ADMINISTRATIVE FAIRNESS IN ALBERTA

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This article discusses the recent development in the scope of the administrative law concept of the "duty to be fair" and the effect of that development on judicial review and on the need to characterize functions. The author examines in depth five recent cases, including Martineau *v.* Matsqui Institution Disciplinary Board *(No. 2), decided by the Supreme Court of Canada in December 1979, insofar as they involve application of the concept of fairness.*

I. INTRODUCTION

The "duty to be fair" is one of the most important recent developments in Canadian Administrative Law. Although the concept of fairness has long been used by the courts as a rough test for determining whether the principles of natural justice have been breached in a particular case, the Canadian courts have now followed the English jurisprudence[1] which gives the duty to be fair a much broader scope than merely determining the content of natural justice. Thus, an administrative body has a duty to be fair, even though the principles of natural justice do not apply to its decision-making process; a breach of that duty is subject to judicial review; and *certiorari* is available in Alberta even though no *quasi*-judicial function is involved. Indeed, one may speculate that the development of the duty to be fair has now totally supplanted the need to characterize a particular function as either *quasi*-judicial or merely administrative before determining what (if any) remedy is available.

The purpose of this article is to review briefly both the history and the theoretical foundations of the duty to be fair, and to examine in detail five recent cases involving the application of this principle: *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police*,[2] *Martineau* v. *Matsqui Institution Disciplinary Board* (No. 2)[3] (both decided by the Supreme Court of Canada); and *Harvie* v. *Calgary Regional Planning Commission*,[4] *Campeau Corporation* v. *Council of the City of Calgary*,[5] and *McCarthy* v. *Trustees of Calgary Separate School District*[6] (all decided by the Court of Appeal of Alberta).

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1. For an excellent summary of the English cases, *see* D. J. Mullan, "Fairness: The New Natural Justice" (1975) 25 *U. of T.L.J.* 281. *See also Alberta Union of Provincial Employees* v. *Alberta Classification Appeal Board* [1978] 1 W.W.R. 193, 81 D.L.R. (3d) 184, 9 A.R. 462 (Alta. S.C.T.D.).
2. (1979) 88 D.L.R. (3d) 671 (S.C.C.); *revg.* (1977) 69 D.L.R. (3d) 13 (Ont. C.A.); *revg.* (1976) 61 D.L.R. (3d) 36 (Div. Ct.).
3. [1980] 1 S.C.R. 602.
4. (1979) 8 Alta. L.R. (2d) 166 (Alta. S.C.A.D.), *revg.* (1978) 5 Alta. L.R. (2d) 301.
5. (1979) 7 Alta. L.R. (2d) 294 (Alta. S.C.A.D.) *revg.* (1978) 8 A.R. 77. This litigation subsequently came before the courts again after City Council had reconsidered the application for rezoning. In *Campeau* (No. 2), the Court of Appeal declined to interfere with Council's actions, which it specifically held to be legislative in nature.
6. [1979] 4 W.W.R. 725 (per Laycraft J. as he then was); *affd.* unanimously by the Court of Appeal in an unreported decision on October 8, 1979. The application for *certiorari* was subsequently heard by Chief Justice Sinclair, who granted it. No appeal was taken from that decision by the Board, which however, at the time of writing, was in the process of re-enacting the dismissal proceedings to comply with the duty to be fair.

II. THEORETICAL CONSIDERATIONS

Until recently, it was generally assumed that the following tautology was true: if there was a *quasi*-judicial function, then the principles of natural justice applied, and *certiorari* was available to superintend any breach of those procedural requirements. Conversely, if the function was not *quasi*-judicial in nature, but merely administrative, the principles of natural justice did not apply, nor was *certiorari* available. Thus the question of fairness only arose to determine the content of natural justice *assuming that a* quasi-*judicial function was involved.*

Unfortunately, the distinction between a *quasi*-judicial function on the one hand, and a merely administrative one on the other, was never clear. However, because the availability of *certiorari* depended upon this characterization, a great deal of litigation occurred, for each case had to be determined by itself, and provided virtually no precedent for subsequent litigation. Although there is considerable elasticity in what constitutes a *quasi*-judicial function (and the courts variously did stretch or narrow the concept), at some point it is simply not possible to characterize something as *quasi*-judicial, no matter how unfair the procedure used, or how desirable it would be for *certiorari* to issue in the circumstances.

The duty to be fair is a much more robust concept. In the first place, it avoids premising the availability of judicial review on the existence of a *quasi*-judicial function, which is not a clear concept in any event. Secondly, it openly articulates the question at least subconsciously asked by the courts in determining whether judicial review should issue for procedural reasons. And, finally, it provides an accurate rubric for administrators of all descriptions to bear in mind when exercising their various functions.

Of course there will be continuous litigation over the question of whether a particular administrator's procedure was in fact fair. It is submitted, however, that this may well not generate any more litigation than that previously arising out of the meaning of "*quasi*-judicial". Rather, the focus of argument will have shifted to the real question at issue: was this decision arrived at fairly? And the judicial answers to this question should, in each case, provide considerably better guidance about acceptable procedures in particular circumstances. No longer will a court's finding that no *quasi*-judicial function is involved effectively grant the administrator *carte blanche* to adopt any procedure no matter how unfair.

It is not possible to dismiss the development of the duty to be fair as merely fleshing out the content of natural justice.[7] On the contrary, it significantly extends the ambit of judicial review beyond the existence of *quasi*-judicial functions (to which only it previously was argued that natural justice applied). And the recent jurisprudence clearly holds that *certiorari*—which historically only issued to quash a *quasi*-judicial function—is available to remedy any breach of the duty to be fair, even if no *quasi*-judicial function is involved.[8] Accordingly, the old trilogy uniting

7. As has often been suggested. While the essence of natural justice may be fairness, the duty to be fair applies even where natural justice may not. In particular, the requirement of fairness is not limited to *quasi*-judicial functions (however they are defined).

8. Laycraft J.'s decision in *McCarthy,* unanimously upheld by the Court of Appeal, is clear authority for this proposition. So is the reasoning of Dickson J. in *Martineau* (No. 2), although Pigeon J.'s majority judgment in that case is less clear on this point. It seems

the existence of a *quasi*-judicial function, the applicability of the rules of natural justice, and the availability of *certiorari* has now been shattered.

Let us, therefore, turn to the Canadian cases which have accomplished this revolution.

III. THE *NICHOLSON* CASE

The *Nicholson* case arose in Ontario under the Judicial Review Procedure Act,[9] and concerned the termination of a probationary police constable. Although section 27 of the Police Act[10] generally provided that:

> . . . [n]o chief of police, constable or other police officer is subject to any penalty under this Part except after a hearing and final disposition of a charge on appeal as provided by this Part,

there was a specific exception preserving the authority of a police board:

> (b) to dispense with the services of any [probationary] constable within eighteen months of his becoming a constable.

Nicholson was not told why he was dismissed, nor was he given notice or any opportunity to make representations before his services were terminated. He applied for judicial review. This was granted by Hughes J. at first instance,[11] who relied heavily on the reasoning of the House of Lords in *Ridge* v. *Baldwin*,[12] to classify the legal position of a police constable as an "office". Therefore, notwithstanding the existence of section 27(b), His Lordship held that, while the Board's[13]

> . . . deliberations may be untrammelled by regulations made under the Police Act, . . . this court should not allow them to proceed as if the principles of natural justice did not exist.

The Court of Appeal, however, reversed, having answered the following question in the affirmative.[14]

> Can the services of a police constable be dispensed with within eighteen months of his becoming a constable, without the observance by the authority discharging him of the requirements of natural justice, including a hearing?

In effect, the Ontario Court of Appeal focussed on the statutory provisions dealing with appeals for permanent constables, noted the absence of similar provisions for probationary members who were employed "at pleasure", applied the maxim *expressio unius est exclusio alterius*,[15] and washed their hands of any general judicial responsibility for enforcing the observance of fair procedures by administrative bodies. In a five-to-

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certain, therefore, that the reasoning of the Supreme Court of Canada in *Calgary Power Ltd.* v. *Copithorne* [1959] S.C.R. 24, (1959) 16 D.L.R. (2d) 241, is no longer good law.

9. S.O. 1971, c. 48.
10. R.S.O. 1979, c. 351.
11. (1976) 61 D.L.R. (3d) 36 (Ont. Div. Ct.).
12. [1964] A.C. 40, [1963] 2 All E.R. 66 (H.L.).
13. *Supra* n. 11 at 45.
14. (1977) 69 D.L.R. (3d) 13 at 14.
15. *Id.* at 17-22. *See also* the application of this maxim by the majority of the Supreme Court of Canada in *French* v. *The Law Society of Upper Canada* [1975] 2 S.C.R. 767, 49 D.L.R. (3d) 1. It is submitted that this application of the *expressio unius* rule is wrong in principle. Natural justice is presumed to apply to decisions, unless specifically ousted by Parliament. Specifying certain procedural steps in some circumstances only reinforces the applicability or flushes out the content of natural justice in those cases; it does not indicate Parliament's intention specifically to exclude natural justice in other circumstances. In short, the onus is on the decision-maker to show Parliament's clear intent to exempt him from complying with natural justice or procedural fairness.

four decision,[16] however, the Supreme Court of Canada reversed the Ontario Court of Appeal, and reinstated the result reached by Hughes J.—thereby quashing the termination of Nicholson's employment (which by then had exceeded the eighteen month probation period!).

Two principal issues underlie the majority decision of the Supreme Court, written by Chief Justice Laskin:

1. Was the status of a probationary constable sufficient to attract the principles of natural justice to termination proceedings?

and 2. Is there a general duty to be fair even if the principles of natural justice do not apply?

The first issue raises the question whether a probationary constable occupies an "office" which cannot be terminated without cause (to which the principles of natural justice apply, following *Ridge* v. *Baldwin*) or is a mere employee who can be dismissed at pleasure. Indeed, this precise issue divided Hughes J. and the Court of Appeal. Chief Justice Laskin, however, held[17] that the lower courts' references to the common law position of policemen were inapt in light of the existence of the Police Act, which made no reference whatever to the concept of employment "at pleasure". It was therefore not necessary to rely upon the *Constitutional Reference* case[18] (as Hughes J. had done) to fit Nicholson's employment into the third category adopted by Lord Reid in *Ridge* v. *Baldwin*, instead of into the second.[19] Nor was it necessary to re-examine whether the law should continue to recognize employment at pleasure, even in light of the decision by the House of Lords in *Malloch* v. *Aberdeen Corporation*.[20] Rather, Chief Justice Laskin held that the Police Act forms a complete code, ". . . a turning away from the old common law rule even in cases where the full [probationary] period of time has not fully run".[21] Accordingly, his Lordship was:[22]

> . . . of the opinion that although the appellant clearly cannot claim the procedural protections afforded to a constable with more than eighteen months' service, he cannot be denied any protection. He should be treated "fairly" not arbitrarily.

It is important to note that this reasoning does not necessarily apply to an employee who truly is engaged at pleasure—although that precise issue did arise in the *McCarthy* case (discussed below).[23] Indeed, this difference in characterizing the nature of Nicholson's employment provides the basis for the dissenting judgment in the Supreme Court. For Martland J. simply held that Nicholson was dismissable at pleasure, that that was the very purpose of the eighteen month probationary period, and that (unlike *Malloch's* case) there were no procedures governing this type of case in the Police Act. Accordingly, Martland J. was of the opinion that

16. Chief Justice Laskin's judgment was concurred in by Ritchie, Spence, Dickson and Estey JJ.; Martland J.'s dissent was concurred in by Pigeon, Beetz and Pratte JJ.
17. (1979) 88 D.L.R. (3d) 671 at 677.
18. *Reference re Power of Municipal Council to Dismiss Chief Constable*, etc. (1957) 7 D.L.R. (2d) 222, 18 C.C.C. 35, [1957] O.R. 28, sub nom. *Re a Reference under the Constitutional Questions Act*.
19. *Supra* n. 12. Lord Reid's three categories in *Ridge* v. *Baldwin* were: first, pure master-servant relationships; secondly, offices held at pleasure; and, thirdly, offices terminable only for cause.
20. [1971] 2 All E.R. 1278 (H.L.).
21. *Supra* n. 17 at 680.
22. *Id.*
23. *See* Part VI.

there was no breach of any legal duty to the appellant in the exercise of this purely administrative function.

This leads to the second issue facing the court: Is there a general duty to be fair even if the principles of natural justice do not apply? Martland J. did not even refer to the "duty to be fair", and it is clear that His Lordship did not recognize it as a concept different from natural justice. Because only an administrative (and not a *quasi*-judicial) function was involved in terminating a probationary constable, the rules of natural justice simply did not apply in this case. *Cedit questio.*

On the other hand, Chief Justice Laskin equally clearly recognized a distinction between the "duty to be fair" and the principles of natural justice. He specifically adopted Megarry J.'s *dictum* in *Bates* v. *Lord Hailsham*:[24]

> that in the sphere of the so-called *quasi*-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness.

The Chief Justice also referred to De Smith's explanation[25] of the relationship between fairness and natural justice, and to the:[26]

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

Finally, the Chief Justice cited several English decisions[27] on the duty to be fair to support his view that this concept is now part of the common law. Because of the unfairness of the method adopted by the Board in deciding to terminate Nicholson, its decision was quashed.

Note that Chief Justice Laskin adopted the concept of the duty to be fair as a remedy for procedural unfairness where no *quasi*-judicial function is involved. He thus tacitly recognized the continuing need to characterize functions as *quasi*-judicial or merely administrative, however difficult that characterization may be. On the one hand, this approach is consistent with the recent English cases; and it undoubtedly permits judicial review of purely administrative functions. On the other hand, it perpetuates the need to distinguish between *quasi*-judicial and merely administrative functions, and it does not decide whether *certiorari* is available as a remedy for a breach of the duty to be fair where no *quasi*-judicial function is involved.[28] Although the seminal importance of *Nicholson* cannot be underestimated, these problems nevertheless were precisely the issues which arose in *McCarthy*[29] and *Martineau* (No. 2).[30]

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24. [1972] 1 W.L.R. 1373 (Ch.D.) at 1378.
25. S. A. De Smith, *Judicial Review of Administrative Action* (3d ed., 1973) at 208-9.
26. *Supra* n. 17 at 681; emphasis added.
27. *Pearlberg* v. *Varty (Inspector of Taxes)* [1972] 1 W.L.R. 534 (H.L.); *Furnell* v. *Whangarei High Schools Board* [1973] A.C. 660 (P.C.); *Russel* v. *Duke of Norfolk* [1949] 1 All E.R. 109, 118; *Selvarojan* v. *Race Relations Board* [1976] 1 All E.R. 13 (C.A.).
28. In *McCarthy*, it was argued by the School Board that *Nicholson* should be confined to proceedings under the Ontario Judicial Review Procedure Act, and should not be applied to *certiorari* in Alberta. Laycraft J. rejected this narrow interpretation of *Nicholson*, and Dickson J. in *Martineau* (No. 2) confirms that the broader view is correct.
29. *Supra* n. 6.
30. *Supra* n. 3.

IV. THE *CAMPEAU* CASE

The duty to be fair was also an important element in the subsequent decisions of the Appellate Division of the Supreme Court of Alberta in *Campeau Corporation* v. *Council of City of Calgary*,[31] and *Harvie and Glenbow Ranching Ltd.* v. *Calgary Regional Planning Commission*.[32]

Campeau involved an application to the City Council to have the land use classification of certain lands changed from "agricultural-future residential" to "direct control" for a multiple-family development, pursuant to section 106(2) of the former Planning Act.[33] The land in question, however, was ideally suited for a park. After lengthy proceedings, City Council decided not to approve the requested amendment to the land use classification guidelines, even though it also declined to purchase the land for use as a park. The landowner applied to the Trial Division for an order either (i) approving the reclassification, or (ii) directing Council to re-hear the matter without taking into account the land's possible use as a park. Milvain C.J.T.D. rejected this application, after having noted that even an affirmative resolution by Council to reclassify the land would have required further approval by the provincial Planning Board:[34]

> Such being the case I am satisfied the decision was no more than an administrative act, done in the performance of a divided concept as to what was a public duty. The decision is not subject to judicial review and the application before me is dismissed.

The Appellate Division unanimously reversed this decision. Lieberman J.A., writing the opinion for the court—one month before *Nicholson* was decided by the Supreme Court of Canada—noted the "difficulties and uncertainties inherent" in characterizing functions as *quasi*-judicial or merely administrative. He went on to note [indeed, predict!] that:[35]

> . . . there is a discernible trend in the decisions of the Supreme Court of Canada to examine the conduct of a tribunal's proceedings or even the exercise of ministerial discretion where a person's rights are affected in order to determine whether they were conducted and exercised fairly and in good faith. If not, the court will, whenever possible, intervene and right the injustice suffered by the aggrieved party by the use of one of the prerogative writs.

His Lordship then referred at length to the Supreme Court of Canada's decisions in *Roper* v. *Royal Victoria Hospital*;[36] *Minister of Manpower & Immigration* v. *Hardayal*;[37] and *St. John* v. *Fraser*;[38] as well as to the recent English cases on the duty to be fair in purely administrative proceedings.[39]

Notwithstanding this disquisition on the duty to be fair, Lieberman J.A. nevertheless held[40] that it was unnecessary to characterize the council's function in handling the application for reclassification of the land. For the principal basis of His Lordship's judgment does not concern the duty to be fair at all, but rather the use of a statutory power for an

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31. *Supra* n. 5.
32. *Supra* n. 4.
33. R.S.A. 1970, c. 276 (since revised: S.A. 1977, c. 89).
34. (1978) 8 A.R. 77 at 86.
35. (1979) 7 Alta. L.R. (2d) at 302.
36. [1975] 2 S.C.R. 62, 50 D.L.R. (3d) 725.
37. [1978] 1 S.C.R. 470, 75 D.L.R. (3d) 465, 15 N.R. 396, *revg.* [1976] 2 F.C. 746, 67 D.L.R. (3d) 738.
38. [1935] S.C.R. 441, 64 C.C.C. 90, [1935] 3 D.L.R. 465.
39. *Supra* n. 1.
40. *Supra* n. 35.

improper purpose—namely, to acquire a park without paying full market value for it. Yet a breach of the principles of natural justice (or of the duty to be fair) has traditionally been treated as a separate ground for judicial review from actions made for an improper purpose, or based on irrelevant evidence, or on the lack of relevant evidence, or those which are simply *ultra vires* the governing legislation. Of course, in some circumstances, the procedures used by administrators acting in bad faith or for an improper purpose or on irrelevant evidence *may* also contravene the principles of natural justice (or the duty to adopt fair procedures). But, with respect, this coincidence of grounds for judicial review is precisely that: a coincidence. Accordingly, it is submitted that the real *ratio decidendi* of the *Campeau* decision concerns improper purpose, which is a substantive matter, and not procedural unfairness. Nevertheless, Lieberman J.A.'s *obiter dicta* on the duty to be fair accurately presaged the subsequent development of the law.[41]

V. THE *HARVIE* CASE

Although decided after *Nicholson* had been reported, and despite numerous references to the duty to be fair, the *ratio decidendi* of the unanimous judgment of the Appellate Division in *Harvie and Glenbow Ranches Ltd.* v. *Calgary Regional Planning Commission*[42] clearly characterizes the subdivision process in Alberta as *quasi*-judicial. Accordingly, the court held that Glenbow Ranches Ltd. had the right to notice and to appear before the Planning Commission on an application by a neighbouring landowner to subdivide the latter's land. The duty to be fair, in this case, did not stand in contradistinction to the principles of natural justice, but rather was relevant to concluding that there was a *quasi*-judicial function involved. The judgment, therefore, demonstrates the elastic nature of the concept of a *quasi*-judicial function.

To reach this conclusion, it was necessary for the court to overcome the judgment in a strikingly similar English case, *Gregory* v. *London Borough of Camden*,[43] to the effect that a neighbouring landowner has no "rights" affected when subdivision on development approval is granted to the applicant. This precedent, and his perception that subdivision was merely a "mechanical process",[44] had led Quigley J. to refuse judicial review over a purely administrative function. Clement J.A., writing for the unanimous court[45] on appeal, came to a different conclusion. First, he noted that it is not possible to compartmentalize judicial and administrative functions, and that the label of "*quasi*-judicial" is apt to describe a composite function which involves both judicial and administrative duties.[46] Secondly, His Lordship rejected the argument that a *quasi*-judicial function was not involved because none of Glenbow's *rights* were involved.[47] He quoted the following passage from the judgment of Martland J. in *Calgary Power Ltd.* v. *Copithorne*:[48]

41. Particularly in *Nicholson*, decided on October 3, 1978—just about a month after Lieberman J.A.'s judgment in *Campeau* (rendered on September 8, 1978).
42. *Supra* n. 4.
43. [1966] 1 W.L.R. 899, [1966] 2 All E.R. 196 (Q.B.).
44. (1978) 5 Alta. L.R. (2d) 301 at 303.
45. Composed of Clement, Moir and Haddad JJ.A.—the latter two of whom formed the court with Lieberman J.A. in *Campeau*.
46. *Supra* n. 4 at 180.
47. *Id.* at 180-185.
48. *Id.* at 180; emphasis added.

> With respect to the first point, the respondent submitted that a function is of a judicial or *quasi*-judicial character when the exercise of it effects the extinguishment or modification of private rights or interests in favour of another person, unless a contrary intent clearly appears from the statute. *This proposition, it appears to me, goes too far in seeking to define functions of a judicial or* quasi-*judicial character.* In determining whether or not a body or an individual is exercising judicial or *quasi*-judicial duties, *it is necessary to examine the defined scope of its functions and then to determine whether or not there is imposed a duty to act judicially.* . . .

Now Martland J.'s judgment in *Calgary Power*[49] has generally been interpreted to mean that there are two necessary requirements for the existence of a *quasi*-judicial function: first, that *rights* are affected; and, secondly, that there is a super-added duty to act judicially. Indeed, Martland J. in *Calgary Power* goes on to quote Lord Chief Justice Hewart's famous *dictum* to this effect from *R.* v. *Church Assembly Legislative Committee; ex p. Haynes Smith*:[50]

> In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be super-added to that characteristic the further characteristic that the body has the duty to act judicially.

Clement J.A., however, referred to *Nicholson,* and rejected this traditional test. To paraphrase, he said that the traditional proposition that rights must be affected went too far in seeking to define a judicial or *quasi*-judicial function.[51] He accepted de Smith's view[52] that:

> . . . the term "rights" is to be understood in a very broad sense, and it is not to be confined to the jurisprudential concept of rights to which correlative legal duties are annexed. It comprises an extensive range of legally recognized interests, the categories of which have never been closed.

Although Glenbow Ranches did not have any cause of action against either the developer or the Commission, nevertheless Clement J.A. held that its interests were so affected by the proposed subdivision that judicial review should issue in the circumstances:[53]

> Administrative law in the statutory sense reflects the concepts of legislatures to meet the difficulties in society arising out of increasing population densities, changing relationships between subjects and between subjects and government, and other societal stresses. The new concepts are expressed in a legislative framework in which various rights, interests, duties and powers are created, for varied purposes and objectives, many unknown to the common law and some of far-reaching effect on traditional concepts. All of these must be given their proper effect. Jurisdiction over their administration is entrusted to newly-created tribunals or, in some cases, to existing tribunals. It is, in my view, necessary to the maintenance of the supervisory jurisdiction of the courts in the general public interest that these new rights and interests be viewed and weighed in the light of the legislative concept that created them, not in the shadow of narrower considerations expressed in times past under different societal conditions. When a new right or interest has been created by statute it must be examined, not in isolation, but in the context of the whole. I am of opinion that the nature and extent of the right or interest is a vitally important facet of the complex judicial process necessary to determine whether, in a particular case, there is a duty on a tribunal to conform wholly or to some degree to the principles of natural justice in coming to a decision affecting the person asserting the interest.

This passage justifies the extension of the concept of a *quasi*-judicial function to a process which only affects "interests" and not technical

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49. [1959] S.C.R. 24 at 30-34.
50. [1928] 1 K.B. 411 at 415.
51. *Supra* n. 4 at 183.
52. *Op. cit., supra* n. 25 at 344.
53. *Supra* n. 4 at 184.

"rights". Unfortunately, it still maintains the distinction between *quasi*-judicial and merely administrative powers, and thus the need to characterize functions. At some point, it simply will not be possible to stretch the elastic concept of *quasi*-judicial to cover a purely administrative function which clearly cries out for judicial review. Thus, with respect, it is unfortunate that Clement J.A. did not follow *Nicholson* (from which he quoted extensively)[54] to its logical conclusion, nor did he in the end give effect to his bold statement of the expanding ambit of judicial review:[55]

> In late years there has been an emerging recognition that the supervisory jurisdiction of the court must keep pace with the increasing variety and scope of what are classified as administrative functions of tribunals, when a decision in the exercise of such functions has an appreciable effect on a right or interest of a subject which is, in the view of the court, of sufficient importance to warrant recognition.

The duty to be fair, therefore, in *Harvie* was relevant because its breach constituted a breach of the principles of natural justice, which applied because a *quasi*-judicial function was involved.

VI. THE *McCARTHY* CASE

A bolder approach to the duty to be fair was taken by the Court of Appeal in unanimously upholding Laycraft J.'s judgment in *McCarthy* v. *Board of Trustees of Calgary Roman Catholic Separate School District No. 1 et al.*[56] Mr. McCarthy was the superintendent of the Calgary Separate School system, and was dismissed by the Board without notice and without reasons. He sought (*inter alia*) *certiorari* to quash his purported dismissal; and the Board countered by asking for a preliminary determination whether *certiorari* could even apply in these circumstances, which it said involved only a master-servant relationship. Milvain C.J.T.D. rejected[57] the Board's application for a preliminary determination, but this was reversed by the Court of Appeal.[58] Laycraft J.'s judgment, therefore, deals with the availability of *certiorari* in these circumstances.

Laycraft J. held[59] that McCarthy occupied a statutory office under the School Act,[60] and that the reasoning adopted by the majority of the Supreme Court of Canada in *Nicholson* applied squarely to this case. Nevertheless, the Board argued that *Nicholson* was decided under the Ontario Judicial Review Procedure Act,[61] and was not authority in Alberta for extending the availability of *certiorari* to supervise the exercise of a purely administrative function. Laycraft J. rejected this argument, even though he specifically held that:[62]

> . . . the function of the board in this case must be characterized as administrative and not as judicial or *quasi*-judicial in the sense that those terms have been distinguished from each other in Canadian cases.

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54. *Id.* at 185-187.
55. *Id.* at 185.
56. [1979] 4 W.W.R. 725. *See supra* n. 6.
57. On November 20, 1978; *Id.* at 727.
58. *Id.* at 728-9.
59. *Id.* at 731-734.
60. R.S.A. 1970, c. 329.
61. S.O. 1971, c. 48.
62. *Supra* n. 56 at 735.

But this characterization clearly poses the problem so neatly avoided by Lieberman J.A. in *Campeau* and Clement J.A. in *Harvie* who both managed to eke a *quasi*-judicial function out of the statutory powers involved in those cases. By holding that only an administrative function was involved in *McCarthy*, Laycraft J. had to consider both (i) whether the duty to be fair had been breached, and also (ii) whether *certiorari* was even available as a remedy for such a breach. His Lordship held that *Nicholson* not only recognized the right of the citizen to fairness in administrative procedure, but also necessarily recognized that *certiorari* was available to enforce that right:[63]

> To hold otherwise is to say that, though administrative acts in Alberta are subject to control by the courts, the only means of control is by the declaratory action. In some cases that result may follow as, for example, where the record produced on the motion under the Crown Practice Rules is inadequate or where the court in the exercise of its discretion decides that the case is not appropriate for a prerogative writ. In many cases, however, it would be highly undesirable that there be no power to quash an administrative decision made contrary to statutory power. When the Supreme Court of Canada recognized the right of the citizen to fair treatment in the exercise of such powers, it must also be taken to have recognized the traditional remedy by which the right might be enforced.

Accordingly, *certiorari* is available to correct a breach of the duty to be fair, even where only an administrative function is involved. It is no longer necessary to stretch the concept of a *quasi*-judicial function to fit the particular facts in which it is alleged that a breach of procedural fairness has occurred. Nor is it necessary to find some other remedy (such as a declaration) for procedural unfairness in a purely administrative matter. In other words, the tautology that *certiorari* is only available to correct breaches of the principles of natural justice, which are only relevant to *quasi*-judicial functions, has been broken.

Laycraft J.'s judgment was unanimously upheld by the Court of Appeal,[64] and must be taken now to represent the law of Alberta—particularly in light of the subsequent decision of the Supreme Court of Canada in *Martineau* (No. 2).

VII. *MARTINEAU* (No. 2)

Precisely the same question which confronted Laycraft J. and the Alberta Court of Appeal in *McCarthy* faced the Supreme Court of Canada in *Martineau* v. *Matsqui Institution Disciplinary Board* (No. 2):[65] is *certiorari* available to remedy a breach of the duty to be fair when a purely administrative function is involved? Although the Supreme Court was unanimous in granting *certiorari*, it divided six-to-three[66] in the reasons for this outcome. The reasoning adopted by the court is, therefore, extremely relevant to the Alberta cases on the duty to be fair, even though *Martineau* arose under the peculiar provisions of the Federal Court Act.[67]

Mr. Martineau was sentenced to fifteen days in solitary confinement for a "flagrant or serious" disciplinary offence. His application for judicial review under section 28 of the Federal Court Act was rejected by

63. *Id.* at 737.
64. In October 1979; unreported.
65. [1980] 1 S.C.R. 602.
66. Martland, Ritchie, Beetz, Estey and Pratte JJ. concurred with Pigeon J.; Laskin C.J.C. and McIntyre J. concurred with Dickson J.'s reasons.
67. R.S.C. 1970 (2d Supp.), c. 10.

the Supreme Court of Canada in *Martineau* (No. 1),[68] because the "directives" governing the procedure for dealing with disciplinary offences were administrative rather than "law", and therefore could not be *quasi*-judicial in nature. Martineau, therefore, proceeded with his second action, under section 18 of the Federal Court Act, for an order of *certiorari* to quash the Disciplinary Board's decision. Mahoney J. at first instance, treating the matter as an application for a preliminary determination of a question of law, held that:[69]

> . . . a public body, such as the respondent, authorized by law to impose a punishment, that was more than a mere denial of privileges, had a duty to act fairly in arriving at its decision to impose the punishment. Any other conclusion would be repugnant. The circumstances disclosed in this application would appear to be appropriate to the remedy sought. I am not, of course, deciding whether the remedy should be granted but merely whether it could be granted by the Federal Court of Canada, Trial Division. In my view it could.

The Federal Court of Appeal reversed this[70] on the basis that a conviction for a disciplinary offence was a purely administrative function with respect to which *certiorari* was not available. The consequence of this view, of course, is that Parliament must be taken to have transferred all supervising jurisdiction over *quasi*-judicial federal bodies to the Federal Court of Appeal under section 28 of the Act, so that the reference in section 18 to *certiorari* in the Trial Division is hollow, leaving no effective judicial review over purely administrative functions.

Pigeon J., writing for the majority of the Supreme Court, refused to accept this view of the law. Rather, he understood *Nicholson* to stand for the "common law principle":[71]

> . . . that in the sphere of the so-called *quasi*-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness[.];

and the further principle that a breach of the duty could be enforced by judicial review. Policy may require that full-blown judicial procedures not be applicable to disciplinary proceedings,[72] thereby preventing their characterization as *quasi*-judicial for the purpose of judicial review under section 28 of the Federal Court Act. Nevertheless, there is still a general supervisory jurisdiction to ensure that purely administrative proceedings are conducted fairly—and, under the Act, that jurisdiction is assigned to the Trial Division under section 18. Although:[73]

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

Pigeon J. upheld[74] Mahoney J.'s ruling that *certiorari* is available under section 18 of the Federal Court Act to supervise a breach of the duty to be fair in purely administrative proceedings.

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68. [1976] 2 F.C. 198 (F.C.A.); [1978] 1 S.C.R. 118.
69. [1978] 1 F.C. 312 (F.C.T.D.) at 318-9.
70. [1978] 2 F.C. 637 (F.C.A.).
71. *Supra* n. 65 at 634. Quoting (with emphasis added) from Megarry J.'s judgment in *Bates* v. *Lord Hailsham* [1972] 3 All E.R. 1019 at 1024; 1 W.L.R. 1373 at 1378 (H.L.); and referring specifically to *Nicholson* as the acceptance in Canada of the duty to be fair as a "common law principle".
72. *Supra* n. 65 at 636-637.
73. *Id.* at 637.
74. *Id.* Note that—curiously—Pigeon J. referred to the proceeding under section 28 of the Federal Court Act as being "in the nature of a right of appeal". Is this to be contrasted to judicial review?

While the remaining three members of the court concurred in the outcome reached by Pigeon J., the reasons written on their behalf by Dickson J. were considerably lengthier, and addressed three specific issues: first, sorting out the respective supervisory jurisdictions of the Trial and Appellate Divisions of the Federal Court under sections 18 and 28 of the Act; secondly, the duty to act fairly; and, finally, the ambit of *certiorari* in Canada.

On the first issue, Dickson J. agreed with Pigeon J. both in the present case, and his *dicta* in *Howarth* v. *National Parole Board*,[75] in rejecting the Federal Court of Appeal's interpretation that section 28 of the Act completely supplants the jurisdiction of the Trial Division to grant *certiorari*. While a breach of the duty to be fair by itself alone is not sufficient to bring an administrative body within the definition of "*quasi*-judicial" required to give the Federal Court of Appeal jurisdiction under section 28,[76] the converse is not true either. Therefore, while the lack of a *quasi*-judicial function may well deprive the Court of Appeal of jurisdiction, it does not mean that the Trial Division cannot remedy a breach of the duty to be fair.[77] And the duty to be fair is procedural in nature, and means more than merely good faith.[78]

Dickson J. then turned his attention to the availability of *certiorari* to remedy a breach of the duty to be fair procedurally. He referred to Atkin L.J.'s famous quotation in *R.* v. *Electricity Commissioners, ex. p. London Electricity Joint Committee Company (1920), Limited*:[79]

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling authority of the King's Bench Division exercised in these Writs.

Dickson J. noted the danger of construing this quotation too restrictively. In particular:[80]

> There has been an unfortunate tendency to treat "rights" in the narrow sense of rights to which correlative legal duties attach. In this sense, "rights" are frequently contrasted with "privileges", in the mistaken belief that only the former can ground judicial review of the decision-maker's actions.

His Lordship thus rejected such a narrow concentration on "rights", and focussed instead on the public policy underlying judicial review:[81]

> When concerned with individual cases and aggrieved persons, there is the tendency to forget that one is dealing with public law remedies, which, when granted by the courts, not only set aright individual injustice, but also ensure that public bodies exercising powers affecting citizens heed the jurisdiction granted to them. *Certiorari* stems from the assumption by the courts of supervisory powers over certain tribunals in order to assure the proper functioning of the machinery of government. To give a narrow or technical interpretation to "rights" in an individual sense is to misconceive the broader purpose of judicial review of administrative action. *One should, I suggest, begin with the premise that any public body exercising power over subjects may be amenable to*

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75. [1976] 1 S.C.R. 453.
76. *Supra* n. 65 at p. 613 of Dickson J.'s judgment. Note, however, that a breach of the duty to act fairly may predispose the court to characterize an impugned function as being *quasi*-judicial as occurred in both the *Campeau* (No. 1) and *Harvie* cases discussed above.
77. *See also The Minister of Manpower and Immigration* v. *Hardayal* [1978] 1 S.C.R. 470, 479; *Roper* v. *Executive of Medical Board of Royal Victoria Hospital* [1975] 2 S.C.R. 62, 67.
78. *Supra* n. 65 at 614.
79. [1924] 1 K.B. 171 (C.A.). Quoted *supra* n. 65 at 617.
80. *Supra* n. 65 at 618.
81. *Id.* at 619; emphasis added.

judicial supervision, the individual interest involved being but one factor to be considered in resolving the broad policy question of the nature of review appropriate for the particular administrative body.

If judicial review will issue even where "rights" are not technically affected, must there nevertheless be a duty to act judicially before *certiorari* is available? Again, Dickson J. rejected such a restriction on the availability of *certiorari*—relying principally upon Lord Reid's judgment in *Ridge* v. *Baldwin*, and on the now long line of English cases on the duty to be fair.[82] These authorities indicated to His Lordship that:[83]

> . . . the application of a duty of fairness with procedural content does not depend upon proof of a judicial or *quasi*-judicial function. *Even though the function is analytically administrative, courts may intervene in a suitable case.* . . . In my opinion, *certiorari* avails as a remedy wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person.

What, then, is the relationship of the principles of natural justice to the duty to be fair? As the reader will recall, Laskin C.J.C. in the *Nicholson* case and Laycraft J. in the *McCarthy* case both treated the duty to be fair as quite distinct from the existence of a *quasi*-judicial power on the one hand, or natural justice on the other. Both Lieberman J.A. in *Campeau* and Clement J.A. in *Harvie,* by contrast, used the concept of fairness to establish that a *quasi*-judicial function was involved, and that the principles of natural justice had been breached. Dickson J. in *Martineau* (No. 2) deals with this contradiction expressly:[84]

> Conceptually, there is much to be said against such a differentiation between traditional natural justice and procedural fairness, but if one is forced to cast judicial review in traditional classification terms as is the case under the Federal Court Act, there can be no doubt that procedural fairness extends well beyond the realm of the judicial and *quasi*-judicial, as commonly understood.

Thus:[85]

> In general, courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework. The Federal Court Act, however, compels classification for review of federal decision-makers.

Finally, Dickson J. had to determine whether the duty to be fair applied in disciplinary cases. He noted that there were a number of precedents for the courts refusing to review disciplinary procedures.[86] Nevertheless, Dickson J. held that, while these may be counsels of caution, the rule of law must run within penitentiary walls:[87]

> It seems clear that although the courts will not readily interfere in the exercise of disciplinary powers, whether in the armed services, the police force or the penitentiary,

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82. In particular, *R.* v. *London Borough of Hillington, ex p. Royco Homes Ltd.* [1974] 2 All E.R. 643 (Q.B.D.); *R.* v. *Barnsley Metropolitan Borough Council, ex p. Hook* [1976] 3 All E.R. 452; *In re H.K. (an infant)* [1967] 2 Q.B. 617; *Liverpool Taxi Owners* case [1972] 2 All E.R. 589; *Furnell* v. *Whangarei High Schools Board* [1973] A.C. 660 (P.C.).

83. *Supra* n. 65 at 622-3; emphasis added.

84. *Id.* at 623.

85. *Id.* at 629.

86. In particular, *R.* v. *Army Council, ex p. Ravenscroft* [1917] 2 K.B. 504; *Dawkins* v. *Lord Rolseby,* L.R. 8 Q.B. 255; *Re Armstrong and Whitehead* [1973] 2 O.R. 495; *Fraser* v. *Mudge* [1975] 3 All E.R. 78 (C.A.); *R.* v. *Board of Visitors of Hull Prison, ex p. St. Germain* [1979] 2 W.L.R. 42 (C.A.), *revg.* [1978] 2 W.L.R. 598 (Div. Ct.); *Daemar* v. *Hall* [1978] 2 N.Z.L.R. 594; *The Queen and Archer* v. *White* [1956] S.C.R. 154; *Regina* v. *Institutional Head of Beaver Creek Correctional Camp, ex p. McCaud* [1969] 1 C.C.C. 371; *Wolff* v. *McDonnell,* 418 U.S. 539 (1975).

87. *Supra* n. 65 at 628.

> there is no rule of law which necessarily exempts the exercise of such disciplinary powers from review by *certiorari.*

Accordingly, Dickson J., on behalf of the minority of the court, concurred with Pigeon J.'s conclusion that, in principle, *certiorari* was available to review the disciplinary proceedings complained of by Mr. Martineau.

VIII. CONCLUSION

One must conclude, therefore, that these five cases have significantly extended the ambit of judicial review in Canada. The duty to be fair is now undoubtedly part of our law. And a breach of the duty to be fair can be corrected by *certiorari,* even if no judicial or *quasi*-judicial function is involved.

Instead of characterizing functions as judicial or administrative, the courts must now concentrate squarely on the real question which has always been before them: Was the procedure used in this case fair in all the circumstances? While different judges may answer this question differently, and it may therefore be difficult to advise either clients or administrators of the answer to that question, it is nevertheless submitted that this approach is totally consistent with the policy underlying the historical judical power to review procedures for breaches of natural justice—to ensure that justice is not only done, but manifestly and undoubtedly perceived to be done. It is submitted, therefore, that the courts' recognition of the duty to be fair should be welcomed by everyone concerned with Administrative Law.

Alas, however, it is probably too early to forget about *quasi*-judicial functions. In the first place, there is still the great danger that other courts in the future will unduly narrow the duty to be fair to apply only to those functions which otherwise would be called *quasi*-judicial. In effect, this would adopt the very same technique used by Lieberman J.A. in *Campeau* and Clement J.A. in *Harvie*—to equate the duty to be fair with the existence of a *quasi*-judicial function—but for the reverse purpose of narrowing judicial review. So long as judges are human, different ones are going to decide differently that fairness was or was not breached in a particular case. What must be avoided, however, is attempting to justify those decisions by reference to the obsolete tool of characterizing the function as purely administrative.

Secondly, the concept of a *quasi*-judicial function is likely to remain important for determining whether that function may be delegated without breaching the rule that *delegatus non potest delegare.*[88] Similarly, administrators' immunity from suit is likely to continue to refer to the qualified immunity of a judicial or *quasi*-judicial officer.[89]

Finally, the duty to be fair does not affect legislative functions at all.[90] Those cases which say that the exercise of a legislative function for an improper purpose is *ultra vires* do not relate to the *procedure* used. Hence, *Campeau* is not really on point. Indeed, for some reason the principles of

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88. *See, e.g., Vic Restaurant* v. *The City of Montreal* (1959) 17 D.C.R. (2d) 813 (S.C.C.); *A.G. (Can.)* v. *Brent* [1956] S.C.R. 318; and *Brant Dairy Co. Ltd.* v. *Milk Commission of Ontario* (1973) 30 D.L.R. (3d) 559 (S.C.C.).

89. *See de Smith, supra* n. 25 at 97-98; 106-107; f. pp. 295-296.

90. *See* the decision of the Alberta Court of Appeal in *Campeau* (No. 2), unreported, judgment rendered May 23, 1980. *Sed quaere* the duty to be fair should not apply to the exercise of legislative powers—particularly delegated legislative powers.

natural justice have never applied to the exercise of a legislative power, and this principle has not been affected at all by the development of the duty to be fair. The distinction between a legislative function on the one hand, and a judicial, *quasi*-judicial or administrative one on the other hand, will continue to be important.

Nevertheless, the duty to be fair is undoubtedly one of the most important recent developments in Canadian Administrative Law.