

# Natural Justice and Fairness — Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?

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### Introduction

In recent years, the common law relating to judicial review of administrative action on the basis of procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of “natural justice” and, more recently and more dramatically, “fairness”, have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency. It is

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\* Of the Faculty of Law, Queen’s University. Much of the research and writing of this article was done while on a sabbatical leave funded by Queen’s University and the Social Sciences and Humanities Research Council of Canada. I am grateful for their support and also to the Institute of Advanced Legal Studies in London for the use of its library. The author also owes much to comments on an earlier draft which I received from Professor Hudson N. Janisch of the Faculty of Law, University of Toronto, and my colleague at Queen’s, Professor J. Noel Lyon.

no longer necessary for the implication of such a duty that the function in question be classified as judicial or quasi-judicial.<sup>1</sup> These overblunt and unduly narrow criteria have been rejected in favour of far greater flexibility, the result of judicial recognition that certain procedures may be useful in the performance of at least some statutory functions which bear little or no resemblance to the adversarial context which typically earned the epithet "judicial" or "quasi-judicial".

Nevertheless, there has been some disquiet about this evolution<sup>2</sup> and the broadened opportunity that it provides for attacking decisions on procedural grounds places a greater obligation than ever on the judiciary to be sensitive to the exigencies of the administrative process. In particular, the concept of "fairness" needs to be elaborated upon and provided with a framework so that judicial review of procedural impropriety does not degenerate into a mass of *ad hoc* decisions of little or no prescriptive or predictive value.

It is not my purpose in this article to directly re-enter that fray. Rather, my concern is with a recent increase in the use of the very same terminology of "natural justice" and "fairness" as a justification for either directly attacking the substance of administrative, *i.e.*, statutory or prerogative decision-making, or developing the scope of review in the grey areas where substance and procedure meet or intersect. Essentially, my argument will be that the use of the terms "natural justice" and more recently "fairness"—either in substitution for or as a supplement to "natural justice"—in the procedural domain is both understandable and has a continuing justification, but that to countenance any further expansion of these terms is unnecessary and fraught with danger. It is unnecessary because most of the possible aims of such an expanded natural justice and fairness doctrine are adequately dealt with by existing, specific grounds of judicial review. It is dangerous because any other aims of such an expansion will for the most part cause an unwise extension in the existing scope of judicial review. It is also dangerous because overbroad use of such open-textured standards will indeed make for the kind of unprincipled and unstructured judicial review which some claim has already resulted from the use of "fairness" terminology in the purely procedural context.

I will, however, qualify this argument in one respect. One of the situations where the courts have intervened for substantive unfairness is in a case of inconsistent treatment. Although it gives rise to difficult

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<sup>1</sup> The leading Canadian authority is *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311.

<sup>2</sup> See, in particular, Loughlin, *Procedural Fairness: A Study of the Crisis in Administrative Law Theory* (1978) 28 U.T.L.J. 215; Macdonald, *Judicial Review and Procedural Fairness in Administrative Law* (1980) 25 McGill L.J. 520 and (1981) 26 McGill L.J. 1; Clark, *Natural Justice: Substance and Shadow* [1975] Public Law 27.

problems, inconsistency does present a strong case for recognition as a ground of judicial review. Nevertheless, it is also clear that it can be recognized on its own terms or as an example of abuse of discretion. It does not require the development of a general substantive unfairness doctrine.

## I. The Authorities

Let me begin by detailing four non-Canadian decisions in which this phenomenon has occurred, albeit either in *dicta* or as a subsidiary reason for the decision in question. The first two cases are decisions of the English Court of Appeal, the third of the New Zealand Court of Appeal, while the fourth comes from the Australian Federal Court, a court of quite recent origin. In each of these cases the standards of "fairness" or "natural justice" were invoked in somewhat different situations. Collectively they serve as a good introduction to the various contexts in which arguments are likely to be made for the application of such standards in other than their conventional, procedural sense.

### A. *R. v. Barnsley Metropolitan Borough Council, Ex parte Hook*<sup>3</sup>

Scatological interest may have contributed to this case achieving more academic attention than it might normally deserve. Nevertheless, the alternative ground for decision advanced by both Lord Denning M.R. and Sir John Pennycuik, but not Lord Scarman, does justify more than passing comment.

Hook, the applicant, was a stall-holder at the Barnsley market. He was observed urinating in a side-street near the market after the public facilities had been closed for the day. This was followed by an exchange of words with a security officer. As a result, the licensing authority withdrew his licence. The main basis for the Court of Appeal's reversal of the Divisional Court's refusal of *certiorari* was participation by the formal complainant—the market manager—in the decision-making process and the hearing of that person's evidence in the absence of Hook.<sup>4</sup>

Lord Denning M.R., however, went on to describe the punishment meted out as "too severe".<sup>5</sup> After referring obliquely to old cases in which the courts had quashed decisions because of "excessive" penalty,<sup>6</sup> he continued:

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<sup>3</sup>[1976] 1 W.L.R. 1052 (C.A.).

<sup>4</sup>*Ibid.*, 1057 *per* Lord Denning M.R., 1060-2 *per* Lord Scarman, 1063 *per* Sir John Pennycuik.

<sup>5</sup>*Ibid.*, 1057.

<sup>6</sup>*Ibid.* He referred to this own previous judgment in *R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1952] 1 K.B. 338, 350 (C.A.), *affg* [1951] 1 K.B. 711. The main authority relied on in that decision was *Commins v. Massam* (1643) March N.R. 196, 82 E.R. 473 (K.B.) [hereinafter cited to E.R.].

So in this case if Mr. Hook did misbehave, I should have thought the right thing would have been to take him before the magistrates under the by-laws, when some small fine might have been inflicted. It is quite wrong that the Barnsley Corporation should inflict upon him the grave penalty of depriving him of his livelihood.<sup>7</sup>

Sir John Pennycuick was also willing to second-guess the market authority on the appropriateness of the penalty:

It seems to me that the isolated and trivial incident at the end of a working day is manifestly not a good cause justifying the disproportionately drastic step of depriving Mr. Hook of his licence, and indirectly of his livelihood.<sup>8</sup>

It is noteworthy that Sir John dealt with this issue in the context of Hook's "right to a hearing *in accordance with the requirements of natural justice*".<sup>9</sup>

Leaving aside for the moment Lord Denning's appeal to ancient authorities, it is very difficult to find in recent, conventional law of judicial review of administrative action any support for the review of excessive penalties, at least in the form expressed by Lord Denning M.R. To the extent that Sir John Pennycuick uses the language of "good cause", "manifestly" and "disproportionately", one could perhaps argue that such review finds its justification in the ability of the reviewing courts to determine the existence of conditions precedent to the exercise of jurisdiction or, alternatively, to characterize the exercise of power as so unreasonable that no reasonable authority would ever have acted in such a way. However, there is no doubt that such a view depends upon a distortion of those existing grounds of judicial review. Uncertain though the concept of jurisdictional error undoubtedly is, it scarcely embraces review of a potentially permissible penalty for perceived misconduct. What is good cause for revocation in this context was clearly a task for primary agency determination and incremental development calling for judicial deference. Moreover, while the unreasonableness ground provides a somewhat more acceptable explanation, its employment without reference to the strict terms of the test usually stated for its application is most surprising, particularly since the examples of its successful invocation are few and far between.<sup>10</sup>

Notwithstanding Lord Scarman's insistence that he was basing his decision on the role of the market manager in the hearing and "that ground

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<sup>7</sup> *Ibid.*, 1057-8.

<sup>8</sup> *Ibid.*, 1063. In fact, this rather than the point about conventional natural justice was the principal basis of Sir John Pennycuick's judgment.

<sup>9</sup> *Ibid.*, 1062 [emphasis added].

<sup>10</sup> See S. de Smith, *Judicial Review of Administrative Action*, 4th ed. J. Evans (1980), 352-4. The traditional test is that of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp.* [1948] 1 K.B. 223, 230 (C.A.): "[a] decision... so unreasonable that no reasonable authority could ever have come to it... but to prove a case of that kind would require something overwhelming." For a recent example of the use of the *Wednesbury* case

alone",<sup>11</sup> it does indeed seem clear that a majority of the Court has accepted an expanded role for judicial review — probably under the rubric of natural justice — whereby decisions perceived to be inappropriate on the merits will be set aside. Aside from moving judicial review one step closer to the power of a court on a general right of appeal, such a move clearly raises the policy question implicit in the following assertion by Professor Jackson commenting on the case in his work, *Natural Justice*:

Such a rule, if recognised, would enable the courts to interfere with any decision which they disliked and goes far beyond any idea of natural justice as a standard for the application of rules.<sup>12</sup>

#### B. *H.T.V. Ltd v. Price Commission*<sup>13</sup>

In what seems to have been an aside in his judgment in *Hook*, Lord Denning also referred to the fact that "[i]t appears that there had been other cases where men had urinated in a side street near the market and no such punishment had been inflicted."<sup>14</sup> In *H.T.V. Ltd v. Price Commission*, the suggestion that inconsistency, at least when coupled with an excessive penalty, might provide a justification for judicial review was arguably given an independent basis as a ground of judicial review.

In this case, one of the complaints was that the Price Commission had changed its method of dealing with a particular item for computation purposes under the *Price Code*. It was alleged that, as well as being incorrect in law, this was offensive because it resulted in inconsistency of treatment in the consideration of H.T.V.'s claim for entitlement to a price increase. In this instance, all three judges sitting in the Court of Appeal accepted the alternative argument although there are some differences between the two

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in a review of sentencing by way of *certiorari*, see *R. v. St Albans Crown Court, Ex parte Cinnamon* [1981] 2 W.L.R. 681, 686 (Q.B.) per Donaldson L.J.: "It is necessary to decide that it is either harsh and oppressive or, if those adjectives are thought to be unfortunate or in any way offensive, that it is so far outside the normal discretionary limits as to enable the court to say that its imposition must involve an error of law of some description, even if it may not be apparent at once what is the precise nature of that error." For Canadian authorities on excessive penalties, see *infra*, notes 170-77 and accompanying text.

<sup>11</sup> *Supra*, note 3, 1062.

<sup>12</sup> P. Jackson, *Natural Justice*, 2d ed. (1979), 215. See, however, the more favourable opinions of this decision: Ouellette, *Le pouvoir de surveillance et le contrôle de la sévérité des sanctions disciplinaires ou administratives* (1978) 38 R. du B. 362; Neville Brown, *La nouvelle justice naturelle: l'administrateur "équitable et raisonnable"* (1980) 21 C. de D. 67, 83-4; H. Wade, *Constitutional Fundamentals* (1980), 75.

<sup>13</sup> [1976] I.C.R. 170, (1976) 120 S.J. 298 (C.A.), *rev'g* (1975) 120 S.J. 7 (Q.B.) per Mocatta J. [hereinafter cited to I.C.R.].

<sup>14</sup> *Supra*, note 3, 1057.

more elaborate judgments on the point, those of Lord Denning M.R. and Lord Scarman.<sup>15</sup>

According to Lord Denning, if a public authority regularly interprets or applies a provision in a particular way, there should be no change "unless there is good cause for departing from it".<sup>16</sup> To so depart is to "act unfairly and unjustly towards a private citizen when there is no overriding public interest to warrant it."<sup>17</sup> Broadly stated, the Master of the Rolls seems to be asserting that once choice or discretion is exercised, it is thereafter circumscribed save to the extent that different circumstances exist justifying a change of direction. There is a paradox here in the apparent conflict between this assertion and the generally-accepted principles that a statutory authority can neither fetter its discretion nor be estopped from performing its public duties.<sup>18</sup> In the light of Lord Denning's judgment, the initial exercise of discretion *ipso facto* legally limits or fetters the future exercise of that discretion save to the extent that different considerations or conditions legitimately prevail. What constitutes good cause for a change is not identified with any precision. It was sufficient for Lord Denning that he could not see any reason for a change here, though the extent to which that conclusion depended upon his further finding that the applicant had been led to believe that he could act upon the previous interpretation and had done so is unclear.<sup>19</sup>

Lord Scarman, after stating that the Commission was obliged to act fairly in the exercise of its powers and pointing out that there was a clear inconsistency in the way the figures were treated, went on to say that "inconsistency is not necessarily unfair".<sup>20</sup> He then judged whether it was unfair in this particular case by reference to its effect on H.T.V. and held that, because the alteration in the basis of calculation deprived H.T.V. of the maximum possible price increases, it was unfair. To be fair to an individual company, the system of computation in effect had to continue to operate on

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<sup>15</sup> Unfair inconsistency was the principal basis of Lord Denning M.R.'s decision. For Lord Scarman and Sir John Pennycuik it was secondary to their holding that the new method or interpretation was contrary to law.

<sup>16</sup> *Supra*, note 13, 185.

<sup>17</sup> *Ibid.*

<sup>18</sup> Lord Denning M.R. did in fact acknowledge this conflict but referred to authorities in which estoppel principles had been applied to public bodies, *ibid.*, 185-6. Those authorities are all cases in which he was a member of the Court: *Robertson v. Minister of Pensions* [1949] 1 K.B. 227; *Wells v. Minister of Housing and Local Government* [1967] 1 W.L.R. 1000 (C.A.); *Lever Finance Ltd v. Westminster (City) London Borough Council* [1971] 1 Q.B. 222 (C.A.). Nevertheless, there is a respectable body of law now applying estoppel principles to statutory bodies. See McDonald, *Contradictory Government Action: Estoppel of Statutory Authorities* (1979) 17 Osgoode Hall L.J. 160; de Smith, *supra*, note 10, 100-5, 317-20 and 346.

<sup>19</sup> *Ibid.*, 185.

<sup>20</sup> *Ibid.*, 192.

the same basis as had been adopted initially. To treat something as an expense in one period but not in a subsequent one caused unfairness in a system based upon limitations on increases in net profits. Conversely, of course, a company would benefit if the change were reversed but the implications of this were not addressed by Lord Scarman.

Seen in this light, Lord Scarman's judgment is much narrower than Lord Denning's in that he does not adopt a general presumption against statutory authorities changing their minds but rather says that, in relation to this particular scheme of approval for price increases, it is simply not within the contemplation of the statute that profits will be calculated differently in different financial periods. To decide fairly upon the appropriateness of an increase requires the use of the same base or starting point each time the exercise is performed. Indeed, it is arguable that this judgment is narrower than the justification of relief in *Hook* based on other people in like circumstances receiving less severe penalties. The principle of inconsistency adopted here is much more directly attributable to the statutory scheme itself than the *Hook* inconsistency which depends essentially on acceptance of the general proposition of substantive justice that like cases ought, absent special considerations, to be treated alike. It can also be seen as an attack on the basis of the result achieved rather than the result itself.

Nevertheless, in so far as both Lord Denning M.R. and Lord Scarman refer to fairness as the underlying basis of their decisions, it is clear that here, as in *Hook*, there has been a movement towards the use of the term as a standard for measuring the outcome of administrative decision-making as well as the procedures attendant on such decisions. Goff L.J. also echoed this when he, in a much shorter judgment, found offensive inconsistency.<sup>21</sup>

### C. *Daganayasi v. Minister of Immigration*<sup>22</sup>

The Anglo-Canadian common law of judicial review, at least in the twentieth century, has on the surface been involved very little with the review of facts. Certainly, the jurisdictional fact doctrine can be invoked,<sup>22a</sup> but a

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<sup>21</sup> *Ibid.*, 195. The principle of consistency of treatment also intrudes in English cases in which municipal rates have been held invalid because they are unfair and not uniform. See *Arsenal Football Club Ltd v. Smith (Valuation Officer)* [1979] A.C. 1 (H.L.).

<sup>22</sup> [1980] 2 N.Z.L.R. 130 (C.A.). J.F. Northey made no reference to the issues of error of fact and substantive fairness in his comment on the decision. See Northey, *Review of Deportation Procedures* [1981] N.Z.L.J. 48.

<sup>22a</sup> For a rare example of where there was review for error on a jurisdictional fact as opposed to error of law or mixed law and fact going to jurisdiction, see *R. v. Hackney Rent Tribunal, Ex parte Keats* [1951] 2 K.B. 15. The issue on which jurisdiction hinged was the factual one of whether certain premises had been rented for business purposes or living. A rent tribunal was held to have erred in fact on this issue and wrongfully assumed jurisdiction. Another early example and discussion of jurisdictional fact is provided by *Terry v. Huntington* (1680) Hardres 480, 145 E.R. 557 (Ex.).

survey of cases where preliminary or collateral jurisdictional error has been the ground of judicial review reveals that the vast majority are cases involving issues of law or at most mixed fact and law. Indeed, there have not been all that many cases in which the courts have been concerned with reviewing the existence of objective facts which are conditions precedent to the exercise of power.<sup>23</sup> Beyond this, review on the basis of no evidence or an absence of evidence has had a very shaky existence.<sup>24</sup> Furthermore, the courts have been very reluctant to review on the basis of unreasonableness, either in the sense of it being an error of law to make a decision which on the facts as found would never have been made by a reasonable authority, or it being an abuse of discretion to make a decision that is so unreasonable that no reasonable authority would ever have made it.<sup>25</sup> Outside of these limited categories, it has generally been assumed that the courts on review would not inquire into the accuracy of the facts as found or the evidential basis for the decision being challenged.

Recently, there have been some signs of change in this respect. In 1972, in *Secretary of State for Employment v. A.S.L.E.F. (No. 2)*, Lord Denning asserted, in a survey of the scope of judicial review, that an exercise of statutory power conditional on it appearing to the relevant authority that there were reasons for doubt could be overturned if the authority "plainly misdirects himself *in fact* or *in law*".<sup>26</sup> While it is possible to see such an assertion as part of the continuing reaction of the courts to *Liversidge v. Anderson*<sup>27</sup> and its severe restrictions on review when such subjective empowering formulae exist, the same is scarcely true of Lord Denning's 1977 *dicta* about review for factual error in *Laker Airways Ltd v. Department of Trade*.<sup>28</sup> The courts, according to Lord Denning, can scrutinize the exercise of statutory and prerogative powers "to see that they are used properly and not improperly or mistakenly. By "mistakenly" I mean under the influence of a misdirection in fact or in law."<sup>29</sup> This clearly goes further than a claim to review authority over the factual components of a condition precedent to the exercise of power, albeit expressed in subjective empowering language. In fact, it comes close to an assertion of general and broad review authority over all issues of fact within the jurisdiction of statutory and prerogative authorities.

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<sup>23</sup> See de Smith, *supra*, note 10, 139-41.

<sup>24</sup> See Elliott, "No Evidence": A Ground of Judicial Review in Canadian Administrative Law? (1972) 37 Sask. L. Rev. 48.

<sup>25</sup> *Supra*, note 10.

<sup>26</sup> [1972] 2 Q.B. 455, 493 (C.A.) [emphasis added].

<sup>27</sup> [1942] A.C. 206 (H.L.).

<sup>28</sup> [1977] Q.B. 643 (C.A.).

<sup>29</sup> *Ibid.*, 706. See also *R. v. West Sussex Quarter Sessions, Ex parte Albert and Maud Johnson Trust Ltd* [1974] Q.B. 24, 36 (C.A.) *per* Lord Denning M.R., discussed in greater detail, *infra*, note 81.



Were it not for two other decisions, it would of course be easy to dismiss these *dicta* as another aberration of Lord Denning's, fit to rank alongside his "correction" by the House of Lords and Privy Council for overzealous scrutiny of public authorities in *Gouriet v. Union of Post Office Workers*<sup>30</sup> and *Pearlman v. Keepers and Governors of Harrow School*<sup>31</sup> as well as his own extra-judicial acknowledgement<sup>32</sup> that he had gone too far in *R. v. Secretary of State for the Environment, Ex parte Ostler*.<sup>33</sup>

However, after *A.S.L.E.F.* and before *Laker Airways*, in *Secretary of State for Education and Science v. Tameside Borough Council*<sup>34</sup> both Lord Scarman in the Court of Appeal and some members of the House of Lords also seemed to adopt a broader basis for judicial review of factual issues than had previously been thought to be the case. In the Court of Appeal, Lord Scarman asserted that "misunderstanding or ignorance of an established and relevant fact" was a ground of judicial review.<sup>35</sup> In the House

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<sup>30</sup> [1978] A.C. 435 (H.L.), *rev'g* [1977] Q.B. 729 (C.A.). See, in particular, 483 *per* Lord Wilberforce, 490 and 495 *per* Viscount Dilhorne, 505-6 *per* Lord Edmund-Davies, 519-20 *per* Lord Fraser of Tullybelton. At issue here was a judgment of the Court of Appeal holding that a private citizen could seek to enjoin breaches of the criminal law irrespective of whether he had suffered injury as a result of those breaches and notwithstanding that the Attorney-General had refused to sue or to lend his support to relator proceedings.

<sup>31</sup> [1979] Q.B. 56 (C.A.), said to be incorrect by the Judicial Committee of the Privy Council in *South East Asia Fire Bricks Sdn Bhd v. Non-Metallic Mineral Products Manufacturing Employees Union* [1981] A.C. 363, 370 (P.C. (Malaysia)) *per* Lord Fraser of Tullybelton delivering the judgment of the Court and by Lord Edmund-Davies in *In re A Company*, (*sub nom. In re Racal Communications Ltd*) [1980] 3 W.L.R. 181, 193-4 (H.L.). This was in relation to the contention of Lord Denning M.R. in *Pearlman* that all errors of law were jurisdictional. Note, however, 185-6 *per* Lord Diplock in *In re Racal Communications*, in which he suggests that Lord Denning is correct in relation to administrative tribunals but not courts of law. Lord Keith of Kinkel concurred with Lord Diplock's judgment, but Lord Salmon, Lord Edmund-Davies and Lord Scarman expressed no view on this point. It is also worth noting that Lord Keith sat without dissent on the Judicial Committee in *South East Asia Fire Bricks*. See the criticism of the Diplock approach in Wade, *New Twists in the Anisminic Skein* (1980) 96 L.Q.R. 492.

<sup>32</sup> Lord Denning, *The Discipline of Law* (1979), 108.

<sup>33</sup> [1977] Q.B. 122 (C.A.). In *The Discipline of Law*, *ibid.*, Lord Denning describes some of his statements in that case as "unguarded". The applicant alleged bad faith and breach of the rules of natural justice and the issue was whether a six week limitation period prevented the case from proceeding. Lord Denning seems to have reaffirmed the part of his judgment which distinguishes between ouster or privative clauses and time limit or limitation clauses, but stepped back from his remarks that judicial bodies and administrative bodies are different for these purposes and that lack of good faith and denials of natural justice only render a decision voidable, not void. See p. 135 of the judgment and pp. 108-9 of the book. This reflects Professor H.W.R. Wade's criticism of the decision in *Anisminic v. East Elloe* (1977) 93 L.Q.R. 8, 10. See also Harlow, *The Boston Bypass or Ostler Ousted* [1977] Public Law 304; Whomersley, *Administrative Law: The Limits of Anisminic* [1977] Cambridge L.J. 4; Gravells, *Some Problems in Administrative Law: A Wasted Opportunity for Clarification* (1977) 93 L.Q.R. 327.

<sup>34</sup> [1977] A.C. 1014 (C.A.), *aff'd* [1977] A.C. 1036 (H.L.).

<sup>35</sup> *Ibid.*, 1030.

of Lords, it is possible to attribute some of the Law Lords' assent to this as a general proposition of judicial review. For example, Lord Wilberforce asserted:

In these cases it is said that the courts cannot substitute their opinion for that of the minister: they can interfere on such grounds as that the minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact.<sup>36</sup>

Nevertheless, extreme caution is necessary in treating this case as an authority on the reviewability of issues of fact by a court, for three reasons in particular. First, the decision under challenge was not itself an original exercise of power but involved the statutory authority of a Minister to intervene against the decision of a local authority in a context which indicated, at least to the courts, the need for considerable deference by the Minister to the wishes of the local authority. Secondly, while the power was granted to the Minister in subjective language, *i.e.*, "if the Minister is satisfied... that any local education authority... [has] acted... unreasonably",<sup>37</sup> the judges once again reacted to the *Liversidge v. Anderson*<sup>38</sup> argument that this immunized the decision from judicial review. While it meant the court could not review matters of pure judgment, to the extent that this exercise of judgment depended upon the existence of certain facts, "the court must inquire whether those facts exist".<sup>39</sup> Thirdly, at least some of the Law Lords put their judgment on the more conventional basis that the Minister had asked himself the wrong question.<sup>40</sup> It is also worth noting that emphasis was placed on the assertion that in determining the appropriate scope of review, "each statute or type of statute must be individually looked at".<sup>41</sup>

Notwithstanding the rather peculiar nature of the statutory context in *Tameside*, the decision provided the secondary basis for the judgment of Cooke J. in the recent New Zealand Court of Appeal decision in *Dagayanasi v. Minister of Immigration*.<sup>42</sup> More significantly for present purposes, Cooke J. also linked error of fact with review for breach of the duty to act fairly,<sup>43</sup> notwithstanding the express reservation on the whole error of fact argument by the other two members of the Court, Richmond P.<sup>44</sup> and Richardson J.<sup>45</sup>

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<sup>36</sup> *Ibid.*, 1047.

<sup>37</sup> *Education Act, 1944*, 7 & 8 Geo. VI, c. 31, s. 68 (U.K.).

<sup>38</sup> *Supra*, note 27.

<sup>39</sup> *Supra*, note 34, 1047 *per* Lord Wilberforce. See also 1024 *per* Lord Denning M.R., 1030 *per* Lord Scarman in the Court of Appeal.

<sup>40</sup> *Ibid.*, 1062 *per* Viscount Dilhorne, 1067 *per* Lord Diplock, 1071 *per* Lord Salmon.

<sup>41</sup> *Ibid.*, 1047 *per* Lord Wilberforce.

<sup>42</sup> *Supra*, note 22, 146-8.

<sup>43</sup> *Ibid.*, 149. Reference was made to *H.T.V. Ltd v. Price Commission*, *supra*, note 13.

<sup>44</sup> *Ibid.*, 132.

<sup>45</sup> *Ibid.*, 149.

*Daganayasi* involved judicial review of the Ministerial refusal of an appeal from a deportation order. The Minister was given authority under the relevant statute to order that a deportation order not be executed "if he is satisfied that, because of exceptional circumstances of a humanitarian nature, it would be unduly harsh or unjust to deport the offender from New Zealand."<sup>46</sup> The applicant's plea for humanitarian consideration had been based upon the argument that the health of her New Zealand-born, and hence citizen, son depended upon his continued access to medical and nutritional facilities available in New Zealand but difficult if not impossible to procure in her native Fiji and that it was "harsh or unjust" to force her either to abandon her son in New Zealand or take him with her to Fiji.

The principal complaints in *Daganayasi* arose from the actions of an extra-departmental medical referee appointed to inquire into the health issue and report to the Minister. While this procedure was not specifically provided for in the statute, the Court had no problems in general with its use. Nevertheless, the Court held unanimously that, given the prejudicial nature of some of the material contained in the medical referee's report, failure to disclose at least the substance of the prejudicial comment had deprived the applicant of a reasonable opportunity to be heard.<sup>47</sup>

The material in question had in fact seriously misrepresented the views of the doctor in charge of the clinic at which the boy was being treated — a rather dramatic demonstration of the value, in cases such as this, of an effective opportunity to respond.

However, Cooke J. did not see these errors of fact simply as a justification or argument for traditional natural justice or fairness review for procedural impropriety. For him they provided a separate or independent ground of judicial review in themselves. In believing that he had obtained from his medical referee "the best and most up-to-date medical advice available" the Minister had made a mistake of fact reviewable on the basis of the *Tameside* case.

As with *Tameside*, there must be some reservations about Cooke J.'s support of error of fact as a general ground of judicial review. Aside from the fact that the two other members of the Court expressly reserved judgment on this particular point, the terms in which Cooke J. ultimately expressed his conclusion suggest a limited application or, perhaps, simply a cautious first step:

I would hold in such a case as this that when the Minister instructs a referee to ascertain the facts for him and report, the Minister should bear responsibility for a misleading or inadequate report. The Minister has implied authority to delegate the function of

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<sup>46</sup> Section 20A(2) of the *Immigration Act 1964*, Stat. N.Z., no. 43, as inserted by s. 6 of the *Immigration Amendment Act 1977*, Stat. N.Z., no. 98.

<sup>47</sup> *Supra*, note 22, 149 per Richardson J.

making inquiries, but if as a result the Minister is led into a mistake and a failure to take into account the true facts, it is not right that the appellant should suffer.<sup>48</sup>

Expressed in this way, review for factual error is perhaps reduced to no more than a particular rule involving delegation: while in certain circumstances the delegation of an evidence-collecting role is permissible, the ultimate decision may nevertheless be set aside if the delegation does not produce an adequate report of the evidence. Support for this proposition may be found in the earlier Privy Council advice of *Jefferies v. New Zealand Dairy Production and Marketing Board*,<sup>49</sup> although there the report before the decision-maker was considered too skeletal rather than inaccurate.

Seen in this way the reviewable error involved becomes much more akin to a process error than to a substantive one. The person charged with taking the decision has not properly considered or heard the case because of the fallibilities of his delegate. Thus in *Jefferies*' case the failure is described by the Privy Council as a breach of the duty to "hear" the parties.<sup>50</sup>

The same restrictive interpretation cannot be given to Cooke J.'s final remarks on the merits of the application for judicial review.

It is indeed possible to combine the two grounds and to put one's conclusion on a somewhat broader basis. This I would do as an alternative. Fairness need not be treated as confined to procedural matters... Standing back and looking at the whole case in perspective — the merits of the appellant's request... , the procedure adopted for dealing with it, the referee's memoranda and report, the grounds of the Minister's decision as appearing from his letter — one may ask whether she has been treated fairly. I think the answer has to be no. This does not mean, of course, that there has been any intentional unfairness; it is merely that what has been done in good faith has produced an injustice.<sup>51</sup>

Cited in support of this approach are *H. T. V. Ltd v. Price Commission*<sup>52</sup> and an earlier New Zealand Court of Appeal decision involving a duty of fairness placed upon an engineer appointed to certify progress under a contract for the purposes of partial payments.<sup>53</sup> However, as with Lord Denning M.R.'s judgment in *Hook*, this really amounts to a claim to broad scrutiny of the merits of tribunal decision-making, at least where there has been some degree of procedural impropriety.

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<sup>48</sup> *Ibid.*, 149.

<sup>49</sup> [1967] 1 A.C. 551 (P.C. (N.Z.)).

<sup>50</sup> *Ibid.*, 566-7 *per* Viscount Dilhorne delivering the judgment of the Privy Council.

<sup>51</sup> *Supra*, note 22, 149.

<sup>52</sup> *Supra*, note 13.

<sup>53</sup> *Canterbury Pipe Lines Ltd v. Christchurch Drainage Board* [1979] 2 N.Z.L.R. 347, 357 (C.A.). Cooke J. himself had delivered the judgment of the Court of Appeal in this case. Indeed, it is interesting to note the extent to which the approach of *Daganayasi*, *supra*, note 22, and *Canterbury Pipe Lines* is foreshadowed in an extra-judicial statement by Cooke J. in May 1975, reported in Cooke, *Third Thoughts on Administrative Law* [1979] Recent Law 218, 225-6 [emphasis added]: "It might not be an altogether absurd over-simplification to say that the day may come when the whole of administrative law can be summed up in the

It is possible to see this approach as justifiable to the extent that it represents a factual counter to an argument that relief should not be available for procedural unfairness when no harm has been caused.<sup>54</sup> Nevertheless, to the extent that it goes beyond this, serious questions must once again be raised. Procedural arguments have always stood on their own in the past and, save to the limited extent just identified, have not required the bolster of a substantively questionable outcome. No reason is advanced for altering that position and if, as seems more likely, Cooke J. is suggesting a general authority to measure outcomes by reference to fairness in both a procedural and substantive sense, it is open to many of the same doubts identified earlier in relation to *Hook*.

#### D. *Minister of Immigration and Ethnic Affairs v. Pochi*<sup>55</sup>

*Pochi* involved an appeal by the Minister on a question of law from a decision of the Administrative Appeals Tribunal to recommend that Pochi not be deported because, in terms of the Tribunal's authority, the original decision to deport was not "the correct or preferable one".<sup>56</sup> The statutory *sine qua non* of the original deportation order was Pochi's conviction of an offence for which he had been sentenced to imprisonment for a year or longer.<sup>57</sup> However, it had been held in previous cases that the apparently open discretion of the Minister was conditioned by what the Minister perceived to be in the best interests of Australia.<sup>58</sup> This, coupled with the fact that before the Tribunal justification of the original decision theoretically rested on the Minister, led the Tribunal to assert, *inter alia*, that

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proposition that *the administrator must act fairly and reasonably*. At present our Court has reserved judgment in a case concerning an architect [*sic*] employed by a building owner but,...., bound to act fairly towards the contractor in making various decisions under the contract. What is the content of that duty?" Note that Cooke J. has also argued for broad discretionary judicial powers in the awarding of damages in contract and tort, though in this instance, he has indicated with greater clarity the way in which such discretionary power should be structured or confined. See Cooke, *Remoteness of Damages and Judicial Discretion* [1978] Cambridge L.J. 288, 296-300.

<sup>54</sup> There is, however, no suggestion that *Daganayasi* was argued this way and Cooke J. clearly treats the procedural argument and the mistake of fact argument as two distinct grounds of judicial review, despite his ultimate combination of them under the rubric of fairness. Indeed, while there is authority to support the proposition that a decision will not be quashed for procedural deficiencies where the outcome would have been the same anyway, e.g., *Glynn v. Keele University* [1971] 1 W.L.R. 487, 496 (Ch.) *per* Sir John Pennycuik, this has been subjected to considerable criticism. See, in particular, Clark, *supra*, note 2, 43-60.

<sup>55</sup> (1980) 31 A.L.R. 666 (F.C. Aust.).

<sup>56</sup> *Ibid.*, 683 *per* Deane J., citing *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577, 589 (F.C. Aust.).

<sup>57</sup> *Migration Act 1958*, Aust. Acts, no. 62, s. 12.

<sup>58</sup> *Supra*, note 55, 670 *per* Smithers J., 684-5 *per* Deane J.

[w]hen an alien who is an established resident becomes liable to deportation under s. 12, the general rule must be that the conduct which is relied on to show that a deportation order is in the best interests of Australia must be proved not merely suspected.<sup>59</sup>

It was argued by the Minister that this constituted one of three errors of law made by the Tribunal. A majority of the Federal Court was not convinced by this argument, holding that "the 'general rule' was applied... as a general rule of administrative practice rather than as an over-riding principle of law."<sup>60</sup> Nevertheless, the majority did, as an alternative, go on to consider the validity of the proposition as a matter of law, and it is in this consideration that the present interest of the case lies.

The foundation for the Court's conclusions on this point lay in the duty of the A.A.T. to observe the principles of natural justice<sup>61</sup> as well as in a perception of strong procedural claims emerging separately from the nature of the subject matter and consequences at issue here.<sup>62</sup> In particular, support was gleaned from United States deportation decisions for the propositions that:

principles of procedural due process are not restricted to purely procedural steps which are preliminary to decision but extend to control the material upon which the decision itself can properly be based<sup>63</sup>

and, following from this:

that the fundamental standards of fairness which are inherent in the concept of procedural due process extend, at least when issues of the gravity of deportation of an established resident are concerned, to exclude decision on the basis of suspicion and speculation.<sup>64</sup>

The notion that natural justice or fairness operated with respect to the material on which the decision was based as well as the procedures adopted, was also said to be supported<sup>65</sup> by the judgments of Lord Willmer and Lord Diplock in *R. v. Deputy Industrial Injuries Commissioners, Ex parte Moore*.<sup>66</sup> According to Lord Diplock in that case, natural justice demanded that decisions be based on evidence whether or not there was a hearing.<sup>67</sup> He then proceeded to define evidence as:

material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must

<sup>59</sup> *Ibid.*, 683 *per* Deane J.

<sup>60</sup> *Ibid.*, 684 *per* Deane J. Evatt J. concurred in Deane J.'s reasons and Smithers J. dissented.

<sup>61</sup> *Ibid.*, 686 *per* Deane J.

<sup>62</sup> *Ibid.*, 686-8.

<sup>63</sup> *Ibid.*, 687-8.

<sup>64</sup> *Ibid.*, 688.

<sup>65</sup> *Ibid.*

<sup>66</sup> [1965] 1 Q.B. 456, 485 (C.A.) *per* Lord Diplock.

<sup>67</sup> *Ibid.*, 488.

not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility for deciding the issue.<sup>68</sup>

In *Moore*, a case involving accident compensation, it was held that use by the Tribunal of the evidence of doctors given in other related cases did not offend the prescription that account was to be taken of evidence of probative value only.<sup>68a</sup>

However, even accepting the suggestion in *Moore* that natural justice involves more than the observance of certain procedures prior to the decision-making process itself, *Pochi* seems to have gone a step further. It is also questionable whether *Moore*, in its demand for the use of only probative evidence, needed to describe that as a principle of natural justice.

First, Lord Diplock in *Moore* does seem to make a valid point when he asserts that natural justice and the right to a fair hearing should involve more than a particular set of procedures before and during any hearing and prior to the commencement of the actual decision-making process.<sup>68b</sup> This principle is recognized when decisions are overturned on the basis that unauthorized persons have participated in the deliberations.<sup>69</sup> Although there is an absence of authority, it would certainly be very surprising if such activities as spinning a coin were not held to be destructive of the validity of the *process* by which the decision has been made.

However, once the decision-maker attempts in good faith to address himself to the evidence and the issues, what constitutes determination of the merits as opposed to the process for determining the merits is often a difficult question. It is not usual for review on the basis of an absence of evidence to be described as natural justice or procedural review.<sup>70</sup> The "no evidence" test of judicial review has sometimes been said to raise the question whether there is any evidence of probative value to support the decision at issue,<sup>71</sup> *i.e.*, the *Moore* test for natural justice in this area. This suggests the lack of any real imperative to talk in "natural justice" rather than "no evidence" terms in *Moore*. Moreover, even while it might be arguable, as D.W. Elliott has also asserted, that "no evidence"<sup>72</sup> review is properly seen as an aspect of natural justice, the question of whether the proper burden of proof was applied, dealt

<sup>68</sup> *Ibid.*

<sup>68a</sup> *Ibid.*, 489.

<sup>68b</sup> *Ibid.*, 488.

<sup>69</sup> See, *e.g.*, *Hook*, *supra*, note 3 where the primary ground was the complainant's participation in the actual decision-making process.

<sup>70</sup> I return to this matter, *infra*, page 275.

<sup>71</sup> See *e.g.*, *Sisters of Charity v. Saskatchewan Labour Relations Board* [1951] 3 D.L.R. 735, 754 (Sask. C.A.) *per* Proctor J.A., delivering the judgment of the Court.

<sup>72</sup> *Supra*, note 24, 97. See also Tracey, *Absence or Insufficiency of Evidence and Jurisdictional Error* (1976) 50 Aust. L.J. 568, 573.

with in *Pochi*, carries much further over into the merits rather than the procedural side of decision-making. In other words, the reviewability of the burden of proof applied by the A.A.T. in *Pochi* is far more appropriately described as a question of law, albeit adjectival,<sup>73</sup> than as an issue of procedure. Its characterization as an aspect of natural justice in *Pochi* was both unnecessary and potentially confusing, unless one is prepared to accept the expansion of the concepts of natural justice and fairness into the substantive as well as procedural arena.

#### E. *Summary of the Four Cases*

Each of the four cases outlined is slightly different in the degree to which it expands the use of fairness or natural justice as a standard in judicial review, though all to a greater or lesser extent promote the idea that these are substantive as well as procedural standards. In *Hook*, severity of penalty was brought within the rubric. In *H.T.V.*, it was inconsistency of treatment. Cooke J.'s judgment in *Daganayasi* involved error of fact, in itself a questionable ground of judicial review, and then proceeded to link error of fact with procedural defects in its assertion of an overall unfair decision. Finally, in *Pochi*, burden of proof was held to involve an issue of natural justice.

While most of these reasons were either *dicta* or supplementary to another supportable ground of judgment, nonetheless they do amount to a significant volume of judicial opinion, particularly as they all come from appellate judges of respected courts. In the second part of the article, I therefore want to explore in greater depth the possible justifications for such an approach. I will do this first of all by brief reference to the history of natural justice and fairness as standards for judicial decision-making and, secondly, by a consideration of what is an appropriate level of judicial intervention in the affairs of statutory decision-makers and by what terminology that level of intervention is most aptly described. I will then consider whether existing Canadian law shows signs of moving in the direction of fairness and natural justice as substantive standards.

## II. Natural Justice and Fairness — Substantive Standards in Existing Law?

There is no doubt that at times the terms “natural justice” and “fairness” have been used as standards of substantive justice, particularly in the private law field. This is amply demonstrated by Professor Paul Jackson in his recent text, *Natural Justice*. In the introductory chapter of that work, he cites many examples of the use by English courts of the term “natural justice”

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<sup>73</sup> See *R. (Hanna) v. Ministry of Health and Local Government* [1966] N.I. 52, 61 (Q.B.) cited in de Smith, *supra*, note 10, 136-7.



either as a justification for a substantive rule of law or to defeat a substantive argument.<sup>74</sup> These examples date from the seventeenth and eighteenth centuries—when natural law theory had great appeal for some judges—right up to the present day. Thus, as recently as 1975, Lord Denning M.R. in *Wallis's Clayton Bay Holiday Camp Ltd v. Shell-Mex and B.P. Ltd* stated that it was “contrary to equity and natural justice” to take advantage of one’s own wrong to acquire title to land.<sup>75</sup> On this point Jackson asserts:

In this century, as in the past, judges and others have used the phrase natural justice in a way which implies the existence of moral principles of self-evident and unarguable truth. To justify the adoption, or continued existence, of a rule of law on the ground of its conformity to natural justice in this sense conceals the extent to which a judge is making a subjective moral judgment and suggests, on the contrary, an objective inevitability. Natural justice, used in this way, is another name for natural law although devoid of some at least of the theological and philosophical overtones and implications of that concept.<sup>76</sup>

As a standard for the measurement of whether substantive justice has been accorded, fairness lacks most of the “theological overtones and implications” of natural justice. Indeed, appeals to “equity”—the other string to Lord Denning’s bow in *Shell-Mex*—are almost as deceptive as invocations of “natural justice” in that they tend to suggest the existence of a clear set of precise principles which justify particular outcomes. In Jackson’s terms, it could be said that to this extent the use of fairness language involves less of an attempt to disguise what in fact is the making of a “subjective moral judgment” by the judge.

Given the general reticence of the judiciary to ever acknowledge such subjective considerations as the real basis for decision-making and the continued assertion of the fiction that the law always simply awaits discovery, it is perhaps surprising to find “fairness” used as a standard of measurement of substantive justice. However, private law examples do exist. Thus, in *Canterbury Pipe Lines Ltd v. Christchurch Drainage Board*,<sup>77</sup> Cooke J. of the New Zealand Court of Appeal, held that relief should be granted because a designated engineer had unfairly failed to certify progress or compliance under a construction contract. After reference to English authority Cooke J. continued:

Duties expressed in terms of fairness are being recognised in other fields of law also, such as immigration. Fairness is a broad and even elastic concept, but it is not altogether the worse for that. In relation to persons bound to act judicially fairness requires compliance with the rules of natural justice. In other cases this is not necessarily so. But we do not think it can be confined to procedure. Its use in the authorities in combination with “impartiality” suggests that it is not meant to be a narrow concept.<sup>78</sup>

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<sup>74</sup> *Supra*, note 12, 1-5.

<sup>75</sup> [1975] Q.B. 94, 104 (C.A.).

<sup>76</sup> *Supra*, note 12, 1.

<sup>77</sup> *Supra*, note 53.

<sup>78</sup> *Ibid.*, 357.

While observers of American contract law and the *Uniform Commercial Code* would see this as an example of the Court imposing a good faith in performance obligation upon a contract,<sup>79</sup> it is significant that Cooke J. explained that unfairness in the sense in which he was using it did not necessarily involve a finding of bad faith against the engineer in question. Rather, the effect of the failure to certify progress was unfair, irrespective of the absence of bad faith. This serves to emphasize that the majority of the Court was concerned with the ultimate result, not with the state of mind of the engineer or the process in which he engaged in deciding not to certify.

Notwithstanding these examples, it would be incorrect to think that “natural justice” and “fairness” are in frequent use in the private law field as explicit standards for the measurement of substantive justice. That does not mean that notions of what is “just” and “fair” do not underlie much private law judicial thinking. Instead, they tend to be expressed more commonly in terms of “reasonableness”. Alternatively, explicit reference to underlying standards is in many cases rendered superfluous by the prior formulation of specific rules, which can be argued from by way of analogy, or by the development of more precise standards by which a rule or conduct can be substantively gauged in a particular case. This latter phenomenon is also true of “reasonableness” itself. The assessment of what is “reasonable” is in many instances largely predetermined by existing explicit rules or standards. Given such common use of “reasonableness” as a standard in the common law, it is therefore somewhat surprising to find the courts moving away from it to the terminology of “fairness” in cases such as *Canterbury Pipe Lines*. Indeed, to the extent that the courts need to revert to first principles in particular cases, it is highly probable that they will do so today in rather more utilitarian terms than simply by reference to notions such as “natural justice” and “fairness” as if they provided an immediately self-evident answer.

Until recently the position in public law has essentially been the same where substantive as opposed to procedural unfairness is concerned. Thus, while Lord Denning is correct when he asserts in *Hook* that there is authority to support the proposition that *certiorari* is available to quash an excessive or unjust penalty, that authority is scant and old. In *Commins v. Massam*, a 1642 decision, Bramston C.J. certainly asserted:

I conceive in some clearness that [*certiorari*] may be granted where any fine is imposed upon any man by commissioner, which they have authority to by their commission, as appeareth by the statute to moderate it in case that it be excessive.<sup>80</sup>

However, not only was this clearly *dicta* and uttered at a time when the modern law of judicial review was just emerging but it was also not mentioned by any of the other judges who sat on the case. Heath J. actually seemed to reject this as a possibility in the following statement:

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<sup>79</sup> See *U.C.C.* §1-203 and *Restatement (Second) of the Law of Contract* (1979), §205.

<sup>80</sup> *Supra*, note 6, 475.

[T]hey are enabled by the statute to proceed according to their discretions, and therefore if they proceed *secundum aequum et bonum*, we cannot correct them; but if they proceed where they have no jurisdiction, or without commission, or contrary to their commission, or not by jury, then they are to be corrected here.<sup>81</sup>

Similarly, while there is ancient authority for the proposition that on review the courts could upset a decision for any error of fact, as Edith Henderson points out, it was customary until 1702 for the Court of King's Bench to retry a matter itself if it thought a tribunal had committed a reviewable error.<sup>82</sup> In fact, the modern principles of judicial review of administrative action did not emerge until the eighteenth century and it is most unwise to extract much support for the scope of substantive review from earlier decisions whether rendered under the rubric of natural justice or not.

It is also interesting to note that the scope of review for error of fact under the long-abolished writ of error was very limited. Thus, when D.M. Gordon in 1926 advocated a return to the review for error of fact provided by the writ of error, he was also quick to point out exactly what this involved:

The exact meaning of 'error of fact'... has nothing to do with findings of fact, weight of evidence, or merits, and to assign error in fact has no resemblance to appealing on the facts. The complaint is not of an error in the decision, but of something that never came before the [tribunal] for decision, not of any mistake in the judgment, but that it was a mistake to proceed to judgment at all. Error in fact arises from matters which are not only outside the issues before the [tribunal], but as to which ordinarily that [tribunal] does not inquire at all.<sup>83</sup>

The primary example he gives of this is the case of a conviction and fine entered by a magistrate when the defendant has died between service of the summons and the hearing.<sup>84</sup>

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<sup>81</sup> *Ibid.*, 473. See also *R. v. Moreley* (1760) 2 Burr. 1040, 1042, 97 E.R. 696, 697 (K.B.) per Lord Mansfield C.J.: "A *certiorari* does not go, to try the merits of the question, but to see whether the limited jurisdictions have exceeded their bounds." Lawton L.J. quoted this passage in *R. v. West Sussex Quarter Sessions*, *supra*, note 29, 41. Lawton L.J. also commented at p. 42: "The history of the nuisance caused by the excessive use of *certiorari* in the century before 1848 should perhaps be a warning for the courts today." This was said in the context of an attempt in *certiorari* proceedings to secure the admission of fresh evidence which would have influenced the result at Quarter Sessions but which was not available at the time of trial. Both Orr L.J. and Lawton L.J. rejected this argument. Lord Denning M.R., while not dissenting on the facts, did however comment at p. 36: "A decision on a question of fact may be vitiated by mistake just as much as by fraud." However, the principle of the case has recently been reaffirmed in *R. v. Secretary of State for the Environment, Ex parte Powis* [1981] 1 W.L.R. 584, 595-7 (C.A.) per Dunn L.J. delivering the judgment of the Court. Note, however, the Ontario position on the admissibility of affidavit evidence to establish "no evidence": *infra*, notes 88 and 210.

<sup>82</sup> E. Henderson, *Foundations of English Administrative Law* [;] *Certiorari and Mandamus in the Seventeenth Century* (1963), 107.

<sup>83</sup> Gordon, *Certiorari and the Revival of Error in Fact* (1926) 42 L.Q.R. 521, 526.

<sup>84</sup> *Ibid.*, 522.

In fact, the real origins of review for error of intra-jurisdictional fact as it presently exists are to be found in the modern cases already discussed. The same is largely true of review for inconsistency<sup>85</sup> although, as we shall see shortly, there is a substantial body of American law on this subject.<sup>86</sup>

These observations cannot be made with respect to those late nineteenth and early twentieth century decisions in which "no evidence" was described as a natural justice ground of review.<sup>87</sup> While they do not constitute a majority of the decisions in which "no evidence" was accepted as a reviewable error, they are not trifling in number. They do, nevertheless, reflect the uncertain status of "no evidence" as a ground of judicial review of administrative action in jurisdictions deriving their law of judicial review directly from English common law.

Even when an absence of evidence has been recognized as a ground of judicial review there has always been some difficulty of classification. Is it a species of jurisdictional error? Or is it mere intra-jurisdictional error of law?<sup>88</sup> Amid these debates, it is not at all surprising to see the argument raised that it is really an error of natural justice.

The reasons for this classification may have been, not a sense that natural justice constituted a substantive as well as a procedural basis for judicial review, but that acting on absolutely no evidence was itself a species of procedural error: anyone who acted without any evidence to support the

<sup>85</sup> Note, however, *Arsenal Football Club Ltd v. Smith (Valuation Officer)*, *supra*, note 21. Arguments for inconsistency as a general ground of review can also be made from the discriminatory by-law authorities. I discuss the Canadian law, *infra*, note 181, and accompanying text. The leading English decision is *Kruse v. Johnson* [1898] 2 Q.B. 91, 99 (Div. Ct) *per* Lord Russell of Killowen C.J. See also *R. v. Brighton Corp., Ex parte Tilling (Thomas) Ltd* (1916) 85 L.J.K.B. 1552, 1555 *per* Sankey J., where he states that one of the obligations of those acting judicially is to "treat all applicants fairly and alike". Both these decisions are noted in de Smith, *supra*, note 10, 346, fn. 42.

<sup>86</sup> Discussed, *infra*, note 133 *et seq.* and accompanying text.

<sup>87</sup> A group of New South Wales cases are discussed, *infra*, note 89 *et seq.* and accompanying text. See also *Re Nelson* [1936] O.R. 31, 33 (Weekly Ct) and *R. v. White* (1962) 39 W.W.R. 425, 428 (Alta S.C.) cited by Elliott, *supra*, note 24, 89. For a much more recent example see the Divisional Court judgment delivered by Pennell J. in *Re Keeprite Workers' Independent Union and Keeprite Products Ltd*, cited by Morden J.A. delivering the Ontario Court of Appeal judgment in the same case: (1980) 29 O.R. (2d) 513, 515 (C.A.). Though the Ontario Court of Appeal reversed the Divisional Court's judgment, the characterization of "no evidence" as "analogous to a denial of natural justice" was not questioned.

<sup>88</sup> See Elliott, *supra*, note 24, 89. In *Re Keeprite Workers' Independent Union*, *ibid*, 519-20, Morden J.A. held that "no evidence" was a species of jurisdictional error, thus justifying the use of affidavit evidence to establish an absence of evidence in the absence of a transcript on the record. Morden J.A. also appealed to s. 2(3) of the *Judicial Review Procedure Act*, R.S.O. 1980, c. 244, to justify the holding that an absence of evidence need not appear on the face of the record. Both these aspects of the decision are criticized strongly by J. Evans, *Remedies in Administrative Law* [1981] L.S.U.C. Special Lectures, 429.

conclusions reached must surely not have really listened to or heard the applicant's case.

This debate is well-illustrated by a series of New South Wales cases decided by a small group of judges around the turn of the century. In a number of them, "no evidence" is asserted to be a breach of the rules of natural justice without elaboration.<sup>89</sup> However, in *Ex parte Jordan*<sup>90</sup> in 1898 we find the statement by one judge that the ground of "natural justice" represented a more accurate characterization of "no evidence" than the notion of jurisdiction. The next year in *Ex parte Mansfield*,<sup>91</sup> all three judges accepted that "no evidence" was a natural justice ground of judicial review. The terms in which at least two of them made that point, however, demonstrate clearly that they saw it essentially as a procedural rather than as a substantive error. According to A.H. Simpson J.:

[T]he decision is [not] contrary to natural justice unless [the court] sees that the Judge has acted without any evidence before him, or unless his decision is so flagrantly wrong that it shews that he has not exercised the judicial functions cast upon him.<sup>92</sup>

O'Connor J.'s statement is even more explicit:

That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such a one that the person appealing has not had his case properly considered by the Judge who decided it.<sup>93</sup>

Further implicit support for the Court's view of "no evidence" as procedural rather than substantive error comes from Owen J. in *Ex parte Fealey*, an 1897 decision in which he takes pains to make it clear that natural justice is not a substantive ground of judicial review:

[H]owever erroneous the judgment may be in law or whatever injustice that erroneous judgment may inflict, the erroneousness or injustice of the judgment does not make the judgment contrary to natural justice. A decision contrary to natural justice is where the presiding Judge or Magistrate denies to a litigant some right or privilege or benefit to which he is entitled in the ordinary course of the proceedings, as for instance where a Magistrate refuses to allow a litigant to address the Court, or where he refuses to allow a witness to be cross-examined, or cases of that kind.<sup>94</sup>

I also suspect that the same kinds of considerations are the basis for Canadian decisions in which "no evidence" has been described as a natural

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<sup>89</sup> See, e.g., *Purcell v. The Perpetual Trustee Co.* (1894) 15 N.S.W.R. 385, 387-8 (S.C.) per Windeyer J., delivering the judgment of the Court. All these cases involved the seeking of either *certiorari* or prohibition in relation to the proceedings of Courts of Petty Sessions. These Courts were required to decide cases on the basis of equity and good conscience and also natural justice. Because of this, there may have been a tendency on the part of the judges in review proceedings to view natural justice in a somewhat broader framework than was usual. Nevertheless, that does not derogate from the illustrative force of the decisions.

<sup>90</sup> (1898) 19 N.S.W.R. 25, 29 (S.C.) per Stephen J.

<sup>91</sup> (1899) 20 N.S.W.R. 75 (S.C.).

<sup>92</sup> *Ibid.*, 81-2.

<sup>93</sup> *Ibid.*, 82-3.

<sup>94</sup> (1897) 18 N.S.W.R. 282, 288 (S.C.).

justice ground of review. They are clearly the underpinnings of Elliott's argument that "no evidence" is best viewed in this light.<sup>95</sup>

In summary, I think it is fair to say that at least until recently, natural justice or fairness, for that matter, as a standard of substantive justice has intruded very little in the law relating to judicial review of administrative action on substantive grounds. This is in marked contrast to the procedural grounds of judicial review where the language of natural justice and now fairness has been all-pervasive. The question of why the terminology has persisted in one area whereas it has been employed rarely in the other is obviously raised.

It is difficult to be other than speculative about this matter, but certain observations can be made without too much distortion by reason of oversimplification. As far as judicial review on substantive grounds is concerned, the disappearance of review for intra-jurisdictional error of fact severely circumscribed the scope of judicial review. Particularly after the enactment of the *Summary Jurisdiction Act* of 1848 in England and its equivalents elsewhere, and the consequent temporary eclipse of review for intra-jurisdictional error of law,<sup>96</sup> the role of the courts in the substantive area was of a limited or reserve nature, extending only as far as jurisdictional error narrowly defined. In time, of course, jurisdictional error became an enlarged concept and out of it grew review for abuse of discretion. Error of law was also eventually resurrected. Nevertheless, it was still generally possible to say that judicial review was different from appeal and that, even in its extreme form, it did not represent an open-ended scrutiny of the merits of administrative decision-making. This accepted wisdom was almost certainly partly responsible for the absence of any assertions of a general review power over the fairness or justice of particular outcomes. Any tendency to move in this direction was probably offset by the development of discreet, generally satisfactory, grounds of judicial review. These included the reserve powers already identified to review for an absence of evidence, bad faith, and the making of a decision that was so unreasonable that no reasonable authority would ever have made it — grounds touching on the merits certainly but obviously not intended to be as open-ended as a general consideration of the fairness of a particular decision. The very scarcity of precedents for their successful invocation attests to this.

For a number of reasons, review for procedural error followed a

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<sup>95</sup> *Supra*, note 24.

<sup>96</sup> See the account of the eclipse of error of law in Lord Goddard C.J.'s judgment in *R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1951] 1 K.B. 711, 715-22, *aff'd* [1952] 1 K.B. 338 (C.A.), in particular, 347-52 *per* Denning L.J. For the Canadian position, see *R. v. Nat Bell Liquors Ltd* [1922] 2 A.C. 128, 159-65 (P.C.) *per* Lord Sumner and *R. v. Prince Edward Island Labour Relations Board, Ex parte F.G. Spencer Ltd* (1971) 16 D.L.R. (3d) 670 (P.E.I.S.C., *in banco*).

somewhat different path. Greek and Roman concepts of justice were concerned with impartial dealing and listening to both sides of a dispute.<sup>97</sup> Judges in early English procedural cases could even find Biblical support for imposing procedural obligations on public and certain private authorities. Thus we find in *Dr Bentley's Case* the reference to God not condemning Adam and Eve before hearing their side of the story.<sup>98</sup> Against this background and given prevailing attitudes towards natural law theory, it is probably not surprising that the courts at an early stage accorded the term "natural justice" to the obligations of certain authorities to act in a procedurally fair manner. Jackson points out that the more neutral term "due process" was also not without its claims at this time<sup>99</sup> given its recognition in *Magna Carta*,<sup>100</sup> two statutes of Edward III,<sup>101</sup> the writings of Coke<sup>102</sup> and the *Petition of Right, 1627*.<sup>103</sup> Nevertheless, "natural justice" prevailed in England, if not in the United States.<sup>104</sup> On the other hand, it rapidly became dissociated from any real sense of "natural law",<sup>105</sup> save to the extent that there were natural law overtones in the very use of the word itself and the acceptance of the notion that "rights" had to be affected before the courts would act to imply procedures.

It would serve no purpose in this paper to further trace in detail the development of the law of procedural decency. That has been well done recently elsewhere.<sup>106</sup>

<sup>97</sup> Jackson, *supra*, note 12, 7, 13; de Smith, *supra*, note 10, 159.

<sup>98</sup> *R. v. The Chancellor, Master and Scholars of University of Cambridge* (1723) 1 Str. 557, 567, 93 E.R. 698, 704 (K.B.) *per* Fortescue J., though it has been noted that the Biblical precedents are conflicting. See Jackson, *supra*, note 12, 12.

<sup>99</sup> *Supra*, note 12, 10-1.

<sup>100</sup> Chapter 39 provides that a free man should not be condemned "except by the lawful judgment of his peers and by the law of the land".

<sup>101</sup> 25 Edw. III, c. 4 states that no one shall be condemned except "in due manner, or by process made by writ original at the common law". 28 Edw. III, c. 3 states "[t]hat no man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited nor put to death, without being brought in answer by due process of the law".

<sup>102</sup> E. Coke, *The Second Part of the Institutes of the Laws of England* (1797), 50, referring to "due process of the common law".

<sup>103</sup> 3 Caroli 1, c. 1, s. 4: "That no man of what state or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death without being brought to answer by due process of law."

<sup>104</sup> See, however, Schwartz, *Administrative Procedure and Natural Law* (1953) 28 Notre Dame Lawyer 169, 174-9 where he argues that "due process" as found in the federal (Fifth and Fourteenth Amendments) and state constitutions is founded just as much in natural law theory as the English version, *i.e.*, "natural justice".

<sup>105</sup> See Macdonald, *Judicial Review and Procedural Fairness in Administrative Law* (1980) 25 McGill L.J. 520, 529. Even Schwartz gives grudging recognition to this, *ibid.*, 191-3, referring particularly to Lord Shaw's judgment in *Local Government Board v. Arlidge* [1915] A.C. 120, 138 (H.L.).

<sup>106</sup> See, in particular, Macdonald, *ibid.*, and Loughlin, *supra*, note 2.

Some reference should nevertheless be made to the emergence of the "fairness" doctrine to put the evolution of this area of the law in a modern perspective. By the 1960s, it was clear that the law relating to the implication of procedural decency obligations had become for the most part overrigid.<sup>107</sup> The result of this recognition was the emergence in cases such as *Ridge v. Baldwin*<sup>108</sup> and *Durayappah v. Fernando*<sup>109</sup> of a much more pragmatic approach to the issue, a breaking away from the rights test and a recognition of the importance of asking the basic question as to what kinds of problems or issues are best resolved by adjudicative techniques. This did not go far enough; the old law relating to natural justice was too rigidly entrenched. More importantly, the issues were now somewhat more sophisticated, and it was recognized that it was not a case of all or nothing. Some decision-making functions, while not requiring full adjudicative hearings, might nevertheless have usefully had certain participatory obligations or perhaps simply an obligation of "proper" consideration attached to them.

Out of this predicament emerged the new vocabulary of the duty to act fairly.<sup>110</sup> This was not in any sense the result of a growing feeling on the part of the courts that the time had come to assert a general review power over the wisdom of administrative decision-making, even though the subsequent conduct of one of the principal proponents of procedural "fairness" review, Lord Denning M.R., might suggest that this was indeed the case.<sup>111</sup> It can best be viewed as a reaction to a particular problem in a particular area of judicial review. Hence it is ironic, though not perhaps surprising, to now see the emergence of fairness in the substantive law of judicial review as a standard for judging the merits of administrative decision-making. The objectives of the proponents of procedural fairness were laudable but their choice of terminology was unfortunate in that "fairness" suggests far more than was intended.

For three centuries "natural justice", despite its open-endedness, was by and large left within the confines of procedural judicial review. With the emergence of "fairness" in the procedural review arena, it now seems as though there is a possibility that both it and "natural justice" are about to be extended into the substantive review area to become at least residual

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<sup>107</sup> The mood of the times, at least in England, was well captured by Wade's title, *The Twilight of Natural Justice?* (1951) 67 L.Q.R. 103.

<sup>108</sup> [1964] A.C. 40 (H.L.).

<sup>109</sup> [1967] 2 A.C. 337 (P.C. (Cey.)).

<sup>110</sup> I have described this emergence in England in *Fairness: The New Natural Justice?* (1975) 25 U.T.L.J. 281. *Nicholson, supra*, note 1, marks the Canadian adoption of the terminology and for subsequent developments here, see J. Evans, H. Janisch, D. Mullan & R. Risk, *Administrative Law—Cases, Text and Materials* (1980), 67-92; Jones, *Administrative Fairness in Alberta* (1980) 18 Alta L. Rev. 351.

<sup>111</sup> I refer in particular to Lord Denning's judgments in *Hook, supra*, note 3 and *H.T.V. Ltd v. Price Commission, supra*, note 13.



categories of judicial review on the merits. Not only is this out of accord with the historical development of judicial review on substantive grounds as well as the normal use of those standards in judicial review but, as I will argue in the next part of the paper, it is also inappropriate, with one possible exception.

### III. The Wisdom of an Expansion of Natural Justice and Fairness to Substantive Areas

It has been suggested that there are major problems in allowing legal issues to be decided simply by reference to standards such as "natural justice" and "fairness". The use of the word "natural" in conjunction with "justice" suggests a particular theory which, even if not philosophically unsound, at least requires an elaborate justification,<sup>112</sup> particularly given the fact that in its most common, historical form it was thought to transcend such commonly-accepted notions as the supremacy of constitutions and, within their proper constitutional sphere, legislatures.<sup>113</sup>

It is clear that the use of this terminology, even in the substantive area, does not necessarily indicate judicial subscription to natural law theory. Denuded of that element, the inquiry is really about what seems just and fair in the particular case before the court. What is wrong with that? Does it not mark a refreshing change from a situation in which the courts often, because of a maze of technicalities, lose sight of their basic task of dispensing justice?

This is not the place for a detailed discussion of the common law method of judicial decision-making. It suffices to say that adjudication by reference to such open-ended standards as natural justice and fairness — the judge's "gut" reaction to the merits of a particular case — is fraught with danger to many of the values that we aspire to in our legal system. Such methods of adjudication can become an excuse for a failure to think through complicated problems and they also raise the spectre of inconsistent decision-making and the complete breakdown of any predictive value based on the outcome of previous cases. This in turn can lead to litigation of the same issue many times over in the hope of a favourable decision from a particular judge.

These points are well-known and perhaps even trite but another important argument must be added to them. As noted previously, twentieth century judicial review of administrative action is clearly founded on the

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<sup>112</sup> See Schwartz, *supra*, note 104 for an attempt to achieve this. For a general and far more elaborate, recent development of a theory of natural law, see J. Finnis, *Natural Law and Natural Rights* (1980).

<sup>113</sup> See, e.g., the judgment of Coke C.J. in *Dr Bonham's Case* (1610) 8 Co. Rep. 107a, 118a, 77 E.R. 638, 653 (C.P.): "because it would be against common right and reason, the common law adjudges the said Act of Parliament as to that point void".

proposition that the authority of the courts over the administrative process is desirably a reserve one. Respect for legislative preference, and in most cases, an evaluation of the comparative expertise of court and statutory authority demand this. Yet when one considers the consequences of the adoption of such loose, potentially open-ended terms as “fairness” and “natural justice” as criteria for substantive review, it is clear that the opportunity for second-guessing the decisions of statutory authorities is increased immeasurably. Both terms suggest a concern with the merits of statutory decision-making in a way which brings into question the substantive wisdom of particular courses of action. If that had been desired, the legislature could easily have achieved it by the creation of a general right of appeal to the courts. Failure to do so should generally be seen as conveying a clear message.

It might be argued that judicial review is already replete with examples of court adjudication of the merits of administrative decision-making, and that express articulation of this under the rubric of “fairness” or “natural justice” is far better than the manipulation of concepts such as jurisdiction to achieve the same end.

Such manipulations have doubtless occurred. But aside from the fact that the excesses of some judges do not of themselves provide a very strong argument for the reversal of a basic philosophy of judicial review as a limited phenomenon, these very excesses may in a certain way provide evidence of judicial acceptance of the limited approach. Mighty strivings to describe an error as jurisdictional perhaps indicate an attempt to gain respectability for a judgment by creating the impression that the actual merits of administrative decision-making have not been interfered with.<sup>114</sup> If there was less judicial commitment to this theory, one would expect much more use to have been made by courts of the “no evidence” and “reasonableness” grounds of judicial review elaborated upon earlier, yet these have remained rarely successful grounds of judicial review. It is also fair in this context to point out both the recent attempts by the Supreme Court of Canada to delineate review for jurisdictional error within a narrow compass<sup>115</sup> and the Privy Council’s seeming rejection of Lord Denning’s argument that all errors of law are jurisdictional.<sup>116</sup> These indicate a very clear commitment to limited judicial review with which any expansion through the rubric of “fairness” and “natural justice” seems at odds.

The infrequent use of “no evidence” and “reasonableness” as grounds for review also forestalls an argument that the invocation of fairness and natural justice as substantive criteria are only an elaboration of and consistent with

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<sup>114</sup> See Ouellette, *supra*, note 12.

<sup>115</sup> See, in particular, *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* [1979] 2 S.C.R. 227.

<sup>116</sup> *Supra*, note 31.

the existing scope of judicial review of the substance of decisions. It is clearly possible for a determined court to stretch concepts such as “no evidence” and “reasonableness” to embrace extensive review on the merits. The fact that this has not often been done indicates a basic judicial respect for the integrity of language and, even accepting the elasticity of words such as “no evidence” and “reasonableness”, it is still possible to assert that they convey a much clearer message of limited judicial intervention than do “fairness” and “natural justice”. This is particularly so when one expands the reasonableness test into its two common variants—“a decision so unreasonable that no reasonable authority could ever have come to it”<sup>117</sup> or “on the facts as found no reasonable authority properly instructed in the law could ever have made the decision”.<sup>118</sup> It is also reflected in the frequent assertion that “no evidence” review does not involve a consideration of the overall sufficiency of evidence.<sup>119</sup>

This is not to argue that “fairness” and “natural justice” will inevitably produce wider review of the merits of statutory decisions. Their use could clearly be circumscribed as a result of judicial elaboration. Rather, the argument is not only that they are open-textured but, in so far as they have a content, it is one which would in any case suggest a broader scope for intervention than that provided by the present narrow grounds of judicial review on the merits. Moreover, to the extent that they might be narrowed in the course of judicial elaboration, one has to question the necessity for their usage. Do not the existing “merits grounds” of judicial review express adequately the limited scope for judicial review? Is the introduction of new terminology really going to add anything, especially given the potential that it provides courts for going altogether too far in the scope of judicial review?

This last question can probably be best answered by further reference to the four decisions which provided the introductory focus for this article. But before returning to them, I wish to reiterate a point made earlier. Arguments in favour of the introduction of “fairness” terminology into the area of procedural administrative justice do not compel acceptance of its usage in the substantive area as well. Whether one accepts the need for far greater judicial precision as to the incidents of procedural fairness, the fact remains that it did not emerge in a vacuum. “Natural justice” as a standard developed by the courts had many good things to be said for it and this wisdom did not disappear but rather came to serve as a basis for judicial decision-making about procedural fairness. In particular, there were the

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<sup>117</sup> See *Associated Provincial Picture Houses Ltd v. Wednesbury Corp.*, *supra*, note 10.

<sup>118</sup> See *Edwards (Inspector of Taxes) v. Bairstow* [1956] A.C. 14, 36 (H.L.) *per* Lord Radcliffe.

<sup>119</sup> See, e.g., *Irving Oil Co. v. A.-G. Nova Scotia* (1979) 35 N.S.R. (2d) 269, 278 (S.C., App. Div.) *per* MacKeigan C.J.N.S.

well-known considerations identified in *Ridge v. Baldwin*<sup>120</sup> and particularly *Durayappah v. Fernando*<sup>121</sup> which gave a clear focus to the question of whether any procedural deficiencies needed to be observed. Such a content or context is not immediately apparent in the use of “fairness” and “natural justice” as substantive criteria and, while it may develop over time, there is no guarantee that it will do so quickly or satisfactorily. Terms which appear open-ended do not necessarily lead to unpredictable decision-making but the creation of a developed substratum of criteria is a potentially painful process and should not perhaps be encouraged unless it is necessary. Necessity did exist in the area of procedural rectitude and there were already-existing elaborations that could be called in aid. The same is not nearly so clear with respect to the substantive grounds of review.

I will now return to the cases to consider, first, whether they suggest any other arguments for a general substantive unfairness doctrine and secondly, whether any of the particular species of “unfairness” identified by the respective courts generate claims for separate recognition as a basis for judicial review.

In *Hook*,<sup>122</sup> the basis of review was primarily the alleged unfairness of an “excessive” penalty. The epithet “excessive” scarcely amounts to any elaboration of “fairness” and, while it might be asserted that in the particular case the injustice was so obvious as not to require elaboration it can be argued in response that (a) the existing “unreasonableness” ground is clearly apt for such obvious cases and (b) “excessive” is as open-ended as “unfair”, meaning that in other less obvious cases the opportunities for second-guessing the use of discretion by statutory authorities are increased. In sum, an existing ground would have sufficed here and the particular category of unfairness said to be exposed by the decision only serves to emphasize the potential for misuse.<sup>122a</sup>

Much the same can be said of review for “error of fact”, whether considered under the rubric of fairness or natural justice or as a separate ground of judicial review. While “error of fact” is obviously a clearer term

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<sup>120</sup> *Supra*, note 108.

<sup>121</sup> *Supra*, note 109, 349 *per* Lord Upjohn: “[F]irst, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other.”

<sup>122</sup> *Supra*, note 3.

<sup>122a</sup> See H. Wade, *Constitutional Fundamentals*, *supra*, note 12, in which he notes the applicability of review for lack of “proportionality” to *Hook*. This ground, which requires that penalties not be excessive, is evidently available in two E.E.C. countries. However, Wade is also of the view that the existing ground of “unreasonableness” provides a sufficient justification for the result in *Hook*.

than "excessive", the costs of allowing judicial review on this ground are considerable. Aside from the standard arguments about relative expertise and legislative signposting against trespassing through the absence of a general right of appeal, the acceptance of such a ground of judicial review would only prolong the process of judicial review incredibly in certain cases; it would also probably prolong the process of statutory decision-making in that statutory authorities would either be compelled judicially to produce full transcripts or records or feel the necessity to do so in order to protect themselves from incompetent judicial inquiry into the facts.<sup>123</sup>

Cooke J.'s judgment in *Daganayasi*<sup>124</sup> does not, however, necessarily go this far nor do the various *Tameside*<sup>125</sup> judgments suggesting review for error of fact. It is arguable that, if delegation by the designated authority of a fact-finding function produces error of fact, there should be judicial review. If anyone other than the primary decision-making authority gathers evidence, the courts should be able to intervene on the theory that authority to delegate is a court-created right and therefore the courts should be able to qualify that right in order to protect the interests of those affected by it. Nevertheless, that seems to run counter to some of the theories that led to judicially-implied powers of delegation in the first place. In particular, it appears to contradict the notion that some delegation is clearly a matter of administrative necessity either because the statutory authority has a heavy work load, or due to structural features of the authority which make it more desirable that certain tasks be performed by another less cumbersome authority or person. Even if one accepts this as a ground of judicial review, it is unnecessary to demand a theory of substantive fairness or natural justice to justify it. It can readily be accommodated within the particular law relating to delegation or even be seen as a process error by arguing, for example, that by reason of the deficiencies of the delegate's fact-finding the primary authority never properly heard the matter under review.

Cooke J.'s more direct invocation of unfairness to describe the overall effect of the failure to confront the applicant with the case against her is unobjectionable at least in so far as it amounts to an assessment of the

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<sup>123</sup> For an argument that tribunal findings of fact should be required, see Taggart, *Should Administrative Tribunals Be Required to State Findings of Fact?* (1980) 9 N.Z.U.L.R. 162. On the dangers of wider factual review, see, e.g., D. Lemieux, *Le contrôle judiciaire de l'action gouvernementale* (1981), 346-7. Note, however, s.5(3)(b) of the *Administrative Decisions (Judicial Review) Act 1977*, Aust. Acts, no. 58, which defines "no evidence" review under s. 5(1)(b) to include making a decision on the basis of a fact which "did not exist" and also s. 28(1)(c) of the *Federal Court Act*, R.S.C. 1970, Supp. II, c. 10 and its provision for review by the Federal Court of Appeal of decisions based "on an erroneous finding of fact that [a tribunal] made in a perverse or capricious manner or without regard to the material before it".

<sup>124</sup> *Supra*, note 22.

<sup>125</sup> *Supra*, note 34.

aggregate effect of the particular reviewable errors already identified. But to the extent that it also amounts to an assertion of an overriding judicial concern with the combination of process and result, even absent specific reviewable errors, it almost certainly goes too far. Expressing it colloquially, it in one sense amounts to an assertion of court authority to review because something “smells fishy” even if there are not specific grounds for judicial review. This either indicates intervention because the court thinks the statutory authority was wrong, or laziness, or mere suspicion on the part of the judge. Of course, tribunals will sometimes make mistakes of fact and judgment and that will be unfortunate for the people involved. For reasons identified earlier, however, that by no means clinches the argument for judicial review on the merits: there are simply far too many other considerations. Furthermore, judicial laziness is not to be encouraged and mere suspicion is not sufficient. Finally, “no evidence” and “unreasonableness” already exist as possibilities in extreme cases, *e.g.*, the delegate who completely fabricates the truth without making any attempt at collection and assessment of evidence.

There is something to be said for the argument that “no evidence” is more akin to a procedural than a substantive basis for judicial review. A complete absence of evidence is indicative of a failure to hear or consider a matter. On the other hand, in so far as the courts use the language of jurisdiction<sup>126</sup> or error of law to describe this ground of review, it is also clearly a ground of judicial review that is concerned with substance. Seen as jurisdictional error, it is based on a theory that “no evidence” on the matters within jurisdiction is just as destructive of jurisdiction as a preliminary or collateral jurisdictional error. Seen as an intra-jurisdictional error of law it presents an extreme example of the type of error described under the rubric of “under the facts as found no reasonable authority properly instructed in the law could ever have reached this conclusion.”

Many judgments and much academic literature confirm that the question of how little evidence is “no evidence” remains subject to much uncertainty.<sup>127</sup> In some of its formulations the “no evidence” ground of judicial review clearly allows for substantial and arguably unjustifiable judicial intervention in the merits of statutory decision-making.<sup>128</sup> Debate

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<sup>126</sup> *Supra*, note 88 and, in particular, Evans’ criticism of this characterization of “no evidence” review.

<sup>127</sup> See Elliott, *supra*, note 24.

<sup>128</sup> See, *e.g.*, *Lapierre v. The Queen* (1976) 15 N.S.R. (2d) 361, 379 (S.C., App. Div.) *per* Macdonald J.A.: “The evidence should be found sufficient if the reviewing court can say that on such evidence a jury, properly instructed and acting judicially could convict”. Contrast, however, *Re Martin, Simard and Desjardins and The Queen* (1977) 20 O.R. (2d) 455, 486-7 (C.A.), *aff’d* [1978] 2 S.C.R. 511; Estey C.J.O. stated that the test for “no evidence” was “quite a different question from” the properly instructed jury test.

about the proper scope of judicial inquiry on the basis of “no evidence” is scarcely advanced by describing it as a natural justice or fairness ground of judicial review. Such usage may be legitimately descriptive of the extent to which general notions of fairness and natural justice are relevant to the law of judicial review. However, to the extent that it suggests the existence of fairness and natural justice as separate grounds of substantive review it is dangerous and unnecessary. In *Pochi*,<sup>129</sup> for example, it was arguably unnecessary for “no evidence”, let alone “natural justice” and “fairness”, to be employed in the description of the error alleged. Failures to apply the correct burden of proof, albeit concerned with the sufficiency of evidence, are more commonly described as errors of law, at least absent a standard privative clause in the relevant statute.<sup>130</sup> Even if it is accepted that the “no evidence” rule is unsatisfactory and there needs to be greater concern with review on the facts, the American doctrine of “substantial evidence” provides a much more readily sustainable position than the complete reassessment of all the evidence implicit in an error of fact doctrine.<sup>131</sup>

A discussion of judicial review on the basis of inconsistency necessarily raises more difficult questions than the other examples of “fairness” or “natural justice” being used as substantive standards of judicial review. It can be argued quite convincingly that review for inconsistency, if accepted as a basis for judicial review, would provide another example of abuse of discretion. It therefore would not require the development of a new ground of judicial review, *i.e.*, substantive unfairness. Nevertheless, whether one sees review for inconsistency as part of abuse of discretion or as a new and separate ground of judicial review or even as a reason for the development of a substantive fairness or natural justice doctrine, the arguments for its acceptance are much more immediately linked to notions of underlying concepts of justice and fairness than is the case generally with justifications for substantive judicial review. The theory of review for jurisdictional error—and for abuse of discretion in general—is largely derived from justifications based on the concept of parliamentary supremacy and the rules of statutory interpretation. The adoption of a principle allowing the limitation of statutory power by reference to an obligation of consistency, while perhaps ultimately explicable in terms of an acceptable theory of statutory interpretation, demands elaboration of fundamental notions of justice.

Perhaps the closest analogy in terms of justifications for the review of

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<sup>129</sup> *Supra*, note 55.

<sup>130</sup> *Supra*, note 72, and accompanying text.

<sup>131</sup> See the brief discussion by Taggart, *supra*, note 123, 168 and the references at p. 175, fn. 11 to advocacy of a “substantial evidence” test for English law. Note, however, that in the last analysis there may not be all that much difference in effect between the Anglo-Canadian “no evidence” rule and the American “substantial evidence” doctrine. See Evans *et al.*, *supra*, note 110, 500-1.

abuse of discretion is to be found in Professor Peter Hogg's assertion that the legitimacy of court review for abuse of discretion is most evident when the exercise of discretion in question has come into conflict with some of the civil libertarian values arguably inherent in the Canadian constitution — freedom of speech, religion and belief.<sup>132</sup> The justifications for review for inconsistency go even further in that they transcend national legal systems and have a universality of the kind claimed by natural law theory, namely that the justice of any system depends upon like cases being treated alike and different cases differently. This becomes immediately apparent on an examination of the much more developed American jurisprudence on this subject. The arguments about review for inconsistency will therefore be considered against that backdrop.

A good starting point is provided by *Muhammad Ali v. Div. of State Athletic Commission, N.Y.*,<sup>133</sup> one of a number of decisions in which American courts have reviewed on the basis of inconsistency. The case concerned the Commission's decision not to renew Ali's licence after he had refused induction into the United States Army and been convicted of a felony. On an application for preliminary declaratory and injunctive relief, Ali's lawyers produced evidence that the Commission had in the past licensed hundreds of convicted felons, including at least one instance involving a person who had gone AWOL and been dishonourably discharged from the army. The evidence served to belie the Commission's assertion that Ali's position was different because his conviction was recent and he had yet to serve his sentence. The statistics in relation to convicted boxers indicated that these two factors had not been points of differentiation in the past.

The Court also refused to accept two other arguments put forward by the Commission. According to Mansfield J., there was no rational basis for singling out draft evaders for special treatment as opposed to burglars, murderers, rapists and persons going AWOL.<sup>134</sup> He also rejected a contention that this represented a proper exercise by the Commission of its right to tighten up standards in the exercise of its discretions.<sup>135</sup> The evidence simply did not support such an interpretation of the events:

[N]or does it appear that the denial of plaintiff's license application presages any general movement away from the pattern of permissiveness which has hitherto characterized the Commission's exercise of its licensing powers. Defendants have not suggested, for instance, that Ali's application was denied pursuant to a newly adopted policy of general application that would require similar disposition of all other applications by those convicted of crimes.<sup>136</sup>

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<sup>132</sup> Hogg, *Judicial Review: How Much Do We Need?* (1974) 20 McGill L.J. 157, 165.

<sup>133</sup> 316 F. Supp. 1246 (S.D.N.Y. 1970). This and other cases are noted by G. Flick, *Natural Justice* (1979), 109-11.

<sup>134</sup> *Ibid.*, 1250-1.

<sup>135</sup> *Ibid.*, 1252.

<sup>136</sup> *Ibid.*, 1252-3.



Accordingly, the Court granted the interlocutory relief which had been sought.

Although the arguments for the plaintiff were in this case made on the basis of the Fourteenth Amendment's "equal protection of the laws" provision, other cases demonstrate that the principle of consistency of treatment is one that the American courts have been prepared to endorse as an implied limitation on the exercise of statutory discretions generally, irrespective of the Fourteenth Amendment.<sup>137</sup> *Ali* may therefore be treated as involving an implicit application of the principle of inconsistency, even without its explicit constitutional backing.

*Ali* also demonstrates at least some of the risks in accepting judicial review on the basis of inconsistency. The determination of whether there has been inconsistency will seldom, if ever, come down to a case of different treatment of two persons in precisely the same situation. Rather, it will generally involve the court in making judgments as to whether A's situation was sufficiently dissimilar to B's to make their differential treatment justifiable. "Is refusing induction qualitatively the same as the situations previously dealt with by the Commission?" As soon as the determination of such questions becomes the court's function, the judge will be involved in substantially the same assessment task as the statute has confided to the Commission. In *Ali*, the Court presents that task as having been made easier by the AWOL—dishonourable discharge precedent, although it should be noted that this precedent was over twenty years old. It is interesting to speculate as to how the Court would have justified intervention if the Commission had been more articulate and disqualified *Ali* because of its unwillingness to set a bad example to American youth in a time of war, the bad example being its seeming approval of the actions of an influential, near charismatic, champion in refusing to fight for his country. It would be difficult for a court to describe such a position as arbitrary. Perhaps it is somewhat misguided, but such mere differences of opinion are generally considered beyond the courts' powers of review absent a general right of appeal, and sometimes not even then.

Similar problems can also be seen in the determination of whether the outcome is sufficiently inconsistent to justify intervention. In this regard, it is significant that the American authorities have for the most part been prepared to give the benefit of the doubt to statutory authorities. On many

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<sup>137</sup> See, e.g., *Del Mundo v. Rosenberg* 341 F. Supp. 345, 349 (C.D.Cal. 1972) quoted, *infra*, note 157 and accompanying text. *The Canadian Bill of Rights*, R.S.C. 1970, App. III, contains a similar provision. Section 1(b) speaks of "the right of the individual to equality before the law and the protection of the law". However, as far as I have been able to ascertain, the use of this provision has up until now been confined to attacks on statutory provisions rather than the manner of exercise of discretions conferred by those statutes. See W. Tarnopolsky, *The Canadian Bill of Rights*, 2d rev. ed. (1975), ch. 8.

occasions, it has been asserted that mere unevenness of treatment is not sufficient to justify intervention.<sup>138</sup> Of particular importance in this regard is the 1973 United States Supreme Court decision in *Butz v. Glover Livestock Commission*,<sup>139</sup> which involved a twenty day suspension of a stock-yard operation because of weighing errors. It was argued that the suspension was not justified because previously such penalties had been assessed only for flagrant and intentional violations. However, according to Mr Justice Brennan delivering the opinion of the Court, "mere unevenness in the application of the sanction does not render its application in a particular case 'unwarranted in law' ".<sup>140</sup> What constitutes "excessive variance"<sup>141</sup> as opposed to "mere unevenness"<sup>142</sup> can, of course, be a very nice question.

Beyond this, as *Ali* clearly suggests, there can be further difficulties. "Excessive variance" does not necessarily guarantee judicial intervention. A good faith change in policy can always be advanced to justify differential treatment. Illustrative of this point is *Federal Communications Commission v. WOKO, Inc.*,<sup>143</sup> a 1946 decision of the United States Supreme Court.

The F.C.C. had refused to renew a licence because of misrepresentations as to the ownership of the applicant's stock and this was an apparent departure from the course of action taken in the other not uncommon instances of similar violations. This argument did not move the Court. To quote Jackson J., delivering the opinion:

But the very fact that temporizing and compromising with deception seemed not to discourage it, may have led the Commission to the drastic measures here taken to preserve the integrity of its own system of reports. The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.<sup>144</sup>

The continued significance of this decision and approach is indicated by the reliance placed on it in *Butz*.<sup>145</sup> However, with the enactment of the federal *Administrative Procedures Act*<sup>146</sup> and especially s. 8(b) and its call for findings or conclusions as well as the basis therefor, has come a demand by most courts that changes in policy be stated and justified as part of the reasons for decisions of administrative agencies. Thus, in *National Labour Relations Board v. Talahassee Coca-Cola Bottling Co.*, Simpson J.

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<sup>138</sup> See K. Davis, *Administrative Law Treatise* [;] 1980 Supplement (1980), 111, § 17.07.

<sup>139</sup> 411 U.S. 182 (1973).

<sup>140</sup> *Ibid.*, 188.

<sup>141</sup> See, e.g., *Cross v. United States* 512 F. 2d 1212, 1217, fn. 3 (4th Cir. 1975).

<sup>142</sup> *Supra*, note 139, 188.

<sup>143</sup> 329 U.S. 223 (1946).

<sup>144</sup> *Ibid.*, 228.

<sup>145</sup> *Supra*, note 139, 187.

<sup>146</sup> *Administrative Procedures Act of 1946*, § 1007(b), 5 U.S.C. § 557(c) (1976).

emphasizes the “added importance” of s. 8(b) obligations where there is an apparent reversal of a previously declared rule.<sup>147</sup> Leventhal J. was even clearer two years later in 1969 in *Marine Space Enclosures, Inc. v. Federal Maritime Commission*.<sup>148</sup> While upholding the ability of statutory authorities to modify or reverse past practices, precedents or policies, he said that the confidence of the reviewing court that the agency is functioning according to law is lessened when “prior precedents are not discussed, the swerves and reversals are not identified, and the entire matter is brushed off once over lightly.”<sup>149</sup>

For the most part the American authorities evidence a fairly sophisticated jurisprudence in relation to the inconsistency problem, a jurisprudence which generally exhibits a sufficiently high degree of deference to the right of administrative authorities to experiment, to change their minds, to become tougher, to become more lenient, even to be inconsistent without explanation within limits. It must be noted that there is nonetheless no universal agreement about the desirability of even such limited controls on statutory discretions. In *Administrative Law of the Seventies*, Professor K.C. Davis is critical of the Internal Revenue Service’s stated policy of not making any special effort to be consistent with its private tax rulings.<sup>150</sup> He also argues that the practice of the Immigration and Naturalization Service may be worse in this regard.<sup>151</sup> The justification given for these policies is that consistency cannot be expected when such a vast enterprise is involved and the costs of endeavouring to achieve it are so great. The difficulty of policing all inconsistency may also in part be responsible for the American courts’ refusal to accede to defences in criminal cases based upon other guilty parties not being prosecuted.<sup>152</sup> This problem raises the difficult question of whether the courts should be prepared to entertain arguments based on inconsistency where to entertain the argument would be to perpetuate error, more particularly, the misinterpretation of or failure to apply a statute. In a 1960 decision, Frankfurter J. suggested that inconsistency was an independent basis for review, irrespective of whether the position which the applicant was seeking to maintain was legally correct or incorrect.<sup>153</sup> However, that *dictum* aside, the position still appears unsettled.

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<sup>147</sup> 381 F. 2d 863, 869 (5th Cir. 1967) citing *Rayonier, Inc. v. National Labour Relations Board* 380 F. 2d 187 (5th Cir. 1967). See also *Secretary of Agriculture v. United States* 347 U.S. 645 (1954).

<sup>148</sup> 420 F. 2d 577 (D.C. Cir. 1969).

<sup>149</sup> *Ibid.*, 585. See, however, *Public Interest Research Group v. Federal Communications Commission* 522 F. 2d 1060 (1st Cir. 1975) for an example of an adequate repudiation of past precedents.

<sup>150</sup> K. Davis, *Administrative Law of the Seventies* (1978), 410-20, § 17.07-1 to 8.

<sup>151</sup> *Ibid.*, 420-5, § 17.07-9.

<sup>152</sup> See, e.g., *Moog Industries, Inc. v. Federal Trade Commission* 355 U.S. 411 (1958); *Federal Trade Commission v. Universal-Rundle Corp.* 387 U.S. 244 (1967).

<sup>153</sup> *United States v. Kaizer* 363 U.S. 299, 308 (1960).

This brief survey of the American authorities suggests that

1. the development of a satisfactory test for reviewable consistency is not an easy task and that, even when a significant amount of jurisprudence has accumulated, there may still be room for inappropriate judicial second-guessing of statutory authorities;
2. the costs of assuring consistency may not be or at least are not perceived by the relevant agency to be worth the gains in terms of even-handed treatment of individuals;
3. there still remains the difficult problem of deciding whether the incorrect but favourable application or non-invocation of statutory powers can ever be relied upon by persons who are subsequently affected in an unfavourable way.

Nevertheless, it is now<sup>154</sup> my view that such a basis for relief should find its place in the Canadian law of judicial review of administrative action, subject of course to the restraints upon interference suggested by the American authorities. In arguing previously against the adoption of "fairness" as a criterion for measuring the substance of administrative action, I suggested that its very open-endedness and potential for broad judicial discretion as to the circumstances requiring intervention were very much anathema to the accepted common law method of deciding cases. Yet, behind that method and its reliance on precedents and incremental development of the law is clearly a principle that as far as possible like cases ought to be treated alike and different cases differently. Too great an adherence to this principle has at times led to the common law becoming overly rigid, yet the essential wisdom of the claim for reasonable equality of treatment is seldom questioned. Indeed, experience with statutory authorities, despite any legislative intentions about experimentation and flexibility, makes it clear that by and large the treatment of like cases alike tends to emerge as a principle of day-to-day functioning, even if sometimes for no "higher" reason than the ease of administration.<sup>155</sup>

Given the prevalence of this principle of consistency of treatment in the development of most legal systems as well as within the various substrata of legal systems, there is a strong case for branding as reviewable those cases where statutory authorities inexplicably fail to act consistently. To do so without reason or without thinking would seem to be the height of arbitrary

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<sup>154</sup> In a previous article, I argued against review on the basis of inconsistency. See *Recent Developments in Nova Scotian Administrative Law* (1978) 4 Dalhousie L.J. 467, 531-8.

<sup>155</sup> Davis notes, *supra*, note 150, 417, § 17.07-5 that, despite public statements to the contrary, the U.S. Internal Revenue Service does attempt to be consistent in the issuance of private tax rulings. See also J. Farmer, *Tribunals and Government* (1974), 179 to the effect that tribunals are just as concerned with consistency as courts: "Consistency in administration has its own special problems and justifications but the result will be much the same".

behaviour. It is also worth remembering that judicial review of administrative action has from its earliest days been concerned with the appearance of the proper administration of justice. If the law is prepared to countenance a rule to the effect that a reasonable apprehension of bias will affect the validity of a decision in order to safeguard the reputation of the law, there is also clearly room for condemning unexplained or inexplicable inconsistencies in the administration of statutory discretions from which the law's reputation will suffer as much. Provided the following admonition of Professor K.C. Davis is kept in mind when the argument is raised, acceptance of such a basis for review is not likely to present a threat to the autonomy of administrative agencies:

Agencies' practices resemble those of the courts not only in following precedents but also in deviating from *stare decisis*. The reasons for deviations are about the same: changes in conditions, objectives, attitudes, understanding, personnel, programs, pressures, political climate, as well as, even in absence of changes in such factors, sheer inability to avoid inconsistencies in dealing with complex subject matter.<sup>156</sup>

Thus, if the courts are sensitive to the various legitimate reasons for acting inconsistently and changing policies,<sup>156a</sup> there is no particular reason to believe that statutory authorities will be deterred from their implied statutory mandate to constantly reassess the policies and principles upon which they decide particular cases. In particular, it should not have the effect of causing them to pursue consistency at the expense of all else.

To argue for inconsistency as a basis for judicial review does not, however, necessarily involve acceptance of substantive unfairness as a general ground of judicial review. The argument for review for inconsistency is based on the reasonably precise principle underlying much of our legal thinking that like cases be treated alike. While that might be said to express our underlying concern with fairness and justice in the legal system, it scarcely amounts to a vindication of substantive fairness review in the more general sense suggested by some of the authorities discussed in this article. It

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<sup>156</sup> K. Davis, *Administrative Law Treatise* (1958), vol. 2, 528, § 17.07. Paralleling Davis's views in a Canadian context are the writings of Professor H.N. Janisch. See *The CRTC and Consistency: A Comment on the TCTS Decision* (1981) 2 C.R.R. 5-183 in which he notes from the perspective of a particular regulatory issue the dangers of an administrative agency having too great a commitment to consistency. However, in his earlier seminal article *Policy Making in Regulation* (1979) 17 Osgoode Hall L.J. 46, 98-100, Janisch urges the adoption of a principle whereby administrative agencies identify their intention to depart from precedent so that affected parties can argue the point as well as the articulation of reasons for departure if the intention is carried through.

<sup>156a</sup> This sensitivity should also involve some appreciation that the statutory context may be all-important. Thus frequent change should be more readily acceptable in an administrative agency with a broad policy mandate involving reflection of the public interest than it is, for example, in the case of the sanctions practices of a professional disciplinary tribunal.

is only in the identification of such an underlying and relatively precise principle that inconsistency can be branded as unfair.<sup>156b</sup> Without that identification, the use of “fairness” itself as a basis for intervention in the administrative process has all the potential for the type of judicial conduct that the principle of consistency seeks to check in administrators—unexplained, inexplicable differentiations in the incidence of judicial review. In fact, to return to a point made earlier, as the following extract from the judgment of Hark J. in *Del Mundo v. Rosenberg* demonstrates, it is relatively easy to accommodate review for inconsistency within the existing rubric of review for abuse of discretion without the assertion of an independent ground of “substantive unfairness”:

Anything else disrupts the consistency and uniformity he must maintain in his decisions to guarantee equal protection of the laws; and is arbitrary, capricious and unreasonable... . The Director’s discretion has been abused.<sup>157</sup>

#### IV. The Present Canadian Position

To this point Canadian authorities have been virtually excluded from this discussion of the problem of substantive unfairness as a ground of judicial review. In part, that is because there has not yet been much movement in this direction by the Canadian courts. *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*<sup>158</sup> is, of course, the decision in which the Supreme Court of Canada accepted the notion of a “duty to act fairly” in its procedural sense. The possibility that “fairness” also has a substantive content was not canvassed by Laskin C.J.C., who delivered the judgment of the Court. Professor Julius Grey, in commenting on the decision,<sup>159</sup> has argued that the following extract from the judgment suggests that fairness has a substantive content:

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 premising good faith.<sup>160</sup>

I do not read it this way. Rather, it seems to me that Laskin C.J.C. is making a very deliberate attempt to indicate that once the procedural decencies are observed the scope for judicial intervention is very limited, indeed confined to the rather rare situation of reviewable bad faith. Moreover, in Dickson J.’s judgment in *Martineau v. Matsqui Institution Disciplinary Board*

<sup>156b</sup> The notion of not defeating reasonable reliance provides a similarly precise principle in another developing area sometimes seen as an example of review for “unfairness”, namely estoppel of statutory authorities. While I do not discuss this ground of review in detail in this article, see *supra*, note 18 and *infra*, note 212.

<sup>157</sup> *Supra*, note 137.

<sup>158</sup> *Supra*, note 1.

<sup>159</sup> Grey, *The Duty to Act Fairly after Nicholson* (1980) 25 McGill L.J. 598, 600-1.

<sup>160</sup> *Supra*, note 1, 328.

(No. 2), with which Laskin C.J.C. concurred, fairness is very clearly treated as simply a procedural concept.<sup>161</sup> Whether fairness has a substantive content therefore remains an open question at the Supreme Court level.

In fact, as far as I have been able to ascertain, the only clear use of "fairness" as a basis for scrutinizing the merits of a statutory decision is to be found in *Trans-West Developments Ltd v. City of Nanaimo*,<sup>162</sup> a 1979 decision of the British Columbia Supreme Court. The case involved a tax sale by the respondent municipality in which the municipality itself was the purchaser. After the statutory period of grace of one year from the time of the sale and purchase, the "owner" attempted to persuade the municipality to

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<sup>161</sup> [1980] 1 S.C.R. 602, 630 *per* Dickson J., delivering the judgment of Laskin C.J.C., McIntyre J. and himself. Pigeon J. delivered the judgment of the other five members of the Court. This is acknowledged by Grey, *supra*, note 159, 602. Earlier, in *Wiswell v. Metropolitan Corp. of Greater Winnipeg* [1965] S.C.R. 512, 522 Hall J., delivering the majority judgment, had stated that quasi-judicial bodies are "in law required to act fairly and impartially". However, the context in which this statement was made makes it clear that "fairness" was being used in a procedural rather than substantive sense. Indeed, in one of the decisions cited by Hall J., *Re Howard and City of Toronto* (1928) 61 O.L.R. 563, 580 (C.A.), Middleton J.A. makes the following statement in reference to the review of the by-laws of municipal councils: "The question is always one of the right of the municipality to determine the question; the justice or fairness of the action of the council is quite beside the mark." This was recently cited with approval by the Ontario Court of Appeal in *Re Village of Wyoming and Homex Realty & Development Ltd* (1979) 23 O.R. (2d) 398, 402 (C.A.) *per* Weatherston J.A., *aff'd (sub nom. Homex Realty & Development Ltd v. Village of Wyoming)* (1980) 116 D.L.R. (3d) 1 (S.C.C.).

<sup>162</sup> (1979) 11 M.P.L.R. 254 (B.C.S.C.). This does not, however, constitute the only occasion upon which the possibility has been raised. See, *e.g.*, *Magrath v. The Queen* [1978] 2 F.C. 232, 255 (T.D.) in which Collier J. seemed to suggest that considerations of substantive fairness might lead to the review of transfer of a prison inmate. Note, however, *Bruce v. Reynett* [1979] 2 F.C. 697, 719-20 (T.D.) in which Walsh J., while citing Collier J.'s *dictum*, seems to confine fairness in prison transfers to procedural considerations. See also in the correctional law context *Re Davidson and Disciplinary Board of Prison for Women and King* (1981) 61 C.C.C. (2d) 520, 539 (F.C.T.D.) *per* Cattanach J., who invokes natural justice in support of quashing a decision because the chairman of a prison disciplinary board failed to consider whether a prisoner was entitled to legal representation in the course of disciplinary proceedings. The failure to consider whether legal representation was necessary occurred because the chairman felt she was bound by a penitentiaries policy directive. Cattanach J. held that the directive was not binding and this led to a wrongful declining of jurisdiction and a failure to independently exercise a discretion both of which were described as offences against a principle of natural justice. Similarly in *Re Abel and Penetanguishene Mental Health Centre* (1979) 97 D.L.R. (3d) 304 (Ont. H.C., Div. Ct), *aff'd (sub nom. Re Abel and Advisory Review Board)* (1980) 119 D.L.R. (3d) 101 (Ont. C.A.), the duty of fairness was held to be breached when the Advisory Review Board failed to consider whether certain information should be revealed in the course of a hearing. Once again the failure arose because the Board felt it had no authority to order its release. In each of these cases, however, the use of fairness and natural justice terminology was clearly unnecessary in that the existing law provided obvious grounds of judicial review, more particularly a wrongful failure to exercise jurisdiction or discretion.

allow it to redeem the property. It was claimed that there were mitigating circumstances and the amount paid by the municipality was well below the true value of the land. The municipality was at first well-disposed towards the "owner's" position and, in the seeming absence of statutory authority to itself sell the land back at undervalue, sought and received special enabling powers from the Minister.<sup>163</sup> However, the municipality's position subsequently changed and it refused to exercise the power granted to it.

On review, Andrews J. held that there had been "unfairness" in a procedural sense<sup>164</sup> and further that the decision not to proceed was taken on the basis of irrelevant evidence "and therefore was a violation of the doctrine of fairness".<sup>165</sup> The irrelevant evidence was principally the City's desire to conclude a sale of the property to a third party for \$200,000, some \$110,000 more than it had paid for it at the tax sale. Perhaps even more significantly, the Court then went on to remit the matter to the City with instructions that it consider two facts:

1. the total disproportion between what it required as compensation for arrears of taxes on the property and the amount the "owner" stood to lose, and
2. the fact that the owner on discovering the situation did all it could reasonably have been expected to do to obtain relief.<sup>166</sup>

Having found that this was a decision tainted by irrelevant considerations, the Court had a sufficient basis for judicial review. Conventionally, this is regarded as a reviewable abuse of discretion, so branding it as a violation of the doctrine of fairness was completely unnecessary. One might have been prepared to treat this as no more than harmless rhetoric were it not for the ultimate disposition of the case. In his remission of the matter to the Council, Andrews J. obviously did as much as he could to ensure a result favourable to the "owner" and showed that any result other than a resale to the owner at the upset price was substantively unfair. In other words, this was more than simply a situation of irrelevant factors being taken into account but one where the judge was assessing the overall merits of the outcome. As Professor Hudson Janisch has pointed out, the Court's directions have in effect made the substantive decision for the Council, despite the judge's refusal to formally order the Council to reconvey the property at the upset price.<sup>167</sup> This employment of fairness

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<sup>163</sup> The Minister of Municipal Affairs was empowered to do this by s. 217 of the *Municipal Act*, R.S.B.C. 1960, c. 255.

<sup>164</sup> *Supra*, note 162, 270-1. In particular, the Council was held to have been unfair in not giving the applicant notice of its intention to reconsider the decision to reconvey.

<sup>165</sup> *Ibid.*, 271.

<sup>166</sup> *Ibid.*, 274.

<sup>167</sup> *Ibid.*, 257. In fact, the Council did not take the obvious hint and the matter became the subject of a second judicial review application, (1980) 24 B.C.L.R. 341. This time, Fulton J. declared that the petitioner was entitled to a reconveyance on payment of arrears of taxes. He held, *inter alia*, at pp. 369-70, that fairness dictated that this was the only possible result of a fair reconsideration of the matter by the Council.



reasoning to reach that decision should, according to Janisch, give rise to some concern:

There is a real danger here that should the courts take it upon themselves to lay down the ground rules for substantive rather than procedural fairness, they will arrogate to themselves a discretion granted to municipalities.<sup>168</sup>

Janisch also notes in passing the apparent lack of consistency between Andrews J.'s ready adoption and use of a substantive fairness doctrine and the traditional reluctance of the Canadian courts to employ "unreasonableness" as a basis of judicial review.<sup>169</sup>

It is worth contrasting *Trans-West Developments* with a couple of other Canadian decisions which suggest a rejection of some of the "developments" discussed in this article. *Re Milstein and Ontario College of Pharmacy*,<sup>170</sup> a decision of the Ontario Court of Appeal in which an excessive penalty was quashed, is of particular interest. The Divisional Court had refused an application for judicial review of a penalty it clearly thought to be excessive.<sup>171</sup> While it was excessive, it could not be said that it was so unreasonable that no reasonable authority could ever have imposed it.

In the Court of Appeal the majority judges both thought the penalty was clearly excessive. For Blair J.A., quashing the penalty was appropriate because of a real likelihood of bias.<sup>172</sup> Lacourcière J.A.'s judgment, however, is much more pertinent for present purposes. After making the strange assertion that it was not proper to test the validity of a penalty by reference to the reasonableness test adopted by the Divisional Court,<sup>173</sup> he went on to describe the question of penalties for breaches of professional disciplinary codes as being peculiarly within the expertise of the appropriate professional disciplinary body.<sup>174</sup> Because of this, the courts' role was limited to intervening where the penalty imposed was beyond jurisdiction or gave rise to an error of law because of the consideration of irrelevant factors.<sup>175</sup> While irrelevant factors were in fact found to have been considered in this instance,<sup>176</sup> the whole tone of the judgment is to the effect that there should be no interference unless a court's perception of an excessive penalty can be linked to an existing basis of judicial review. Lacourcière J.A. does not

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<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> (1978) 20 O.R. (2d) 283 (C.A.) *per* Lacourcière and Blair J.J.A., Wilson J.A., dissenting.

<sup>171</sup> (1976) 13 O.R. (2d) 700, 709-10 (Div. Ct) *per* Cory J.

<sup>172</sup> *Supra*, note 170, 294-5. Note, however, his comment that "[i]t is, however, not within the province of the Court to inquire whether that penalty was excessive, unreasonable or otherwise objectionable", at p. 294.

<sup>173</sup> *Ibid.*, 289.

<sup>174</sup> *Ibid.*, 290.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*, 290-2.

suggest that an excessive penalty is itself reviewable on the basis of natural justice or fairness.<sup>177</sup>

Fairness also surfaced only to be rejected in *Metropolitan Toronto Board of Commissioners of Police v. Metropolitan Toronto Police Association*,<sup>178</sup> a recent decision of the Ontario Court of Appeal. While not strictly about fairness as a ground of substantive judicial review, it does hint at a very limited role for substantive fairness in the public law arena. The case involved an application for judicial review of an arbitration award. It was claimed and accepted by the Court that the arbitrator erred in holding that the management rights clause of a collective agreement was subject to an overriding obligation of fairness. The terms in which the Court dealt with the matter are instructive:

If, however, the majority of the Divisional Court in the *Marsh* case were purporting to lay down a general rule, that all decisions of management pursuant to a management rights clause which do not contravene any other provisions of the agreement must stand the further test whether in the opinion of an arbitrator they were made fairly and without discrimination, then with respect we do not agree. The decisions relied on by Weatherston J. in the *Marsh* case... dealt with procedural fairness in proceedings before domestic and statutory bodies; they did not deal with the interpretation of collective agreements.<sup>179</sup>

This suggests a somewhat different position with respect to the interpretation of agreements than that adopted by Cooke J. in *Canterbury Pipe Lines*<sup>180</sup> and it also hints strongly at a reluctance to see the procedural fairness cases being employed as analogies in other areas.

Yet there are a number of cases in which the issue of inconsistency, in its various guises, has arisen. Most useful are those involving the striking down of discriminatory by-laws, for these decisions demonstrate a clear commitment on the part of the Canadian courts to the principle of consistency of treatment, albeit in a restricted area. The courts seem to accept that not only may licensing by-laws not be discriminatory on their

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<sup>177</sup> See also *Re Tse and College of Physicians and Surgeons of Ontario* (1979) 23 O.R. (2d) 649, 657-9 (Div. Ct) per Henry J. and *Chèvrefils v. Le Conseil de Discipline du Collège des Médecins et Chirurgiens de la Province de Québec* [1974] C.A. 309, 311 per Crête J.A. The latter decision is discussed rather sceptically by Ouellette, *supra*, note 12. It is, however, also worth noting that in *Re Tse* at p. 658 one of the standards applied by Henry J. was whether the penalty was disproportionate to that imposed in other cases. This perhaps amounts to a recognition of the principle of consistency in the Canadian law of judicial review.

<sup>178</sup> (1981) 33 O.R. (2d) 476 (C.A.) per Houlden J.A., delivering the judgment of himself, MacKinnon A.C.J.O. and Zuber J.A. Leave to appeal to the S.C.C. granted 19 October 1981 per Laskin C.J.C., Dickson and McIntyre JJ.

<sup>179</sup> *Ibid.*, 478. The *Marsh* case is *Re Municipality of Metropolitan Toronto and Toronto Civic Employees' Union Local No. 43* (1977) 16 O.R. (2d) 730 (Div. Ct).

<sup>180</sup> *Supra*, note 53. Of course, the context was somewhat different in that in *Canterbury Pipe Lines* the engineer's obligation of lack of partiality was much easier to infer from the contractual arrangement; his role was that of an independent umpire.

face<sup>181</sup> but they must not leave open the possibility for discrimination. Thus, in *Coastal Insurance Ltd v. Town of Wolfville*, Cowan C.J.T.D. of the Nova Scotia Supreme Court, Trial Division struck down a by-law to the effect that

[n]o person shall erect... any... sign... without making application... to the Committee on Streets and obtaining permission... subject to such conditions as the said Committee may impose.<sup>182</sup>

It is arguably going too far to disallow by-laws of this kind without proof of a discriminatory motive or purpose or, alternatively, without proof of actual discriminatory application leading to relief in the particular situation rather than outright invalidation of the by-law. It is also clear that by closer structuring and confining of such delegated discretions, the municipality can avoid the strictures of decisions such as *Coastal Insurance*.<sup>183</sup> Nevertheless, these cases indicate a clear policy against discrimination in licensing by-laws, a policy which stretches back at least to the 1893 Supreme Court of Canada decision in *Attorney-General of Canada v. City of Toronto*,<sup>184</sup> and finds its most common expression in the following extract from Middleton J.'s judgment in the 1923 decision of *Forst v. City of Toronto*:

When the municipality is given the right to regulate, I think that all it can do is to pass general regulations affecting all who come within the ambit of municipal legislation. It cannot itself discriminate, and give permission to one and refuse it to another; and, *a fortiori*, it cannot give municipal officers the right, which it does not possess, to exercise a discretion and ascertain whether as a matter of policy permission should be granted in one case and refused in another.<sup>185</sup>

The courts have arguably been far less inclined to invalidate on the basis of discrimination in the field of zoning by-laws. Thus, in *Re Lacewood Development Co. and City of Halifax*,<sup>186</sup> MacKeigan C.J.N.S., delivering

<sup>181</sup> As in *R. v. Varga* (1979) 27 O.R. (2d) 274 (C.A.) in which a by-law discriminating on its face between categories of service stations was struck down, and *Wedman v. City of Victoria* (1979) 15 B.C.L.R. 303 (S.C.) involving discriminatory treatment in the levying of charges for garbage collection. Both cases also demonstrate the nice questions that can arise as to whether allowing one group and not another or charging one group and not another amounts to impermissible discrimination—a dilemma well known to American civil liberties lawyers and commentators. Of further interest is McKenzie J.'s statement in *Wedman* at p. 310 that the by-law had to afford "fairness and equal treatment". However, it is also clear that here he saw the unfairness as being the discriminatory treatment so it is probably not appropriate to treat this as a decision accepting a general doctrine of substantive fairness.

<sup>182</sup> (1973) 40 D.L.R. (3d) 745, 747 (N.S.S.C., T.D.). See also *R. v. Fink*, an unreported judgment of Wedge P.C.J. (Sask. Prov. Ct), 28 March 1980, discussed by McConnell, *Comment* (1980) 58 Can. Bar Rev. 766, 768-70.

<sup>183</sup> See, e.g., *City of Toronto and F.E. Wellwood v. Outdoor Neon Displays Ltd* [1960] S.C.R. 307, cited by McConnell, *ibid.*, 769.

<sup>184</sup> (1893) 23 S.C.R. 514, cited in *Wedman*, *supra*, note 181.

<sup>185</sup> (1923) 54 O.L.R. 256, 278-9 (C.A.) cited, e.g., in *Coastal Insurance*, *supra*, note 182, 749 and *Re H.G. Winton Ltd and Borough of North York* (1978) 20 O.R. (2d) 737, 745 (Div. Ct).

<sup>186</sup> (1975) 58 D.L.R. (3d) 383 (N.S.S.C., App. Div.).

the judgment of the Appeal Division of the Nova Scotia Supreme Court, referred to the leading Supreme Court of Canada decision of *Township of Scarborough v. Bondi*<sup>187</sup> and held that the by-law under challenge must not only in fact discriminate but that discrimination “must be carried out with the improper motive of favouring or hurting one individual and without regard to the public interest.”<sup>188</sup> Nevertheless, the Ontario Divisional Court in *H.G. Winton Ltd v. Corporation of the Borough of North York*<sup>189</sup> seemed to hold that bad faith and unlawful discrimination would be presumed in the case of a by-law singling out lots or properties for special treatment. This approach, if accepted, would bring the zoning by-law rules much closer to general by-law principles and the bulk of American case law on inconsistency of treatment. To quote Robins J., delivering the judgment of the Court:

So also, does the fact that the by-law singles out one property, to the clear detriment of its owners, for a use classification different to that applicable to all other owners covered by the same zoning category under the borough's comprehensive zoning scheme. This indicates bad faith; it also constitutes discrimination.

Here, no planning purpose has been shown to explain, let alone justify, the selection of a single spot in the borough as the subject of this amendatory zoning by-law. There is no rhyme nor reason, in a planning sense, for it. Nothing appears in the evidence or on the face of either the by-law or resolution which warrants rezoning this property, and it alone, or provides any planning basis for doing so.<sup>190</sup>

This clearly indicates that certain discriminations or apparent inconsistencies of treatment are capable of explanation but, in the absence of either a patent reason for or an explanation of differential treatment, the court is entitled to presume invalidity. I would argue that this is a proper approach to take to the issue of inconsistency since the affirmative proof by an applicant of an absence of justification for differentiation of treatment would in most cases be a difficult, if not impossible, task. Few cases are like *Roncarelli v. Duplessis*,<sup>191</sup> in which the defendant was reasonably frank about his motives. From an evidential perspective it seems a far more satisfactory approach to call for an explanation by the person or body best able to provide one in the case of a differentiation without apparent justification. This reflects the House of Lords' approach to discretions generally laid down in *Padfield v. Minister of Agriculture, Fisheries and Food*.<sup>192</sup>

<sup>187</sup> [1959] S.C.R. 444.

<sup>188</sup> *Supra*, note 186, 396.

<sup>189</sup> *Supra*, note 185.

<sup>190</sup> *Ibid.*, 745.

<sup>191</sup> See the extracts from Premier Duplessis' evidence at trial reproduced in *Roncarelli v. Duplessis* [1959] S.C.R. 121, 134-7.

<sup>192</sup> [1968] A.C. 997 (C.A.), *rev'd* [1968] A.C. 1016, 1053 (H.L.) *per* Lord Pearce to the effect that a court is justified in assuming an absence of valid reasons when no reasons are given for the exercise of a statutory discretion in a particular way and the material before the court points in favour of another course of action.

Discrimination also intrudes in another area of Canadian judicial review law. In both *Attorney-General of Manitoba v. National Energy Board*<sup>193</sup> and *Re Scott and Rent Review Commission*,<sup>194</sup> decisions were reviewed because the decision-makers had treated affected persons differently in according participatory rights. In *Scott*, a case involving an application for a rent increase, the landlord was allowed to be present when the tenant was interviewed but the tenant was excluded from the landlord's interview. While in some situations there is clearly room for different participatory opportunities to be afforded to different categories of affected person,<sup>195</sup> these two decisions provide a good illustration of the fact that inconsistency as an argument is not confined to cases of inconsistency in substantive outcome.

Outside of the by-law and procedure cases there is not much Canadian authority on the issue of inconsistency. Janisch has noted<sup>196</sup> two Canadian decisions on the issue: *Re City of Portage La Prairie and Inter-City Gas Utilities Ltd*<sup>197</sup> and *Re Board of Directors of Lethbridge Northern Irrigation District and C.U.P.E., Local 70*.<sup>198</sup> Neither can be taken to preclude completely review for inconsistency. In the first case, the adoption of a more expanded notion of the "public interest" than employed in a previous decision was held unreviewable on the basis of the "completely different circumstances".<sup>199</sup> Far from rejecting review for inconsistency, this decision of the Manitoba Court of Appeal in fact seems to assume its availability if the circumstances have not changed. The *Lethbridge Northern Irrigation District* decision is not quite so favourable in that Milvain C.J.T.D. of the Alberta Supreme Court clearly states that the decision of a labour board reversing its course on an issue of law "of itself cannot be grounds for quashing its decision".<sup>200</sup> It is, however, significant that he goes on to uphold the right of the board to "repent and recant"<sup>201</sup> thus suggesting that his

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<sup>193</sup> [1974] 2 F.C. 502, 525-6 (T.D.) per Cattanach J.

<sup>194</sup> (1977) 81 D.L.R. (3d) 530, 537 (N.S.S.C., App. Div.) per MacKeigan C.J.N.S. See also *Township of Innisfil v. Township of Vespra* (1981) 123 D.L.R. (3d) 530 (S.C.C.) in which the Court refused to uphold an immunity from cross-examination of a government witness outlining government policy at a municipality annexation application hearing. The witness and the evidence submitted were held subject to testing in the same way as other witnesses and other evidence since the statutory scheme gave no indication of a differential treatment for government policy evidence.

<sup>195</sup> See, e.g., *Seafarers' International Union v. Canadian National Railway Co.* [1976] 2 F.C. 369, 381 (C.A.) per Le Dain J., distinguishing between the parties to an application and objectors.

<sup>196</sup> *Policy Making in Regulation*, *supra*, note 156, 99-100.

<sup>197</sup> (1970) 12 D.L.R. (3d) 388 (Man. C.A.).

<sup>198</sup> (1973) 38 D.L.R. (3d) 121 (Alta S.C., T.D.).

<sup>199</sup> *Supra*, note 197, 397.

<sup>200</sup> *Supra*, note 198, 125.

<sup>201</sup> *Ibid.*

rejection of the argument of inconsistency is confined to cases where that inconsistency results from a tribunal realizing a past error.

In *Re Burgess Transport & Storage Ltd and Board of Commissioners of Public Utilities for Nova Scotia*, Morrison J. of the Nova Scotia Supreme Court, Trial Division, rejected as unsupported by the facts an argument of reviewable inconsistency in the outcome of applications for trucking licences.<sup>202</sup> This cannot be taken as resolving the issue one way or the other. However, in another Nova Scotia decision, Cowan C.J.T.D. indicated some sympathy for the Frankfurter view that inconsistency was a worse sin than error. The issue in *Board of Governors of Dalhousie University v. City of Halifax*<sup>203</sup> concerned the City's failure to demand strict compliance with the terms of a by-law regulating applications for building permits. Given a pattern of excusing non-compliance, the City could not suddenly change its position in the case of an application by the University.

This decision must be treated with some reservations. First, this particular issue was not pursued by the Appeal Division<sup>204</sup> in its decision in the case or on further appeal to the Supreme Court of Canada<sup>205</sup> though in each instance Cowan C.J.T.D.'s award of relief to the University was upheld. Secondly, it was subsequently distinguished by Dubinsky J. in *Chater v. City of Dartmouth*<sup>206</sup> on the basis that an important element of Cowan C.J.T.D.'s judgment was that in this instance a representation was made that non-compliance was still acceptable, whereas in *Chater* that element was lacking. Thirdly, in *Polai v. City of Toronto*, the Supreme Court of Canada held that a defendant in a prosecution could not raise the defence that the municipality maintained a "secret" list of offenders against whom such prosecutions would not be launched.<sup>207</sup> This decision has been applied to deny a defence in a case where a policy of immunity from prosecution for a special class was not followed with respect to a member of that class.<sup>208</sup> It was also relied upon by Dubinsky J. in *Chater* as support for the more general proposition that, at least absent a representation, the relevant authority can always revert to strict enforcement of the law.<sup>209</sup>

<sup>202</sup> (1976) 72 D.L.R. (3d) 231, 243 (N.S.S.C., T.D.).

<sup>203</sup> (N.S.S.C., T.D.) S.H. No. 03589, 23 April 1974, 26 *per* Cowan C.J.T.D., quoted by Dubinsky J. in *Chater v. City of Dartmouth* (1975) 62 D.L.R. (3d) 122, 132-3 (N.S.S.C., T.D.).

<sup>204</sup> *Re Governors of Dalhousie College & University and City of Halifax* (1974) 53 D.L.R. (3d) 610 (N.S.S.C., App. Div.).

<sup>205</sup> [1976] 1 S.C.R. v, without reasons.

<sup>206</sup> *Supra*, note 203, 140.

<sup>207</sup> [1973] S.C.R. 38.

<sup>208</sup> *R. v. Catagas* (1977) 81 D.L.R. (3d) 396 (Man. C.A.) *per* Freedman C.J.M.

<sup>209</sup> *Supra*, note 203, 139-40. See also the *dicta* of Cowan C.J.T.D. in *Coastal Insurance*, *supra*, note 182, 750-1 to the effect that *Polai* seemed to preclude a defence on the basis of the previously lax enforcement of a by-law.

Nevertheless, none of this should be seen as a challenge to inconsistency as a general ground of judicial review in Canada. The narrower *ratio* of *Polai* reflects the American position and it is also clear that the American courts, while generally agreed on the availability of review for inconsistency, have still not resolved the Frankfurter dilemma of whether consistency is to be preferred to correctness.

In summary, the Canadian authorities on the issues raised by the four cases on which I have focussed do not, except in the case of inconsistency, amount to much.<sup>210</sup> This is a fortunate state of affairs in that the opportunity still exists for a thorough judicial analysis of the ramifications of a substantive fairness or natural justice doctrine and avoidance of some of the fairly obvious pitfalls. The discriminatory by-law decisions do, however, suggest a useful analogy in support of an argument for judicial review on the basis of inconsistency.

### Conclusion

This article has not been a general plea against any further increase in the scope of judicial review of administrative action. I am persuaded that a strong case can be made for the identification of inconsistency as a possible basis for judicial review. This may be seen as a new and separate ground of review, although viewed more realistically, it is perhaps no more than an elaboration of one of the circumstances which falls within the existing, somewhat open-ended ground of review entitled "abuse of discretion". Beyond this, there have been suggestions in recent years that "abuse of process" be developed by the courts as a separate ground of judicial review.<sup>211</sup> Breaches of gratuitous undertakings by statutory authorities have also given rise to invalidity of the decision-making process in issue.<sup>212</sup> More

<sup>210</sup> In writing about *Re Keeprite Workers' Independent Union*, *supra*, note 87, Professor Evans, *supra*, note 88, expresses the fear that allowing in affidavit evidence to establish an absence of evidence will contribute to an already inappropriate growth in judicial scrutiny of tribunal decision-making for factual error. Nevertheless, three aspects of *Re Keeprite* may serve to stem this tide, 520-1 *per* Morden J.A. First, the Court of Appeal reversed the Divisional Court and held there was evidence to support the ultimate decision, notwithstanding that a factual error had been made. Secondly, the Court stated that the admission of affidavit evidence to establish an absence of evidence "should be very exceptional". Thirdly, the "no evidence" test was described in very limiting terms: "The exacting jurisdictional test of a complete absence of evidence on an essential point".

<sup>211</sup> See, e.g., *Re Smith and The Queen* (1974) 22 C.C.C. (2d) 268 (B.C.S.C.). Nevertheless, the prospects for this ground being invoked in judicial review of the criminal process seem to have been dealt a severe blow in *Rourke v. The Queen* [1978] 1 S.C.R. 102. Note, however, the somewhat more optimistic view of Braithwaite, *Developments in Criminal Law and Procedure: The 1979-80 Term* (1981) 2 Sup. Ct Law Rev. 177, 225-30. This results from *dicta* in a number of more recent Supreme Court of Canada decisions. See also Cohen, *Abuse of Process: The Aftermath of Rourke* (1977) 39 C.R.N.S. 349.

<sup>212</sup> See, e.g., *R. v. Liverpool Corp., Ex parte Liverpool Taxi Fleet Operators' Assoc.* [1972] 2 Q.B. 299 (C.A.) and the comment by Evans, *The Duty to Act Fairly* (1973) 36 M.L.R. 93; *Re Laidlaw Transport Ltd and Bulk Carriers Ltd* (1974) 23 O.R. (2d) 737 (Div. Ct).

generally, notions of justifiable reliance have been deployed in the development of a growing body of law that statutory authorities may be subject to at least a limited estoppel doctrine.<sup>213</sup> This article is not intended to foreclose debate on these possibilities though their development may have to be considered in the light of some of the reservations expressed here.

The main thrust of this article has been a limited, though I think important, one. It has been to assert that the common law of judicial review of administrative action does not presently need a general substantive fairness or substantive natural justice doctrine. Such a doctrine does not flow necessarily from the recently-developed theory of procedural fairness and it also lacks the practical and linguistic justifications that gave rise to that theory. Indeed, it has the potential to be positively dangerous to the satisfactory resolution of the proper role of the courts in their relations with the administrative process. Viewed as a justification for review for intra-jurisdictional error of fact, it amounts to a usurpation of review authority only sustainable in the case of certain situations of the general right of appeal. As a criterion for judging the end result of an administrative process, it is either unnecessary because of the existing scope of review for abuse of discretion, or overbroad in that it lacks the deference to the judgment of the statutory decision-maker which is so much a part of the rubric surrounding the existing law of judicial review of administrative action on the basis of unreasonableness or arbitrariness— a deference which clearly seems to be demanded by the legislature's choice of the statutory authority as the primary decision-maker on the merits.

In the most recent edition of de Smith's *Judicial Review of Administrative Action*, it is asserted:

The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle.<sup>214</sup>

Examples are given of the application of that principle: they include the duty to be impartial,<sup>215</sup> not to discriminate<sup>216</sup> and the growing number of instances of the application of doctrines of estoppel to statutory authorities.<sup>217</sup> I would argue that all of these instances of reviewable error, as well as that of inconsistency, can be justified on their own terms by appeals to more clearly understood or understandable notions such as equality and reliance.

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<sup>213</sup> *Supra*, note 18.

<sup>214</sup> *Supra*, note 10, 346.

<sup>215</sup> *Ibid.*, fn. 40.

<sup>216</sup> *Ibid.*, fn. 41.

<sup>217</sup> *Ibid.*, fn. 43.



The notion of substantive unfairness opens up the possibility of a lengthy and unnecessary succession of judicial review matters in which inconsistency and paucity of reasoning predominate. At a time when the Supreme Court of Canada has finally begun to make some sensible advances in its approach to the crucial concept of jurisdiction, the integrity of the law of judicial review cannot afford that those advances be undercut by an *ad hoc* attack on the perceived problems of administrative justice. In the long run, justice in this area is not necessarily advanced by simply talking about, or in terms of, fairness or natural justice. A modern sophisticated legal system demands far more than that, though as my advocacy of "inconsistency" review suggests, this is not to say that appeals to first principles are totally out of place in the judicial review of administrative action. However, precision in articulation and justification is paramount. Generalities will not suffice.

In the last analysis, this article is really about the use of words. It is sometimes asserted that judicial review is concerned with the limits of judicial toleration and that once that limit has been reached a way will be found to justify intervention. Recently, Professor Yves Ouellette has expressed the same thought in a slightly different way:

Il arrive fréquemment que lorsque les Tribunaux prennent la précaution de rappeler qu'ils n'ont pas à intervenir dans l'exercice d'un pouvoir discrétionnaire, c'est souvent qu'ils se proposent de le faire indirectement.<sup>218</sup>

Nevertheless, it is also obvious that language is the tool with which lawyers and judges have to work and that refining and respecting language are the means by which effect is given to valid policy goals. To the extent that fairness and natural justice as substantive principles of judicial review can give no guarantee of consistent respect for the underlying basis of a judicial review system founded in deference, their use is to be deprecated. Bad faith, partiality, arbitrariness, capriciousness and oppression are terms in current use which can be clearly related to legitimate concerns that power be exercised for statutorily proper purposes. On the other hand, gross unreasonableness, a complete absence of evidence and even jurisdiction are indicative of a role for the courts confined to ascertaining the limits of statutory power and being very circumspect in scrutinizing the performance of tasks within the statutory authority's mandate.

This is not meant to suggest that all is well in the house of judicial review. There is still obviously much room for thought and the refinement of language. However, it is my argument that the adoption of fairness or natural justice as substantive standards of judicial review, far from advancing the prospects for a sound policy-based, well-articulated law of judicial review, will in fact lead to less precise language and thought and inevitably to inappropriate increases in the scope of judicial review.

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<sup>218</sup> *Supra*, note 12, 364.