CASE COMMENTS AND NOTES

DISCRETIONARY REFUSAL OF JUDICIAL REVIEW IN ADMINISTRATIVE LAW

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The discretionary nature of the prerogative remedies and other forms of judicial review raises serious practical and theoretical difficulties in Administrative Law. Practically, de Smith[1] recognizes three general circumstances in which the courts may exercise their discretion to refuse a remedy to which an applicant is otherwise entitled: (i) where there is an appeal which provides a more efficient remedy;[2] (ii) where the applicant's conduct has disentitled him to relief;[3] and (iii) where it would be pointless to issue the remedy.[4] Mere inconvenience to the administration is not generally accepted as proper grounds for refusing judicial review.[5] Theoretically, great difficulties arise whenever an applicant is denied judicial review to which he is otherwise entitled, for an *ultra vires* administrative action is thus insulated from effective challenge. Is such a decision valid, void, or only voidable? This theoretical question goes to the very heart of Administrative Law, because the courts can only evade the effect of a privative clause by characterizing such decisions as void, not voidable. The purpose of this article is to examine these problems in light of the recent decision of the Supreme Court of Canada in *Harelkin* v. *The University of Regina.*[6]

The *Harelkin* case arose out of the dismissal of a student from the School of Social Work at The University of Regina. Under the legislation creating the University,[7] an appeal from such a decision lay to a committee of the University Council, and a further appeal lay to a committee of the University Senate. Mr. Harelkin did appeal to the Council; but it dealt with the matter in his absence, without informing him of the specific submission made to it by the officers of his faculty, and without giving him an opportunity either to correct the

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1. J. M. Evans, *de Smith's Judicial Review of Administrative Action* (4th ed. 1980) at 422-428.
2. *See, e.g., Re Chad Investments Ltd. and Longson, Tammets & Denton Real Estate Ltd. et al.* (1971) 20 D.L.R. (3d) 627 (Alta. S.C. A.D.); *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal* [1959] 2 All E.R. 433 (C.A.); *Re Minister of Education et al. and Civil Service Association of Alberta et al.* (1977) 70 D.L.R. (3d) 696 (Alta. S.C. A.D.); *Re McGavin Toastmaster Ltd. et al.* (1973) D.L.R. (3d) 100 (Man. C.A.); *Development Appeal Board* v. *North American Montessori Academy Ltd.* (1977) 7 A.R. 39 (Alta. S.C. A.D.).
3. *See, e.g., Homex Realty and Development Company Limited* v. *The Corporation of the Village of Wyoming,* unreported, 12 November 1980 (S.C.C.).
4. *For example,* where there has been only the merest technical error in procedure, which could not possibly affect the result of the proceedings.
5. *See, e.g., R.* v. *Paddington Valuation Officer, ex p. Peachey Property Corpn. Ltd.* [1964] 1 W.L.R. 1186 (Div. Ct.); [1966] 1 Q.B. 380 (C.A.); *cf. R.* v. *G.L.C., ex p. Blackburn (No. 1)* [1976] 1 W.L.R. 550.
6. [1979] 2 S.C.R. 561.
7. The University of Regina Act, 1974, S.S. 1973-74, c. 119, ss. 33(1)(e) and 78(1)(c).

case against him or to make his own submissions. In short, the Council clearly breached the principles of natural justice by not following a fair procedure. It decided against him, and confirmed his dismissal from the University. He did not take the further appeal to the Senate. Some months later, however, he applied for *certiorari* and *mandamus* to quash the Council's decision and to require it to rehear his appeal.

Bence C.J.Q.B. held[8] that the statutory provision requiring the Council "to hear and decide" student appeals meant literally what it said; the requirement "to hear" referred to all relevant testimony and representations, both written and oral; and that it would be improper for him to speculate whether a further appeal to the Senate could cure the defect in the Council's proceedings, as happened in *King* v. *The University of Saskatchewan.*[9] Accordingly, the late learned trial judge granted *certiorari* to quash the Council's decision and *mandamus* to require it to rehear the matter by allowing Harelkin to be present in person, to present evidence, and to be represented by counsel.

In a very brief judgment, the Court of Appeal unanimously reversed[10] the trial judge, relying on the earlier decision in *Re Wilfong; Cathcart* v. *Lowery,*[11] where Culliton C.J.S. had said:[12]

> In this province the practice has been that where there is a right of appeal a certiorari should not be granted except under special circumstances.

Perhaps no special circumstances existed in Harelkin's case, and perhaps the very "same matter" would be dealt with on appeal to the Senate. Nevertheless, it is odd that Woods J. A. went on to state[13] that the one-sided procedure adopted by the Council in not hearing Harelkin — whether right or wrong in law — was *within its jurisdiction.* With respect, this incorrectly implies that no procedural error can ever deprive a delegate of jurisdiction; and it therefore raises doubt about the court's authority to grant judicial review for procedural irregularities, even where there is no alternative remedy such as an appeal.[14] With respect, the question whether a breach of natural justice or the duty to be procedurally fair goes to jurisdiction is quite separate from considering the cir-

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8. [1977] 3 W.W.R. 754.
9. [1969] S.C.R. 678; 6 D.L.R. (3d) 120; 68 W.W.R. 745 (S.C.C.).
10. [1979] 3 W.W.R. 673.
11. (1962) 32 D.L.R. (2d) 477; 37 W.W.R. 612; 37 C.R. 319.
12. *Id.* at 615 (W.W.R.).
13. *Supra* n. 10 at 675. Equally, it is odd that Woods J.A. notes that the second issue in this case "raises the question of the right to judicial review of decisions of a university committee such as that in question here", although he does not render any decision on the point. *See Vanek* v. *Governors of The University of Alberta* (1975) 5 W.W.R 429 (Alta. S.C. A.D.); *McWhirter* v. *Governors of The University of Alberta* (1978) 80 D.L.R. (3d) 609; *Re Polten & Governing Body of The University of Toronto* (1976) 59 D.L.R. (3d) 197 (Ont. H.C., Div. C.); J. W. Bridge, "Keeping Peace in the Universities: The Role of the Visitor" (1970) 86 *L.Q.Rev.* 531; G. Fridman, "Judicial Intervention into University Affairs" (1973) 21 *Chitty's L.J.* 181; Y. Ouellette, "Le contrôle judiciaire sur l'université (1970) 48 *Can. Bar Rev.* 631; *Fekete* v. *The Royal Institution for the Advancement of Learning* [1968] C.S. 361 (Que.); *Langlois* v. *Rector and Members of Laval University* (1973) 47 D.L.R. (3d) 674 (Que. C.A.).
14. The court's jurisdiction to grant prerogative remedies is both supervisory and inherent; it is not granted by statute (though it may be removed by statute) and its rationale lies in keeping inferior bodies within the respective jurisdictions which Parliament has granted to them. If no nullity arises from a procedural error, what authority does the court have to intervene?

cumstances in which the court should exercise its discretion to refuse to issue a prerogative remedy.[15]

The Supreme Court of Canada, sharply divided,[16] narrowly upheld the Court of Appeal. Beetz J., writing for the majority,[17] held that: (1) the prerogative remedies are discretionary, and do not issue automatically, even in cases involving jurisdictional errors; (2) a breach of natural justice does not entail the same kind of nullity as if there had been a lack of jurisdiction in the Council; but merely renders the decision voidable, and until set aside such a decision is fully capable of being appealed from; (3) in the circumstances, Harelkin would be entitled to a full hearing on the appeal to the Senate, which would therefore "cure" the breach of natural justice at the lower level, and would therefore be an adequate, less costly and more efficient remedy; and (4) even though the statute clearly imposed an obligation on the Council to follow natural justice, the Court should nevertheless exercise its discretion to refuse judicial review where the legislature has set up a comprehensive code for dealing with disputes within the University, with whose self-governing affairs the courts are generally reluctant to interfere, at least while there is a possibility of correcting its errors itself.[18]

Dickson J., writing for the three dissenters,[19] joined issue with every one of the majority's reasons. First, he held that the discretionary nature of the prerogative remedies only referred to the court's discretion to refuse the remedy in "special circumstances", and that the existence of an appeal does not constitute "special circumstances" where the alleged error goes to jurisdiction. Secondly, Dickson J. unequivocally held that a breach of natural justice is not merely an error of law within the delegate's jurisdiction, but is so fundamental to the power granted to the delegate that it deprives him of the jurisdiction to make any decision. And, finally, His Lordship held that *certiorari* issues *ex debito justitiae*[20] when the error is jurisdictional, and the courts have virtually no discretion to refuse *certiorari* in these circumstances.

The differences between the majority's and the minority's reasoning are so fundamental to the theory of Administrative Law that it is important to examine them very carefully.

A. *Does a Breach of Natural Justice Go to Jurisdiction?*

Virtually all of Administrative Law depends upon two maxims: (i) Parliament is sovereign; and (ii) a delegate to whom Parliament has granted powers must act strictly within his jurisdiction, and the courts will determine whether his actions are *ultra vires*.

Now, a delegate's jurisdiction may depend upon certain preliminary or collateral matters. Thus, in *Anisminic* v. *Foreign Compensation*

15. It is one thing to assert that the court has the right to refuse a prerogative remedy even if the inferior delegate's decision is void. It is quite another thing to suggest that such a refusal renders that decision voidable and not void.

16. 4:3.

17. Beetz, Pigeon, Pratte and Martland JJ..

18. Relying on *King* v. *The University of Saskatchewan, supra* n. 9.

19. Dickson, Spence and Estey JJ..

20. As a matter of right. *See* n. 36 *infra*.

Commission,[21] the Commission was bound to consider a claim for compensation filed by a party whose property was sequestrated by the Egyptian Government after Suez, or that party's successor-in-title. Entertaining a claim from someone who did not meet those conditions would clearly have been *ultra vires* the power or jurisdiction granted to the Commission by Parliament. Conversely, refusing even to receive a claim for a person who did meet those conditions would also have been *ultra vires*. Similarly, in *Bell* v. *Ontario Human Rights Commission,*[22] the Commission could only hear complaints of discrimination relating to the rental of self-contained residential premises. The question whether particular premises were self-contained is obviously a jurisdictional one. Again, if Parliament gives the delegate power to make a park, it is *ultra vires* for the delegate to try to use that power to build a highway. All of these are examples of what may be called substantive *ultra vires*.

Even if the delegate is acting substantively within the subject matter granted to him by Parliament (i.e., has correctly decided any preliminary or collateral point, or is in fact exercising the power granted to him), his actions may nevertheless be *ultra vires* if he commits any of the following errors:

(i) breaches the principles of natural justice or the duty to be procedurally fair;[23]
(ii) considers irrelevant evidence;[24]
(iii) ignores relevant evidence;[25]
(iv) acts for an improper purpose or out of malice.[26]

In each of these cases, the delegate does have jurisdiction to commence his action, to deal with the matter, but steps outside of his jurisdiction by committing one of the errors listed above. His decision is clearly subject to judicial review. Now, with one exception,[27] the only theoretical basis upon which the superior courts are entitled to review the legality of a delegate's action is based upon their inherent power to keep inferior tribunals within their respective jurisdictions. The concept of jurisdiction thus underlies these four grounds for judicial review every bit as much as it underlies review of other substantive *ultra vires* actions by a delegate of the Legislature. The unstated premise, of course, is that Parliament never intended its delegate to act contrary to natural justice, or to consider irrelevant evidence, or to ignore relevant evidence, or to act maliciously or in bad faith. Of course

21. [1969] 2 W.L.R. 163 (H.L.).
22. (1971) 18 D.L.R. (3d) 1 (S.C.C.).
23. *See, e.g., Alliance des professeurs catholiques de Montréal* v. *Commission des relations ouvrières du Québec* [1953] 2 S.C.R. 140; *Ridge* v. *Baldwin* [1964] A.C. 40 (H.L.); *Cooper* v. *Wandsworth Board of Works* (1863) 143 E.R. 414.
24. *Smith and Rhuland* v. *The Queen* [1953] 2 S.C.R. 95; *Padfield* v. *Minister of Agriculture, etc.* [1968] 2 W.L.R. 924 (H.L.); *Dallinga* v. *City of Calgary* (1976) 62 D.L.R. (3d) 433 (Alta. S.C. A.D.).
25. Which may really only be the reverse of acting on irrelevant evidence; of "unreasonableness" and lack of evidence as grounds for judicial review.
26. *Roncarelli* v. *Duplessis* [1959] S.C.R. 120; *Campeau Corporation* v. *Council of City of Calgary (No. 1)* (1979) 7 Alta. L.R. (2d) 294 (Alta. S.C. A.D.); *cf.* the *Padfield* case, *supra* n. 24.
27. Error of law on the face of the record, even though the error does not go to the delegate's jurisdiction. For an excellent historical explanation of this anomaly *see R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338, [1952] 1 All E.R. 122 (C.A.); *cf.* Lord Reid's judgment in *Anisminic, supra* n. 21.

Parliament's sovereignty means that it would theoretically permit its delegates to act in any of these ways, and the courts would have to give effect to such specific legislative commandment. But the Legislature rarely does this and the courts continue to construe legislation (and other powers[28]) on the assumption that these four requirements must be complied with in order for the delegate's action to be valid. In short, these requirements go to the substantive jurisdiction of the delegate, and must do so to authorize the courts to interfere with any such defective administrative action.

It is true that — for example — a breach of the principles of natural justice appears to be merely a procedural error, committed after the delegate has validly commenced his exercise of the power which Parliament has granted to him. But it would be incorrect to assume that such a procedural error is somehow less important or less substantive than a clear attempt by the delegate to do something completely unrelated to the power granted by Parliament (e.g., to build a highway instead of a park). For more than a century, the assumption has been that Parliament intends the procedural requirements of natural justice to be observed by certain delegates, as part and parcel of the power granted to them; any default renders the decision void.[29] Nor is it possible to say that such a decision is voidable. If it were, what would entitle the courts to intervene to correct it? For the decision would — on the voidable assumption — lie within the jurisdiction of the delegate, would not be *ultra vires*. Of course such an error undoubtedly constitutes an error of law[30] which could be corrected by the court under its anomalous power to grant *certiorari* to correct even errors of law not going to jurisdiction. But this power to correct errors of law clearly is not available if there is a privative clause depriving the courts of their inherent power to review decisions of such a delegate made within his jurisdiction. Yet the courts have consistently held that privative clauses do not protect "decisions" which are made outside of the delegate's jurisdiction, because such decisions are void (not voidable), and therefore are not "decisions".[31] Nor is it difficult to find such cases involving breaches of natural justice, improper consideration of the evidence, or malice. None of these cases could have avoided the clear words of a privative clause if the decision involved were merely voidable instead of being void, because then there would have been a "decision" protected by the privative clause.

B. *The Court's Discretion to Refuse a Remedy*

Under what circumstances should the court exercise its discretion to refuse to grant a remedy?

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28. Including delegated legislation such as rules and regulations, as well as delegated discretionary powers and duties.

29. Otherwise the decision in *Cooper* v. *Wandsworth Board of Works*, *supra* n. 23, would have been the opposite, for the demolition order there would have been valid and therefore a complete defence to the action in trespass (which is not a discretionary remedy). *See* H.W.R. Wade, "Unlawful Administrative Action: Void or Voidable?" Part I at (1967) 83 *L.Q. Rev.* 499; Part II at (1968) 84 *L.Q. Rev.* 95; Wade's *Administrative Law* (4th ed. 1977) *esp.* at 296-301 and 447-450. *Cf. Durayappah* v. *Fernando* [1967] 2 A.C. 337 (P.C.).

30. Because a breach of the principles of natural justice, or of the duty to be fair, obviously is an error of procedure.

31. *See, eg., Anisminic, supra* n. 21; *Bell, supra* n. 22; *Toronto Newspaper Guild* v. *Globe Printing Co.* [1953] 3 D.L.R. 561 (S.C.C.). *Cf. Pringle* v. *Fraser* (1972) 26 D.L.R. (3d) 28 (S.C.C.); *Re Woodward Estate* (1972) 27 D.L.R. (3d) 608 (S.C.C.).

As noted above, Professor de Smith recognized[32] only three cases: (i) where there is an appeal which provides a more efficient remedy; (ii) where the applicant's conduct has disentitled him to relief; and (iii) where it would be pointless to issue the remedy.

To the extent that the *ratio decidendi* of Beetz J.'s judgment in *Harelkin* can be restricted solely to the court's discretion to refuse judicial review where there is an effective appeal provided, it is consistent with Professor de Smith's statement of the law. To the extent, however, that His Lordship's judgment is read more widely, it clearly extends the court's ability to refuse judicial review, and almost puts a positive onus on the applicant to demonstrate why judicial review should be granted. Certainly the courts have never before asserted a bold discretion to refuse to correct breaches of natural justice, in the absence of any factors defined in Professor de Smith's three categories.

Dickson J., on the other hand, clearly starts from the principle that the prerogative remedies should issue whenever grounds for judicial review have been established. Only rarely should the courts exercise their discretion to deprive an applicant of the remedy to which he is entitled. This circumscription of the court's discretion to refuse a remedy is particularly important where a jurisdictional point is involved, for otherwise a totally illegal administrative act would effectively be insulated from legal challenge.[33] But the courts should also not lightly refuse to grant judicial review (in the absence of a privative clause) where a mere error of law occurs within the delegate's jurisdiction, for precisely the reasons given by Lord Denning in *R. v. Northumberland Compensation Appeals Tribunal, ex p. Shaw*:[34] no delegate should be permitted to misconstrue the law. Apart altogether, then, from the question whether a breach of natural justice goes to jurisdiction or constitutes an error within jurisdiction,[35] the courts should virtually always issue a remedy to correct the defect. Hence, Dickson J.'s reference to these remedies as issuing *ex debito justitiae*.[36]

With respect, this writer submits that Dickson J.'s approach is the better view because it represents the previous jurisprudence more accurately, and because it clearly accords with the policy underlying the availability of judicial review of administrative action. The three categories for refusing

32. *Supra* n. 1.

33. As Dickson J. argued in his dissenting judgment in *Harelkin*.

34. *Supra* n. 27.

35. For a discussion of which non-jurisdictional errors of law remain after *Anisminic*, see B.C. Gould, "*Anisminic* and Jurisdictional Review" [1970] *P.L.* 362.

36. De Smith, *supra* n. 1 at 417 says that ". . . the expressions 'clear want of jurisdiction', 'discretionary', 'as of right' and '*ex debito justitiae*' were used with singular disregard for consistency . . .". In *P.P.G. Industries Canada Ltd.* v. *A.-G. Canada* [1976] 2 S.C.R. 739, *ex debito justitiae* was used in a completely different sense to permit the Attorney-General to have standing as a matter of right, even though he was refused the remedy sought as was in the court's discretion. *See* my comment at (1977) 55 *Can. Bar Rev.* 719, *esp.* at 735-739. Surely Beetz J. and Dickson J. agree that *certiorari* is discretionary. The latter's reference to *ex debito justitiae* emphasizes that *certiorari* will normally issue whenever grounds are shown, unless clear reasons for refusing it are demonstrated, and the categories of such reasons will not be extended.

judicial review exist because of public policy, and should not be extended willy-nilly.[37]

C. *Discretion and the Content of Natural Justice or Fairness*

It is obvious that the content of natural justice — or fairness — will vary according to the circumstances of each case. And different judges will undoubtedly reach different conclusions as to whether the requirements of natural justice — or fairness — have been breached in different circumstances. Nevertheless, it is important to distinguish the existence of a breach of natural justice or fairness (which is a ground for judicial review) from the court's decision to exercise its discretion to refuse judicial review of the defective administrative act.

The *Harelkin*[38] and *Inuit Tapirisat*[39] cases represent opposite ends of the spectrum of cases on the content of natural justice in particular circumstances. In the latter case, the Supreme Court of Canada unanimously held that the federal Cabinet was bound to adopt a fair procedure in dealing with an appeal to it from the Canadian Radio-Telecommunications Commission, but that the content of this duty to be fair was extremely minimal.[40] It did not include the right to be present, or to reply to the other side's submissions. Undoubtedly, part of Their Lordships' decision rests on the fact that the relevant legislation provided for an alternative, more formal appeal to the courts; and the applicants should not be permitted to complain of the perfunctory manner in which their political appeal was dispatched. Nevertheless, the *ratio decidendi* of the case clearly is that all of the

37. *Cf.* the frequent *dicta* limiting public policy as a ground for striking down contracts. Public policy is "a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law". (Burroughs J. in *Richardson* v. *Mellish* (1824) 2 Bing. 229, 252). Lord Haldane asserted that the courts could not "invent a new head of public policy": *Janson* v. *Driefontein Consolidated Mines Ltd.* [1902] A.C. 484, 491.

38. *Supra* n. 6.

39. *A.-G. Can.* v. *Inuit Tapirisat of Canada et al.* (1981) 115 D.L.R. (3d) 1 (S.C.C.).

40. Although it may be argued that Estey J., writing for the unanimous Court, held that s. 64(1) of the National Transportation Act imposed no procedural requirements of any description on the Governor-in-Council in revising rates set by The Canadian Radio-Telecommunications Commission, he did state (at p. 15) that judicial review would issue if the Governor-in-Council did not even examine the contents of the petition in question. This implies that they must at least squarely direct their minds to the issues raised, even though this particular statutory power involved "legislative power in its purest form". On the applicability of the principles of natural justice, or fairness, to purely legislative functions, *see: Campeau (No. 1), supra* n. 26; and in his dissenting judgment in *Homex, supra* n. 3, Dickson J. said (at p. 12):

> . . . Once it is clear that rights are being affected, it is necessary to determine the appropriate procedural standard that must be met by the statutory body. Above all, flexibility is required in this analysis. There is, as it were, a spectrum. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual little or no procedural protection . . . On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards, particularly when personal or property rights are targeted, directly, adversely and specifically.
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> It seems to me that a similar analysis should be employed in the present case. *That is, it is not particularly important whether the function of the municipality be classified as "legislative" or as "quasi-judicial".* Such an approach would only return us to the conundrums of an earlier era. One must look to the facts of each case. . . . [emphasis added]

On the court's jurisdiction to review the actions of the Cabinet's exercise of statutory powers (and what constitutes the Cabinet), *see Gray Line of Victoria Ltd.* v. *Chabot* [1981] 2 W.W.R. 636 (B.C. S.C.).

(minimal) procedural requirements for fairness had been complied with; therefore, there was no defective decision (whether void or voidable), and no question arose of exercising the court's discretion to refuse the applicant a remedy to which it was otherwise entitled.

Harelkin[41] was very different. All of the judges agreed that there was a breach of natural justice, thereby constituting at least *prima facie* grounds for judicial review. But Beetz J., writing for the majority of the Supreme Court of Canada, gave considerable importance to the fact that Harelkin might have a proper hearing on the appeal to the Senate, which would "cure" the procedural defects in the impugned decision by the Council. On the other hand, Dickson J., writing for the minority, refused to speculate on either the completeness of the appeal before the Senate or its ability to cure the invalid previous decision.

The question arises as to the relationship of the court's inquiry into the content of natural justice applicable to a particular case, and its decision whether to refuse to grant a remedy. Obviously, to the extent that the court has determined that it will exercise its discretion to refuse a remedy, it may be tempted to hold that there has been no breach of natural justice or fairness in the case. It may do this either by minimizing the content of natural justice or fairness applicable to the particular case, or by finding that those procedural requirements have been complied with in any event.[42] But, with respect, this method is unacceptable. The grounds for judicial review should be dealt with first; only later should the court squarely consider whether it should exercise its discretion to refuse the remedy. Otherwise, the proper considerations to be taken into account in exercising that discretion inevitably become camouflaged in determining the content of natural justice or fairness. Let the courts be openly seen to refuse a remedy to the applicant who is otherwise entitled to it — and let them expect to justify their refusal.

D. *Alternative Remedies*

It is important to examine more closely the justification for the existence of the court's discretion to refuse judicial review when there is an equally efficient alternative remedy, such as an appeal.

First, it must be emphasized that this rule undoubtedly engages the court's discretion, and is not a rule of law. This helps to explain why, in certain circumstances, judicial review has been granted notwithstanding the existence of an appeal — particularly if that appeal does not lie to a superior court.[43]

Second, note that the applicability of the rule does not depend upon the presence of a privative clause protecting the decision from which the appeal is to be taken,[44] which would clearly indicate the Legislature's intention to provide the appeal *instead of* judicial review. Nevertheless, this supposed legislative intent must surely underlie the existence of the court's discretion to refuse judicial review even where there is no privative clause to highlight

41. *Supra* n. 6.

42. *Compare* the approach of the court in the *Inuit Taparisat* case, *supra* n. 39, with that in the *Gray Line* case, *supra* n. 40.

43. This is the *ratio* of the decisions in the *Chad* and *Montessori* cases, *supra* n. 2.

44. *Cf.* the reasoning of the Supreme Court of Canada in *Pringle* v. *Fraser*, *supra* n. 31.

the exclusivity of the appeal. Yet, this very assumption points to the fallacy inherent in the discretionary nature of the rule. For either the Legislature intended the appeal to be exclusive, or it did not; either judicial review should be precluded in all cases where there is an appeal, or in none.

Of course, it may be answered that some cases will arise where the appeal would not provide an effective manner for raising the same points at issue in judicial review, which therefore should not be refused. On the one hand, merely stating the problem this way takes such a circumstance out of de Smith's second class of cases in which the courts may exercise their discretion to refuse judicial review: no effective appeal exists *on the issues in question*. On the other hand, focusing on what are the issues in question inevitably forces one to ask how many appeals can ever effectively deal with allegations that the decision appealed from was reached contrary to the principles of natural justice,[45] on irrelevant evidence,[46] by ignoring relevant considerations,[47] or for an improper purpose.[48] Most appeals are designed to reconsider the merits of the initial decision, not to deal with these relatively technical (but important) matters. With respect, was Beetz J. correct to suggest[49] that Mr. Harelkin would receive a fair hearing on his appeal to the Senate? Would Mr. Harelkin have been allowed to argue only one point there: that the Council's decision was void because of the unfair procedure which it had adopted? Of course not; the Senate undoubtedly would have then gone on to decide his case on its merits — and perhaps would not even have listened to his complaints about the earlier body's procedure.

As long as the court can be certain that the appellate body has in fact rendered justice on the merits it may make sense to focus — as Beetz J. did[50] on the "curative" effect of the appeal as a ground for exercising the court's discretion to refuse judicial review. Nevertheless, this reasoning assumes that the appeal has already occurred before the application for judicial review is heard; and these were not the facts in either *Harelkin* or *King* v. *The University of Saskatchewan*.[51] Further, it is respectfully submitted that such reasoning is simply wrong where the proceedings occur in reverse order, for the following reasons. First, the court cannot possibly insure that a subsequent appeal will in fact inevitably do justice on the merits, thereby "curing" the defective earlier proceedings. Secondly, there is no guarantee that the appellate body will be able to appreciate either the existence or the importance of the lower body's obligations to be procedurally fair. Thirdly, it is really beside the point to observe (or hope) that the appellate body will itself adopt a fairer procedure;[52] the unfairness of the initial proceedings is

45. *Supra* n. 23.
46. *Supra* n. 24.
47. *Supra* n. 25.
48. *Supra* n. 26.
49. *Supra* n. 6 at 584 and 587-594.
50. *Id.*.
51. *Supra* n. 9. Note that in *King*, the appeal involved a complete trial *de novo*, and had already taken place, thereby permitting the court to determine whether justice had in fact been done to the student. The appeal in *Harelkin* had not yet occurred, leaving the court to speculate as to the fairness of the appellate proceedings. Further, the objection that the student was entitled to two completely separate hearings on the merits, and the procedural irregularity effectively expropriate his right to one of those hearings.
52. The likelihood of which split Beetz and Dickson JJ..

the fatal defect. Finally, the appeal surely exists to provide a second hearing on the merits. Refusing judicial review of an improper *first* hearing simply expropriates the applicant's statutory right to *two* hearings.[53] He is inevitably forced to abide by the decision of the appellate body alone — the only body which has given him a fair hearing; and no appeal lies therefrom. This, frankly, appears to fly in the face of the clear intent of the Legislature in providing for the appeal in the first place. It is submitted, therefore, that virtually all cases involving procedural irregularities cannot be effectively appealed,[54] and therefore should not cause the courts to exercise their discretion to refuse judicial review sought on these grounds.

Nor should the court automatically refuse judicial review if the alleged error is one of substantive law (such as in the *Anisminic*,[55] *Bell*[56] and *Shaw*[57] cases) merely because there is an appeal. Surely the court should consider the nature and legal expertise of the appellate body, and the likelihood of precisely the same issue being brought back to the court after that body has decided the appeal.

This analysis, therefore, suggests that the courts should carefully re-evaluate their discretion to refuse judicial review where an effective appeal could be taken.

E. *Conclusion*

In conclusion, it is submitted that the decision of the majority of the Supreme Court of Canada in *Harelkin* must be read extremely carefully to restrict its *ratio decidendi* to the court's discretion to refuse judicial review in certain circumstances. In particular, "the *Harelkin* heresy" that a breach of natural justice merely renders the decision voidable, and not void, must be resisted furiously in order to maintain the Rule of Law. Finally, much greater critical scrutiny must be devoted to the court's discretion to refuse judicial review.

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53. Using the criminal law paradigm, a procedural irregularity at trial is grounds for appeal, which would result in the whole matter being remitted for a complete rehearing to the trial court, from which a further appeal on the merits would lie to the court of appeal. In *Harelkin*, the problem was that the appellate body not only would be unlikely to understand the procedural defects of the first proceedings, but would not then remit the matter back for rehearing by the Council. Rather, the appeal body would simply dispatch the case on its own merits, thereby expropriating the student of his right to two complete hearings.

54. Beetz J. makes heavy weather over the apparent difficulty of appealing a void decision. Clearly, he wishes to preserve the right of the student to appeal, and to prevent the University from repudiating the lawfulness of the appeal if it loses. This may be desirable in terms of administrative efficiency, or fairness to those who do appeal instead of seeking judicial review. To suggest, however, that this is a reason why a breach of the principles of natural justice renders the decision voidable (and not void) is nonsense, and undercuts the court's own authority to review the impugned decision in a proper case. How is such an appeal to be challenged? Clearly, in the end, before the courts — who undoubtedly should exercise their discretion to refuse to review the appellate decision merely because the earlier decision was void for procedural irregularity. Unfortunately, Dickson J. did not deal squarely with this point in *Harelkin*.

55. *Supra* n. 21.

56. *Supra* n. 22.

57. *Supra* n. 27.