can conveniently be classified as both.

It would be possible to turn this into a tautology by postulating that it is unreasonable to be unfair. This would not, however, be of any assistance in understanding and explaining the law. On the other hand, it is of interest to note that any decision which violates the duty to act fairly but does not amount to a *total* refusal of hearing usually entails an unreasonable decision on what is admissible or relevant¹⁹⁹ or on the conditions to be imposed on the exercise of the duty to act fairly.²⁰⁰

We thus see that any categories that one might set up are only tentative and that, at all times, the different concepts must be considered together.

VIII. *The special treatment of labour relations*

One fact is striking. Almost all of the recent cases which seemingly restrict judicial review²⁰¹ are in the field of labour relations.²⁰² Almost all of the cases which seemingly extend judicial review are not in that field.²⁰³ This is too regular to be written off as a coincidence. It is all the more significant when one remembers that, in the past, labour relations was a field very frequently selected for judicial intervention, almost always on the side of management.²⁰⁴ It is not surprising that higher

197. *Roberval*, *supra*, note 56.

198. *Tribunal*, *supra*, note 56.

199. *Roberval*, *supra*, note 56.

200. E.g. Where an adjournment is unreasonably refused *McCarthy v. MEI*, [1979] 1 F.C. 121 (Fed. C.A.) or where information is unfairly withheld (*Radulesco*, *supra*, note 53) or obtained (*Kane*, *supra*, note 45).

201. But, it is argued here, these cases do not have that effect.

202. *CUPE*, *supra*, note 64; *Teamsters' Union Local 938 v. Massicotte* (1982), 134 D.L.R. 3d 385 (S.C.C.) [1982] 1 S.C.R. 710; *Syndicat des Employés*, *supra*, note 25; *Blanchard*, *supra*, note 10; *CLRB v. Nauss and Halifax Longshoremen*, [1983] 1 S.C.R. 245, *Re Alberta Union of Public Employees* (1982), 136 D.L.R. (3d) 1 (S.C.C.).

Labour relations are to be understood here in a broad sense. For instance, arbitration in the medical field, a common occurrence even without formal accreditation must be included: *St. Luc Hospital v. Lafrance* (1982), 136 D.L.R. (3d) 577 (S.C.C.). What is important is that these arbitration decisions usually concern economic regulation and not issues of basic rights. However, as soon as the basic rights are affected, the courts must look into the matter at some depth and consider the policy question: *Galea v. Centre Hospitalier Rouyn-Noranda*, [1984] C.A. 37 (Que. C.A.); *Evoy v. Ouellette* 1986 SC 500-05-004930-853 (Que. SC per Martin J.). This last case is also significant in that it makes a sharp distinction between decisions "merely" unreasonable and those "patently" so.

203. E.g. *Nicholson*, *supra*, note 4; *Martineau No. 2*, *supra*, note 4, *Cardinal*, *supra*, note 141.

204. See Grey, *supra*, note 39. In Canada, promanagement intervention in labour relations was common until fairly recently. It was the British Privy Council which, in *John East Iron Works v. Labour Relations Board* (1948), 48 D.L.R. 673, prevented s. 96 from being used to sterilize the movement towards relatively equal power in collective bargaining. This type of jurisprudence inspired Professor Laskin's (as he then was) criticism in *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses* (1952), 30 Can. Ban Rev. 968.

courts, seeking to maintain a fair balance between the claims of capital and labour, at least before the Courts, have discouraged intervention except in very flagrant cases. The problems which arose — the special nature of labour relations, the conservatism of many lawyers and judges (but not usually of the leaders of the profession²⁰⁵) and the need to abstain from much review if the system was to work — were not common to other fields of public law.

The exceptional situation in labour relations was emphasized by Laskin, C. J. in one of his last judgments, *CLRB v. Halifax Longshoremen Association*.²⁰⁶ He said:²⁰⁷

There is no doubt that, as already noted, we tread a narrow line and nothing said in this case can be taken to establish any general principle. There may be an area in law relating to superior court review of other tribunals, judicial as well as administrative where more fundamental issues arise than arise in the circumstances of these proceedings. No doubt there will be required on occasion some infringement of the proper limits of jurisdictional review where an administrative tribunal, responding to questions of fact, must construe and apply its constitutive authority, be it contractual or statutory. Nothing herein determined should be read as bearing on such considerations faced as we are here with a unique and narrow question arising out of the extraordinary framework of these labour relations.

Where more “fundamental” issues arose, such as liberty, basic issues of justice and integrity of the public administration system, our courts have not shown the reluctance to intervene which at times appeared in many labour arbitration cases.²⁰⁸ It follows that, if a new policy of judicial restraint can be observed at all, it is one of very limited application and without effect except, to some extent, in one field.²⁰⁹

IX. Conclusion

There is no doubt that Canadian administrative law has changed beyond recognition in the last fifteen years. Opponents of judicial review have attempted to see in some recent trends a move towards renewed emphasis on judicial restraint. It is submitted that this conclusion is not correct.

205. That is, not usually of the highest courts; nor consistently of any court.

206. *Canadian Labour Relations Board v. Halifax Longshoremen's Association*, *supra*, note 201.

207. *Id.* at 258.

208. See *Nicholson*, *supra*, note 4; *Martineau No. 2*, *supra*, note 4; *Radulesco*, *supra*, note 116; *Singh*, *supra*, note 51; *Howard v. Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution*, *supra*, note 110; *Crevier v. A.G. Que.*, *supra*, note 22, for examples of this. See also *Grey* *supra*, note 39.

209. And even in that field restraint is not universal. See *Miriam Homes*, *supra*, note 67 and especially *Alliance des Infirmières de Sherbrooke v. Hôpital d'Youville* (1985), CA 500-09-001561-844 (Que. C.A.). Many of the cases cited in this essay are labour cases.

Judicial restraint has always existed, firstly because judicial review is not appeal and mere disagreement with a decision has never constituted legal grounds to quash it and secondly, because where a specialized tribunal is given policy powers, it would clearly be undesirable for a legalistic analysis of rights and obligations to be made by courts at every opportunity. None of this is new in any way.²¹⁰

Where opponents of judicial review may draw some comfort is Dickson, J.'s *dictum* in *CUPE*²¹¹ that "courts . . . should not be alert to brand as jurisdictional . . . that which may doubtfully be so."²¹² However, this can be seen as a rationalization rather than as a restriction.

One trend which cannot be doubted is the one away from technicalities, procedural niceties and an accent on remedies to a basic acceptance of the need to decide every debate on the *merits*. What *CUPE*²¹³ teaches us is to cease searching for a technical formula for judicial review, for some litmus paper test for "jurisdictional issues" and to consider in each case, the nature of the tribunal, its expertise, and the connection between its expertise and the impugned decision. Sometimes, a decision, even in the area of expertise, will be too blatantly *ultra vires* to be saved. In other cases, however, the expertise will play a major role in deciding which among doubtful decisions is to stand and which is to be quashed. The law will not be more or less favourable towards judicial review, but it will grant review with greater concern for basic justice and less for arid rules.

If the *CUPE*²¹⁴ case has had neutral total effect on judicial review, in other developments, review has made great strides. Fairness has been relatively firmly established. Reasonableness has been formally added to the list of jurisdictional grounds of review²¹⁵ and it is the counterpart of fairness, doing to the substantive aspect of decisions what fairness did for procedure. It must be stressed that unreasonableness took nothing away — decisions which are clearly *ultra vires* or which are made in a manner inconsistent with the principles of fairness, are still quashed, even if they are reasonable.

"Unreasonableness" is an additional argument, drawing its strength from the fact that courts are not disposed to tolerate arbitrary government or administration, whatever technical arguments are mustered in its defence.

210. See *Local Government Board v. Arlidge*, [1915] A.C. 120, a surprisingly modern-sounding discussion.

211. *CUPE*, *supra*, note 64.

212. But the full force of this statement is probably limited to labour relations. See *supra*, note 205, 206, 207. The statement was first cited, *supra*, note 95.

213. *CUPE*, *supra*, note 64.

214. *CUPE*, *supra*, note 64.

215. It had long been present, but without clear formulation.

The result is a form of judicial review adapted to a society in which the state intervenes constantly in the economic and social life of its citizens. When state participation was relatively rare, one could live with numerous technical, procedural and substantive protections for public authority.²¹⁶ Now, such protection would mean denial of the rule of law in very important areas of human endeavour. The government or other public authorities decide how we are to conduct many aspects of our lives, spend public funds and do a myriad of other things not imagined fifty years ago. These things affect us in direct and important ways. When issues not involving administrative law have as great an effect on everyday life — criminal punishment, family law, contracts, delicts and so on — there is normally access to the courts. That is one of the essential traits of modern liberal democracy.

It would be undesirable and unfair, to make access impossible, or so risky as to be impractical, in our public law. It would mean two types of justice — one for the private sector, and one, less effective, for the public one.

Moreover, it is naive to think that fundamental freedoms and basic rights are not threatened by public authority, even in a democracy. Power is always dangerous in all hands, because it is so tempting for those who wield it to abuse it, often for the best motives. If any protection of basic freedom and justice is to be serious and if we are not willing to give up the social benefits of state intervention in our lives then judicial review becomes one of the most significant tools for controlling public authority while deriving the desired benefits from its activities. It is important for it not to be used to paralyze social schemes or to prevent progress where there is no violation of basic rights and no true injustice. That is where Dickson, J.'s advice not to brand decisions as jurisdictional too easily is important.²¹⁷ However, where there is violation of individual rights, freedoms or dignity or where there is true injustice, courts must jealously guard their power to intervene. If it should ever fall into disuetude, the rule of law would be seriously impaired.

One thing which clearly strengthens the rule of law in public affairs is the simplification of the legal rules surrounding judicial review. By reducing such administrative law to relatively simple concepts — jurisdiction, fairness and reasonableness — the Courts have made it possible for the basic rules of administrative law to become better-known both in the legal community and among laymen. By making the result of

216. Save, of course, in criminal law.

217. See also his comments in *Reference re Validity of the Residential Tenancies Act*, [1981] S.C.R. 714.

litigation dependent on the content and not the form of the impugned decision or the application for review, they have served to increase confidence that basic rights can successfully be defended from encroachment.

