PRINCIPLES OF ADMINISTRATIVE LAW

Second Edition

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of their inherent jurisdiction to review the *vires* of actions taken by delegates pursuant to statute.

The effect of privative clauses can be obtained in several different ways. As discussed above, the most obvious way is for the legislation to state expressly that the administrator's action shall not be reviewed in any court. The legislation could either specifically prevent the court from issuing any of the remedies available for judicial review, or could specifically abolish the grounds for judicial review, or both. Alternatively, the legislation could extend the jurisdiction of the delegate so far that the ambit for judicial review is reduced to virtually nothing. This results from the exact but inverse relationship between the ambit of the delegate's jurisdiction and the scope of the *ultra vires* doctrine. In particular, the possibility of judicial review becomes minimal if the legislation delegates powers in very subjective terms, such as the British courts held in *Liversidge v. Anderson*[53] where the Secretary of State was given power to intern anyone whom he suspected of being an enemy alien. Short of an out-and-out malicious formation of the suspicion,[54] it would be virtually impossible for the courts to say that the delegate had transgressed the ambit of the discretionary power granted to him by the legislation.

Astonishingly, privative clauses do not always achieve their objective. In particular, the courts have consistently held that jurisdictional errors mean that no lawful decision has been taken by the delegate, so that there is nothing to be protected from judicial review by the privative clause.[55] Indeed, this view has frequently been applied to strike down breaches of natural justice which could only be done if such breaches are jurisdictional in nature and therefore incapable of being preserved by a privative clause.[56]

The Supreme Court of Canada has recently recognized the tension created by the desirability for judicial review of administrative action and the sovereign ability of the legislative branch to enact privative clauses.[57] In the end, the "perfect" privative clause would prevent all judicial review,

53 [1941] 3 All E.R. 338 (H.L.). The actual wording of delegation of power was in much more objective terms than the decision of their Lordships would lead one to believe, *viz.* [16 p. 341]:

> "If the Secretary of State has *reasonable cause* to believe any person to be of hostile origin or association . . .and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained". [Emphasis added.]

For an interesting postscript on the controversy caused by this case, and particularly by Lord Atkin's famous dissent, see Heuston, "*Liversidge v. Anderson* in Retrospect", (1970) 86 L.Q. Rev. 33.

54 Which would generally be very difficult to prove, particularly in a proceeding for a prerogative remedy where discovery is not available. Compare the situation in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, which was an action for damages in delict (tort), where the premier's malice came out in cross-examination.

55 See, *e.g.*, *Metro Life Ins. Co. v. Int. Union of Operating Engineers*, [1970] S.C.R. 425; *Anisminic Ltd. v. Foreign Comp. Comm.*, [1969] 2 A.C. 147.

56 *Alliance des Professeurs Catholiques de Montreal v. Que. Lab. Rel. Bd.*, [1953] 2 S.C.R. 140; *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 S.C.R. 18.

57 *Crévier v. A.G. Que.*, [1981] 2 S.C.R. 220.

by the Clement Committee Report in Alberta in 1966.[310] The latter deals with the issue as follows:

> Individuals have the right to know the reasons for a decision that has been come to by a tribunal.

This point also was the subject of unanimous criticism and complaint in submissions which touched on specific tribunals, and is a matter that has greatly exercised writers and commentators on civil liberties. It is interesting to compare the views on this point of three important committees. In the *Franks Report* the following was said:

> Almost all witnesses have advocated the giving of reasoned decisions by tribunals. We are convinced that if tribunal proceedings are to be fair to the citizen, reasons should be given to the fullest practicable extent. A decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more likely to have been properly thought out. Further, a reasoned decision is essential in order that, where there is a right of appeal, the applicant can assess whether he has good grounds of appeal and know the case he will have to meet if he decides to appeal. It is true that, in the simpler types of case, particularly where the decision turns on the expert judgment of the tribunal itself rather than on the application of stated law to proven fact, it may only be possible to give a brief statement of reasons, for example that the evidence of one party has been preferred to the evidence of the other, or that having heard the arguments and inspected the premises the tribunal considers that the rent should be X. But generally fuller reasons for decisions can be given.

The Attorney General's Committee on Administrative Procedure (the *Acheson Report*, U.S. Government Printing Office, 1941) contains the following observation:

> For, in the first place, the requirement of an opinion provides considerable assurance that the case will be thought through by the deciding authority. There is a salutary discipline in formulating reasons for a result, a discipline wholly absent where there is freedom to announce a naked conclusion. Error and carelessness may be squeezed out in the opinion-shaping process. Secondly, the exposure of reasoning to public scrutiny and criticism is healthy. An agency will benefit from having its decision run the professional and academic gauntlet. Third, the parties to a proceeding will be better satisfied if they are enabled to know the basis of the decision affecting them. Often they may assign the most improbable reasons if told none.

310 *Report of the Special Committee on Boards and Tribunals to the Legislative Assembly of Alberta*, 1966 (the "Clement Report").

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313 Section 12 of the 1971 Eng
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(6th ed., 1989) at 934-7.
314 R.S.A. 1980, c. A-2.

An emerging trend has suggested that the failure to give reasons, in certain circumstances, may breach the duty to be fair, even where there is no statutory requirement. In *Rainbow v. Central Okanagan School District No. 23*,[303] the court examined such factors as the overall statutory scheme, the rights affected by the decision, and the impact the decision would have upon the appellant. In *Hutfield v. Board of Fort Saskatchewan General Hospital District No. 98*,[304] the court held that the absence of reasons, in conjunction with other procedural improprieties, was sufficient to negate a fair hearing.[305] A failure to give reasons was also fatal in *Re Pacific Western Airlines Ltd.*,[306] although there was no statutory requirement to do so. The Commission found that reasons were required because of a growing judicial trend to enhance procedural fairness, ensuring a meaningful right of appeal, and to ensure public confidence.

(ii) Statutory requirements for reasons

Notwithstanding the traditional common law position, fairness (and the perception of fairness) in administrative decision-making dictates that the persons affected by a decision should know why it has been reached.[307] This is all the more true where there is a right of appeal, or where the availability of judicial review depends on the ability to demonstrate that the delegate's reasoning contained either a jurisdictional error or an intra-jurisdictional error of law on the face of the record. Without reasons, it may be impossible to correct a bad result, arrived at on irrelevant evidence, in bad faith, for an improper purpose[308] or as a result of bias (to cite only some examples). This point was one of the great reforms advocated by the *Report of the Franks Committee on Tribunals and Inquiries*[309] in England in 1957, and subsequently

All Souls Review of Administrative Law in the United Kingdom, (1988) c. 3; S.R. Ellis, C. Tretheway, F. Rotter, "Tribunals — Reasons, and Reasons for Reasons", (1990-91) 4 C.J.A.L.P. 105.

303 (1990) 45 Admin. L.R. 273.

304 (1986) 49 Alta. L.R. (2d) 256.

305 It is unclear how the absence of reasons made the hearing itself unfair. What does the failure to give reasons indicate about the fairness of the hearing itself? See D.P Jones, "A Comment on Legitimate Expectations and the Duty to Give Reasons in Administrative Law", (1986) 25 Alta. L.R. 512.

306 (1984) 9 Admin. L.R. 109 (C.T.C.).

307 There has also been some support for the requirement of reasons under s. 7 of the *Charter of Rights and Freedoms*. See *D & H Holdings Ltd. v. Vancouver (City)*, (1985) 15 Admin. L.R. 209 (B.C.S.C.); *Cadieux v. Mountain Institution*, (1984) 9 Admin. L.R. 50 (Fed. T.D.); *Canada (Department of Employment & Immigration) c. Cushnie*, (1988) 35 Admin. L.R. 38 (Que. C.A.).

308 *E.g.*, in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, where the premier (in discovery) gave his improper reason for cancelling Roncarelli's liquor licence.

309 *Report of the Committee on Administrative Tribunals and Inquiries* (the "Franks Committee Report"), (England: 1957, Cmnd. 219). See also *The Report of the Donoughmore Committee on Ministers' Powers* (England: 1932, Cmd. 4060), pp. 80, 100.

was not unlimited and it had been used in a manner that did not accord with the intention of the Act which conferred it.

Lord Hodson said:[326]

> The reasons disclosed are not, in my opinion, good reasons for refusing to refer the complaint seeing that they leave out of account altogether the merits of the complaint itself.

Lord Pearce said:[327]

> Thus the independent committee of investigations was corner-stone in the structure of the Act. It was a deliberate safeguard against injustices that might arise from the operation of the scheme.
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> . . .
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> It is quite clear from the Act in question that the Minister is intended to have *some* duty in the matter. It is conceded that he must properly consider the complaint. he cannot throw it unread into the waste paper basket. he cannot simply say (albeit honestly) "I think that in general the investigation of complaints has a disruptive effect on the scheme and leads to more trouble than (on balance) it is worth; I shall therefore never refer anything to the committee of investigation." To allow him to do so would be to give him power to set aside for his period as Minister the obvious intention of parliament, namely that an independent committee set up for the purpose should investigate grievances and that their report should be available to Parliament. This was clearly never intended by the Act.

A general abdication of the minister's power and duty in this fashion was not in accord with Parliament's intention. Similarly, Lord Upjohn outlined that might constitute unlawful behaviour by the minister:

(a) an outright refusal to consider a relevant matter;
(b) misdirecting himself on a point of law:
(c) taking into account some wholly irrelevant or extraneous consideration; or
(d) wholly omitting to take into account a relevant consideration.

If the reasons disclosed that the minister had committed one of these errors and thereby acted unlawfully, he had exceeded his jurisdiction. Even if his discretion was said to be unfettered, this did not unfetter the control which the judiciary had over the executive, namely that in exercising its powers, the latter had to act lawfully; this the court determined by looking at the scope and purpose of the Act in conferring a discretion. The minister, by failing to understand the scope and object of section 19, and of his functions and duties under it, so misdirected himself in law.

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326 *Supra*, note 320 at 958.
327 *Ibid.*, at 960-62.

(iv) What constitutes "reasons"

As the Alberta Court of Appeal noted in *Dome Petroleum Ltd. v. Public Utilities (Alberta)*,[328] the rationale for requiring an administrator to give reasons is

> to enable persons whose rights are adversely affected by an administrative decision to know what the reasons for that decision were. The reasons must be proper, adequate and intelligible. They must also enable the person concerned to assess whether he has grounds of appeal.

This mirrors the approach adopted by the English courts in *Re Poyser and Mills' Arbitration*.[329] The reasons were held to be inadequate because the arbitrator had indicated in his report that certain items were bad and others were good, but he did not identify which was which. As Megaw J. stated:

> I am bound to say this, and again I do not think it was disputed by [counsel for the landlord], that a reason which is as jejune as that reason is not satisfactory, but in my view it goes further than that. The whole purpose of section 12 of the *Tribunals and Inquiries Act*, 1958, was to enable persons whose property, or whose interests, were being affected by some administrative decision or some statutory arbitration to know, if the decision was against them, what the reasons for it were. Up to then, people's property and other interests might be gravely affected by a decision of some official. The decision might be perfectly right, but the person against whom it was made was left with the real grievance that he was not told why the decision had been made. The purpose of section 12 was to remedy that, and to remedy it in relation to arbitrations under this Act. Parliament provided that reasons shall be given, and in my view that must read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised. In my view, it is right to consider that statutory provision as being a provision as to the form which the arbitration award shall take. If those reasons do not fairly comply with that which Parliament intended, then that is an error on the face of the award. It is a material error of form. Here, having regard to paragraph 3, this award, including the reasons, does not comply with the proper form, and that is, in my view, an error of law on the face of the award. . . . I do not say that any minor or trivial error, or failure to give reasons in relation to every particular point that has been

328 2 A.R. 453 at 472 (C.A.) (per Sinclair J.A.), affirmed [1977] 2 S.C.R. 822.

329 [1964] 2 Q.B. 467 at 477-78 (per Megaw J.). Even if the duty to give reasons is not mandatory, failure to do so may imply inadequate reasons, which Megaw J. suggested might constitute a reviewable intra-jurisdictional error of law.

raised on the hearing, will be sufficient ground for invoking the jurisdiction of this court.

Merely parroting the matters which a delegate is required to consider does not constitute a "reason" for his action. For example, a development appeal board is given discretion under the *Alberta Planning Act* to approve certain non-conforming developments if they do not adversely affect the amenities of the neighbourhood.[330] In *Hannley v. Edmonton*,[331] the Court of Appeal struck down a board's decision which merely repeated that the particular development "would not adversely affect the amenities of the neighbourhood" because that did not constitute a "reason" but rather stated a conclusion. A similar result was reached in both *Morin v. Provincial Planning Board*[332] and *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)*.[333]

The fact that reasons are obscure will not of itself make them bad when an inference can be drawn from them to enable a court to deal with the matter.[334] Similarly, although the reasons must demonstrate (necessarily or by implication) that the delegate considered the matters required by statute,[335] the delegate does not need to enumerate each finding of fact.[336] It is not satisfactory that a board restates its policy guidelines to comply with requirements of providing reasons.[337]

In summary, it appears that the test for determining whether the reasons given by a delegate are adequate in law is whether they show why or how or on what evidence the delegate reached the conclusion.[338] If so, then any statutory requirement to give reasons will be satisfied (although the reasons given may disclose another fatal error); if not, that fact alone will constitute a fatal flaw in the exercise of the delegate's power.

(v) The effect of failing to give reasons

The failure to give reasons may invalidate the statutory delegate's actions in two possible ways. First, as the House of Lords noted in *Padfield*,[339] the failure of the minister to give a reason may lead the court to conclude that he had no proper reason for his actions, and must therefore have acted for some improper purpose. As a result of this influence, the delegate's action is necessarily *ultra vires*. This reasoning can apply even where the delegate

330 R.S.A. 1980, c. P-9, s. 69(5).
331 (1978) 7 Alta. L.R. (2d) 394 (C.A.).
332 [1974] 6 W.W.R. 291 (Alta. T.D.).
333 *Supra*, note 333.
334 *Iveagh v. Min. of Housing and Loc. Govt.*, [1964] 1 Q.B. 395 (C.A.).
335 *Morin v. Prov. Planning Bd., supra*, note 337.
336 *Service Employees' Int. Union v. Nipawin Dist. Staff Nurses Assn.*, [1975] 1 S.C.R. 382; *Woolaston v. Min. of Manpower & Immigration*, [1973] S.C.R. 102.
337 *Consumers' Association of Canada (Alta.) v. Alberta (Public Utilities Board)*, (1985) 10 Admin. L.R. 137 (Alta. C.A.).
338 *Couillard v. City of Edmonton and Crown Life Insurance Co.*, (1979) 10 Alta. L.R. (2d) 295 (Alta. C.A.).
339 [1968] 2 W.L.R. 924 (H.L.).

(v) Newfoundland Telephone Co.

In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*[155] a commissioner of the Board chose to express his opinions publicly and vocally regarding an issue that was to come before the Board in a public hearing. The issue was the appellant's wage and benefits policy for its executives. The Newfoundland Court of Appeal found that although there was a reasonable apprehension of bias, the Board's subsequent decision revealed that there had been no actual bias and the Board's ruling was therefore upheld.[156] On appeal, the Supreme Court of Canada overturned that judgment, and addressed the extent of the duty of fairness applicable to this particular Board. Cory J., writing for the Court, noted that the extent of the duty depends upon the nature and function — the context — of the particular tribunal. He referred to the Court's decisions in *Old St. Boniface*[157] and *Save Richmond Farmland Society*[158] which required a determination of the location of the delegate along "the spectrum of administrative bodies whose functions vary from being almost purely adjudicative to being political or policy making in nature".[159] He concluded that, with respect to elected officials, the test of a reasonable apprehension of bias was whether the party had an open mind. However, a board exercising adjudicative functions would be expected to more closely comply with the standards applicable to the courts. A board exercising a policy function was more likely to have greater leeway similar to an elected body.

In *Newfoundland Telephone*, the Court found that the board was exercising two functions at two different times. At the point at which the Board was conducting an investigatory function, the court said that "a wide licence must be given to board members to make public comment. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias."[160] On the other hand, the Court found that once the Board had reached the hearing stage, greater discretion was called for in order to avoid the creation of a reasonable apprehension of bias. The nature of the board member's comments after the hearing process had begun was found to have created

155 (1992) 4 Admin. L.R. (2d) 121 (S.C.C.).

156 In *Nfld. Light & Power Co. v. P.U.C. (Bd.)*, (1987) 25 Admin. L.R. 180, the Newfoundland Court of Appeal had applied similar reasoning. One member of the PUB was a strong consumer advocate, having acted as an advocate for a group of consumers. He then sat on the ultimate adjudication of the dispute. The court held that this did not constitute a reasonable apprehension of bias because the member ultimately decided on the basis of the evidence. This approach is clearly in error, as indicated by the subsequent decision of the Supreme Court in *Newfoundland Telephone, (ibid.)*.

157 *Supra*, note 149.

158 *Supra*, note 141.

159 (1992) 4 Admin. L.R. (2d) 121.

160 *Ibid.*, at 138.

a reasonable apprehension of bias, and therefore the proceedings were found to be unfair and invalid.[161]

The case does not seem entirely clear about whether there is one test (*i.e.*, a test of reasonable apprehension of bias, with a shifting threshold for what would be reasonable, depending on the function and nature of the Board), or two tests, (first, a test of reasonable apprehension of bias for boards exercising adjudicative functions; and, secondly, an open-minded test for elected officials and boards exercising a policy function[162]).

Conflicting policies underly these two approaches. The first policy is the overriding theme — that justice must not only be done, it must be seen to be done — with the result that it is sufficient to invalidate a decision if there is a reasonable apprehension of bias. The second, but conflicting, policy is judicial deference—particularly to elected legislative decision-makers whose functions are inherently partial and not neutral. The discussion by Cory J. seems apt:[163]

> It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards,

161 *Ibid.*, at 126. One of the commissioners of the Board was playing the role of a self-appointed champion of consumers' rights on the board and made several statements to the press against the executive pay policies prior to the public hearing by the Board. The commissioner made such statements as:

> "If they want to give Brait [the chief executive officer of the appellant] and the boys extra fancy pensions, then the shareholders should pay it, not the rate payers," Mr. Wells said.
>
> . . .
>
> "So I want the company hauled in here — all them fat cats with their big pensions — to justify (these expenses) under the public glare . . . I think the rate payers have a right to be assured that we are not permitting this company to be too extravagant."
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> . . .
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> "Who the hell do they think they are?" Mr. Wells asked. "The guys doing the real work, climbing the poles never got any 21 percent increase."
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> . . .
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> The telephone company wants the report kept confidential, "but, who do they think they are," said Mr. Wells. "This document should be public."

162 See pp. 13-14, 15, 17, 18 and 20 of decision.

163 *Ibid.*, at 134.

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a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the Legislature.

(f) Conflicts of Interest

The *National Energy Board* case[164] pinpoints one of the weaknesses of our present regulatory system: the interchange of personnel between the bodies regulated and the regulatory agencies. This interchange provides the regulatory agencies with the expertise which they require in order to understand and regulate their respective industries. Unfortunately, however, there are concomitant disadvantages of this convenient arrangement: first, the tendency of these expert members of the regulatory agencies to view the matters before them from the narrow perspective of their experience of the regulated industry, without taking into account the broader public interest; and secondly, the tendency of persons appointed to regulatory agencies to use their position and experience as a springboard back into the industry at a very high level. However, as much as this flow increases the agencies' expertise, it does not always foster the public's perception of impartiality.[165]

Similar problems arise from the interchange of members of the political government or the public service proper (as opposed to quasi-independent adjudicative or regulatory agencies) with the private sector. How often has

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164 *Supra*, note 122.

165 Former U.S. President Carter was the first to implement a policy prohibiting former members of such agencies from taking employment in the regulated industry for a period of two years after their retirement. See "Carter expects . . .", *The Economist*, 8th Jan. 1977, p.41, where the U.S. President's policy was described as follows:

> Mr. Carter has spoken out against the "revolving door" through which outgoing members of regulatory agencies pass to join up as lobbyists with the firms they have supervised. The new rules extend to two years the period poachers must wait before handling matters they touched as keepers. Retiring officials will also be barred for a year from formal or informal contact with former colleagues for financial gain. The occasional drink, it seems, is still permitted.
>
> The stricter rules apply only to cabinet members and the most senior officials. Unless written into law, they are not easily enforceable. But exacting penalties is hardly the point. Mr. Carter's "code" was felt necessary to dispel public mistrust and has its symbolic side.

President Bill Clinton adopted rules to govern the post-election activities of the members of his campaign officials and transition team. See "Clinton sets tough rules for his transition team, Aides restricted from lobbying federal agencies," Thomas L. Friedman, The New York Times (reprinted in *The Edmonton Journal*, November 14, 1992), which summarizes two aspects of his ethics policy as follows:

> President-elect Bill Clinton issued ethics guidelines on Friday for his transition team, for the first time barring officials for six months after Inauguration Day from lobbying federal agencies they deal with and prohibiting involvement in decisions that could affect their financial or business interests.
>
> . . . Clinton plans presently to issue separate ethics guidelines for members of this administration. Those guidelines are expected to feature a ban on lobbying any federal agency in which an administration official was involved for five years after leaving government. The current ban is one year.

in their dealing with government and a prohibition against taking improper advantage of their previous office when they leave government employment. The *Code* provides a mechanism for ensuring that no conflicts of interest arise as a result of property or financial interests and the post-employment measures are intended to minimize the potential conflicts of interest arising from the prospects of future employment while still employed by the government, from preferential treatment or privileged access to government after leaving it and taking personal advantage of information acquired in the course of official duties.

In Alberta, the provincial government appointed a Conflict of Interest Review Panel, which in February 1990 recommended[170] the adoption of guidelines similar to the Federal Code, but applicable to cabinet ministers and MLAs as well. This report led to the enactment of the *Conflicts of Interest Act*,[171] and to the appointment of an Ethics Commissioner[172] as an officer of the legislature itself. The Act not only prohibits MLAs from performing certain activities (including dealing with the government for a period of time after leaving office[173]), it also requires disclosure of the members[174] financial affairs (and some of that information is available for public viewing). The application of the Act has subsequently been extended to senior public servants and members of administrative agencies.

Greater awareness by the government of possible or perceived conflicts of interest should cause it to exercise greater care in appointing its various officers, particularly to quasi-judicial bodies. For example, in the *National Energy Board* case, there were eight members of the board, all of whom were presumably competent to hear the applications in question. Why, therefore, was it necessary for Crowe to act as chairman of these hearings? At any rate, even if neither Parliament nor the government exhibits much sensitivity to the appearance of justice in appointing high officers of state, the courts should not quail at applying the *nemo judex* rule in the matter which come before them.

3. The Test for Bias

Because the rationale for the *nemo judex* rule lies in the appearance of justice being done, it has long been established that it is not necessary to

170 In February 1990.

171 R.S.A. 1991, c. C-22.1, effective on 1 March 1993.

172 The first Ethics Commissioner is Robert Clark, who had for many years previously been an MLA and party leader.

173 Most Cabinet Ministers in Canada face post-employment restrictions on leaving office. The minimum period of time involved is six months (Alberta, Nova Scotia and Yukon) and the maximum is two years (Federal). There are no post-employment restrictions for Cabinet Ministers in New Brunswick, Prince Edward Island, Quebec and Saskatchewan at present. A 12-month "cooling-off" period exists for Federal public servants. Similar legislated restrictions on board members appear not to exist at the provincial level in Canada.

174 And their immediate families.

demonstrate that a decision-maker is actually biased.[175] Indeed, no evidence can be led to show that the delegate is not in fact biased,[176] because that state of affairs is irrelevant to the issue before the court: namely, is there a reasonable apprehension of bias?[177]

There used to be some confusion as to whether the proper test was (a) a real likelihood, or (b) a reasonable apprehension of bias. Although some commentators have suggested that there is no practical difference between these two tests,[178] the law now appears to be correctly settled in favour of the latter.[179] After all, there may well be circumstances in which there is a "reasonable apprehension" of bias when a detailed examination of the facts might demonstrate no "real likelihood" thereof. Perhaps the converse situation

175 Note that the appellants in the *National Energy Board* case, [1978] 1 S.C.R. 369, reversing (*sub nom. Re Canadian Arctic Gas Pipeline Ltd.*), (1976) 65 D.L.R. (3d) 660, specifically disclaimed that Mr. Crowe was in fact biased. Similarly, the House of Lords indicated that no one could have presumed Lord Cottenham to have allowed his financial interest to affect his order in *Dimes v. Grand Junction Canal Co.*, (1852) 3 H.L. Cas. 759. *A fortiori*, however, the existence of actual bias or hostility will nullify a decision: *Pearson v. Anctil*, [1974] C.A. 19 (Que.).

176 As discussed in the *Ringrose* case, [1976] 4 W.W.R. 712 (S.C.C.). In the Alberta Court of Appeal, [1975] 4 W.W.R. 43 at 48, Prowse J.A. said:

> In my view these cases [*Szilard v. Szasz*, [1955] S.C.R. 3; and *Ghiraradosi v. Min. of Highways (B.C.)*, [1966] S.C.R. 367] merely support the conclusion that when circumstances exist from which a reasonable apprehension of bias arises *evidence is not admissible for the purpose of establishing that a person the law presumes to be biased was not in fact biased.* They do not purport to deal with the question of the admissibility of evidence for the purpose of having the relevant circumstances before the court so that it may consider whether in those circumstances a reasonable apprehension of bias arises. [Emphasis added.]

Although de Grandpré J. referred to Laskin C.J.C.'s decision in *P.P.G. Indus. Can. Ltd v. A.G. Can.*, (1976) 65 D.L.R. (3d) 354 (S.C.C.), he did not appear to notice that the Chief Justice did quite definitely consider evidence, contrary to principle, which showed that Buchanan had not in fact *participated* in the Anti-Dumping Tribunal's decision, although he had signed one copy of it. Nevertheless, that evidence was not directed to bias, but rather to show non-participation.

177 For cases that have inappropriately allowed evidence of actual bias see *Nfld. Light & Power Co. v. P.U.C. (Bd.)*, (1987) 25 Admin. L.R. 180 (NFLD. C.A.) where the court found that a tribunal member's role as an advocate for a particular position did not constitute a reasonable apprehension of bias because the member ultimately decided on the basis of the evidence; and *L.(A) v. Crimes Compensation Board (Sask.)*, [1991] 5 W.W.R. 315 (Q.B.) where Maurice J. noted that there was no reasonable apprehension of bias in the same panel rehearing an issue, because the panel's decision had been quashed for an apprehension of bias, not actual bias.

178 For a discussion of the differences in the tests, see *Metro. Properties Co. (F.G.C.) v. Lannon*, [1969] 1 Q.B. 577 (C.A.), p. 599 *per* Lord Denning M.R., p. 606 *per* Edmund Davies L.J. See also H.W.R. Wade, *Administrative Law*, 5th ed. (Oxford: Clarendon Press, 1982), pp. 430-32; and S.A. de Smith, *Judicial Review of Administrative Action*, 3rd ed. (London: Stevens & Sons Ltd., 1973), pp. 230-32.

179 Accepted by Chief Justice Laskin writing for the unanimous Supreme Court of Canada in *P.P.G. Indust. Can. Ltd. v. A.G. Can.*, (1976) 65 D.L.R. (3d) 354 (S.C.C.), reversing (1974) 39 D.L.R. (3d) 678; accepted by de Grandpré J. in the *Ringrose* case, *supra*, note 46, even though he had dissented on this point in the *National Energy Board* case, *supra*, note 122 at pp. 728-29. The test was also accepted in *Szilard v. Szasz*, [1955] S.C.R. 3.

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180 *Supra*, note 148.
181 *Supra*, note 152.
182 *Supra*, note 122.
183 *Supra*, note 155.
184 *E.g.*, that attitudinal b
185 *Supra*, note 46.
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can also exist. But the public policy which requires the appearance of justice necessarily focuses on perceptions. Hence, the real likelihood of bias must be as irrelevant as actual bias to the applicability of the *nemo judex* rule.

In terms of attitudinal bias, the test is not as clearly settled. The Supreme Court's decisions in *Old St. Boniface*[180] and *Save Richmond Farmland*[181] suggest that the test is whether the delegate in fact has a closed mind, and these cases draw a distinction between bias that is perceived as a result of pecuniary interest or a relationship on the one hand, and bias arising from strongly held personal views on the other hand. This approach is similar to the dissent expressed by de Grandpré J. in the *National Energy Board*[182] case. The test articulated in the *Newfoundland Telephone*[183] case may, arguably, reconcile the distinctions between attitudinal bias and the other forms of bias by instituting a single test for any breach of the *nemo judex* rule. According to this approach, the test is to be applied flexibly depending upon the type and function of the tribunal involved.

In each case, the courts must determine whether a particular fact-pattern gives rise to a reasonable apprehension of bias. It is important not to elevate individual decisions, relating to the circumstances in which a reasonable apprehension of bias can arise, into inflexible rules of law.[184] It is this flexibility that is important in Dickson J.'s approach in *Ringrose*.[185] On the other hand, there must be some basis for saying that there is a reasonable apprehension of bias. Thus, a number of cases impose a duty on the person raising the allegation to make reasonable inquiries about the facts upon which bias is alleged.[186] Probably this duty is no more than not to be irresponsible,[187] for any higher duty to investigate would require the person to conclude that there was at least a real likelihood of, if not actual, bias. Further, the party alleging bias need not actually perceive bias personally. It is sufficient that a reasonably well informed person would perceive it.[188]

180 *Supra*, note 148.
181 *Supra*, note 152.
182 *Supra*, note 122.
183 *Supra*, note 155.
184 *E.g.*, that attitudinal bias could never constitute a breach of the *nemo judex* rule.
185 *Supra*, note 46.
186 *E.g.*, see de Grandpré J.'s comments in the *National Energy Board* case, *supra*, note 122, at 741-45.
187 In any event, many people may quite reasonably doubt the impartiality of a decision-maker without feeling the necessity of verifying their suspicions beyond a reasonable doubt. The courts, therefore, should not impose the same investigative duty on the person who alleges breach of the *nemo judex* rule as it would on a prudent man who considers making a potentially defamatory statement.
188 *E.g.*, in *Newfoundland Telephone* the test was phrased "The test is whether a reasonably informed bystander could reasonably perceive bias". But see *Shelly Western v. Saskatchewan United Food & Commercial Workers, Local 1440-F6*, [1986] 4 W.W.R. 84, where the court noted that delay in objecting to the presence of the party alleged to be biased "casts doubt on the existence of a reasonable apprehension of bias" (at 87). This appears to be inconsistent with the objective standard of the test. In *Budge v. Alberta (Workers' Compensation Board)*, [1987] 6 W.W.R. 217 (Q.B.), reversed [1991] 3 W.W.R. 1 (Alta. C.A.) the court said that

anomalous use of *certiorari* to correct an error of law on the face of the record. On the other hand, total lack of evidence appears to be a jurisdictional error capable of judicial review, even in the face of a privative clause. Similarly, it is submitted that an unreasonable appreciation of the facts may sometimes constitute a jurisdictional defect in the tribunal's proceedings. This point was clearly recognized by the Supreme Court of Canada in *Blanchard v. Control Data Canada Limited*, where Lamer J. provided the following analysis:[44]

> In looking for an error which might affect jurisdiction, the emphasis placed by this Court on the dichotomy of the reasonable or unreasonable nature of the error casts doubt on the appropriateness of making, on this basis, a distinction between error of law and error of fact. In addition to the difficulty of classification, the distinction collides with that given by the courts to unreasonable errors of fact. An unreasonable error of fact has been categorized as an error of law. The distinction would mean that this error of law is then protected by the privative clause unless it is unreasonable. What more is needed in order that an unreasonable finding of fact, in becoming an error of law, becomes an unreasonable error of law? An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.
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> Not only is the distinction between error of law and of fact superfluous in light of an unreasonable finding or conclusion, but the reference to error itself is as well. Indeed, though all errors do not lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact, or a combination of the two), which is unreasonable.
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> In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal. I hasten to add that the distinction between an error of law and one of fact is still entirely valid when the tribunal is not protected by a privative clause. Indeed, though all errors of law are then subjected to review, only unreasonable errors of fact are, but no others.

6. The "Patently Unreasonable" Doctrine in the Face of a Privative Clause

The presence of a statutory[45] privative clause prevents the anomalous use of *certiorari* to correct errors of law on the face of the record that lie

44 [1984] 2 S.C.R. 476 at 494-95.

45 *I.e.*, in the same statute as creates the delegate's power to do the act in question. There may be some doubt as to the precise meaning of a privative clause, particularly where the Act specifically provides that *certiorari* or some other remedy is available in some short

within the delegate's jurisdiction. Of course privative clauses[46] cannot constitutionally be effective to oust judicial review of jurisdictional questions, on the rationale that a statutory delegate cannot lawfully make a decision outside his jurisdiction, so there is nothing to be protected by the privative clause. Precisely because intra-jurisdictional errors of law lie within the delegate's jurisdiction, however, there is a decision or action which can be protected by the privative clause. In order to succeed in obtaining judicial review when there is a privative clause, one must show that a jurisdictional error has been committed by the delegate. A vast number of cases can be used to illustrate attempts to characterize particular errors of law as "going to jurisdiction". Until recently, it was probably true to state that no satisfactory test had ever been devised to differentiate intra-jurisdictional errors of law from those which go to jurisdiction, although the Supreme Court of Canada has recently articulated a "pragmatic and functional" test for making this distinction.[47]

A line of cases has developed the doctrine that all errors of law which are "patently unreasonable" are jurisdictional in nature, and therefore cannot be immunized from judicial review by a privative clause. The clearest statement of this doctrine occurs in the Supreme Court of Canada's decision in *Blanchard v. Control Data Canada Limited*, where Beetz J. said:[48]

> According to the prior decisions of this Court, a patently unreasonable error by an administrative tribunal in interpreting a provision which it has to apply within the limits of its jurisdiction will in itself cause the tribunal to lose its jurisdiction.

and Lamer J. put it this way:[49]

> In principle, where there is a privative clause the superior courts should not be able to review errors of law made by the administrative tribunals. However, it is now settled that some errors of law can cause the arbitrator to lose his jurisdiction. The debate turns on the question of which errors of law result in the loss of jurisdiction.

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period of time (*e.g.*, 30 days): *Re Alta. Union of Prov. Employees and Bd. of Gov. of Olds. College*, (1982) 21 Alta. L.R. (2d) 104 (S.C.C.); *United Nurses of Alta., Loc. 11 v. Misericordia Hosp.*, [1983] 6 W.W.R. 1 (Alta. C.A.); and *Suncor Inc. v. Fort McMurray Independent Oil Wkrs., Loc. 1*, [1983] 1 W.W.R. 604 (Alta. C.A.); all discussed below. Does a "no *certiorari*" clause have the same effect as a "final and binding" clause? These are difficult questions of statutory construction. See S. Chumir, "The *Rammell* and *Farrell* Cases", (1963) 3 Alta. L. Rev. 124, for a discussion of different types of privative clauses, and R. Carter, "The Privative Clause in Canadian Administrative Law, 1944-1985: A Doctrinal Examination", (1986) 64 Can. Bar Rev. 241; and H.W. Arthurs, "Protection Against Judicial Review", (1983) Rev. du B. 277. See also *Pringle v. Fraser*, [1972] S.C.R. 821; *Min. of Fin. v. Woodward*, [1973] S.C.R. 120; and *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 S.C.R. 18.

46 Loosely defined. There is quite a range of stronger and weaker wording used in privative clauses (or "glosses").

47 See note 7 above for the recent Supreme Court of Canada cases articulating a "pragmatic and functional" test for identifying matters which are jurisdictional in nature.

48 *Supra*, note 44 at p. 479.

49 *Ibid.*, pp. 492-93.

Contrary to the decision of Lord Denning in *Pearlman v. Keepers and Governors of Harrow School*, [1979] 1 All E.R. 365, where he said (at p. 372) that "no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends" (subsequently disapproved by the Privy Council in *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union*, [1980] 3 W.L.R. 318, and *Re Racal Communications Ltd.*, [1980] 2 All E.R. 634), this Court has tended since *Nipawin* . . . and *C.U.P.E.* . . . to avoid intervening when the decision of the administrative tribunal was reasonable, whether erroneous or not. In other words, only unreasonable errors of law can affect jurisdiction. The following extract from *C.U.P.E.* . . . has become the classic statement of the approach taken by this Court:

> Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

This is a very severe test and signals a strict approach to the question of judicial review. It is nevertheless the test which this Court has applied and continues to apply. . . .

Because the doctrine of patent unreasonability has been extended to other circumstances where it is inappropriate, it is important to examine *C.U.P.E.* and subsequent cases in some detail.

(a) The *C.U.P.E.* Case

The *C.U.P.E.*[50] case dealt with a complaint by a union that the New Brunswick Liquor Corporation was replacing striking employees with management personnel contrary to section 102(3)(a) of the *Public Service Labour Relations Act*,[51] which provided as follows:

> 102(3) Where subsection (1) and subsection (2) are complied with employees may strike and during the continuance of the strike
>
> (a) the employer shall not replace the striking employees or fill their position with any other employee, and
>
> (b) no employee shall picket, parade or in any manner demonstrate in or near any place of business of the employer.

The question arose as to whether the use of management personnel to perform the functions of striking workers constituted an illegal "replacement"

50 *Can. Union of Pub. Employees Loc. 963 v. N.B. Liquor Corp.*, (1979) 97 D.L.R. (3d) 417, [1979] 2 S.C.R. 227 (S.C.C.).

51 R.S.N.B. 1973, c. P-25.

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52 *Supra*, note 50 at
53 *Ibid.*, p. 422.
54 See *Service Empl*
at 389.
55 *Jacmain v. A.G.* (
56 *Parkhill Furniture*
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57 *Jarvis v. Assoc. M*
58 *Supra*, note 50 a

Once the error is classified as jurisdictional, the reasonableness of the decision is irrelevant:[195]

> Unquestionably, as has already been noted, it is often difficult to determine what constitutes a question of jurisdiction, and administrative tribunals like the Board must generally be given the benefit of any doubt. Once the classification has been established, however, it does not matter whether an error as to such a question is doubtful, excusable or not unreasonable, or on the contrary is excessive, blatant or patently unreasonable. What makes this kind of error fatal, whether serious or slight, is its jurisdictional nature.
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> . . .
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> *Once a question is classified as one of jurisdiction, and has been the subject of a decision by an administrative tribunal, the superior court exercising the superintending and reforming power over that tribunal cannot, without itself refusing to exercise its own jurisdiction, refrain from ruling on the correctness of that decision, or rule on it by means of an approximate criterion.*
>
> *That is why the superior courts which exercise the power of judicial review do not and may not use the rule of the patently unreasonable error once they have classified an error as jurisdictional.*

As Cory J. noted in *Econosult*, this statement of the law was strongly criticized by many commentators, including Wilson J. in her subsequent dissent in *National Corn Growers Assn.*[196] However, it is now clear that Beetz J. stated the law correctly in *Syndicat*, and that this is accepted by Cory J. and the rest of the Supreme Court in *Econosult*. The difficulty, however, is to have some method of determining whether a particular matter is jurisdictional or not. While some matters may clearly be jurisdictional, there may be a large grey area about whether the delegate has jurisdiction to decide other matters. What test is to be applied to determine whether the delegate has jurisdiction to deal with a particular matter or not?

(g) *Bibeault*—The Continued Existence of "Preliminary and Collateral Matters", and The Development of the "Functional and Pragmatic" Test for Identifying Jurisdictional Matters

The second decision by Beetz J. was *U.E.S., Local 298 v. Bibeault*.[197] It reaffirms the possible existence of preliminary or collateral matters (which some readers of *C.U.P.E.* thought Dickson J. had abolished) upon which jurisdiction depends. It also confirms that the patently unreasonable doctrine does not apply to prevent judicial review of whether the preliminary or

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195 At pp. 441-2 (emphasis added). See also *A.T.A. v. Edmonton Separate School District No. 7*, (1992) 5 Alta. L.R. (3d) 97 (C.A.).

196 Discussed in part (h) of this chapter, *infra*.

197 [1988] 2 S.C.R. 1048.

collateral matters have been complied with. And — for the first time — the court identifies a "pragmatic and functional" approach to determining whether the legislature intended a particular matter to be within the jurisdiction of the delegate.

Beetz J. said:[198]

> The idea of the preliminary or collateral question is based on the principle that the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and that such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator. The theoretical basis of this idea is therefore unimpeachable — which may explain why it has never been squarely repudiated: any grant of jurisdiction will necessarily include limits to the jurisdiction granted, and any grant of a power remains subject to conditions. The principle itself presents no difficulty, but its application is another matter.
>
> The theory of the preliminary or collateral question does not appear to recognize that the legislator may intend to give an administrative tribunal, expressly or by implication, the power to determine whether certain conditions of law or fact placed on the exercise of its power do exist. It is not always true that each of these conditions limits the tribunal's authority; but *except where the legislator is explicit, how can one distinguish a condition which the legislator intended to leave to the exclusive determination of the administrative tribunal from a condition which limits its authority and as to which it may not err*? One can make the distinction only by means of a more or less formalistic categorization. Such a categorization often runs the risk of being arbitrary and which may in particular unduly extend the superintending and reforming power of the superior courts by transforming it into a disguised right of appeal.
>
> *The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: it substitutes the question "Is this a preliminary or collateral question to the exercise of the tribunal's power" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?"*

Then Beetz J. articulated his method for determining whether an alleged error is jurisdictional or not:[199]

> *The formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error.* At first sight it may appear that the functional analysis applied to cases

198 At pp. 1086-7 (emphasis added).

199 At p. 1088 (emphasis added).

> of patently unreasonable error is not suitable for cases in which an error is alleged in respect of a legislative provision limiting a tribunal's jurisdiction. *The difference between these two types of error is clear: only a patently unreasonable error results in an excess of jurisdiction when the question at issue is within the tribunal's jurisdiction, whereas in the case of a legislative provision limiting the tribunal's jurisdiction, a simple error will result in a loss of jurisdiction. It is nevertheless true that the first step in the analysis necessary in the concept of a "patently unreasonable" error involves determining the jurisdiction of the administrative tribunal. At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.* At this initial stage a pragmatic or functional analysis is just as suited to a case in which an error is alleged in the interpretation of a provision limiting the administrative tribunal's jurisdiction: in a case where a patently unreasonable error is alleged on a question within the jurisdiction of the tribunal, as in a case where simple error is alleged regarding a provision limiting that jurisdiction, the first step involves determining the tribunal's jurisdiction.

(h) The *National Corn Growers Association* Case

The decision in *National Corn Growers Association v. Canada (Canadian Import Tribunal)*[200] is important because of the sharp divide in the Supreme Court about whether the patently unreasonable doctrine is to be used as a sword (to allow the court to review unreasonable administrative decisions) or a shield (to protect administrative decisions from judicial review). How far can the court go in scrutinizing the reasonableness of the delegate's decision? Can the court only consider the reasonableness of the delegate's interpretation of its constitutive statute, or can the court go further into the reasonableness of the delegate's evidentiary findings and the reasonableness of its conclusions? The majority of the Court scrutinized the delegate's decision at all levels before upholding the decision of the Anti-Dumping Tribunal on the basis that the Tribunal's method of interpreting its Act was not "patently unreasonable". While Madam Justice Wilson reached the same result, she would have greatly restricted the ambit of the court's scrutiny of the delegate's decision-making process, confining it the reasonableness of its interpretation of its constitutive statute only.

Mr. Justice Gonthier, writing for the majority of the Court, made the following comments:

> Although the terms of s. 28 of the *Federal Court Act* are quite broad in scope, it is to be remembered that *courts*, in the presence of a privative clause, *will only interfere with the findings of a specialized*

200 [1990] 2 S.C.R. 1324.

perhaps by a specialized and expert body that can inject elements of custom and public policy into its decisions.[20]

A "privative clause" is a statutory provision which purports to oust the inherent jurisdiction of the superior courts to review the legality of actions taken by statutory delegates. In theory, the doctrine of Parliamentary Sovereignty means that the courts must give effect to such legislative provisions. On the other hand, the courts were initially quite creative in finding ways to evade the effect of privative clauses: largely by holding that the legislature could not have intended to confer power on a statutory delegate to exceed the bounds of the jurisdiction which the legislature has conferred on a delegate. If the statutory delegate exceeds jurisdiction, then the decision is void, and there is therefore no lawful action which can be protected by the privative clause. Accordingly, the distinction between jurisdictional and intra-jurisdictional errors is extremely important in understanding the courts' approach to privative clauses. Although each privative clause must be construed in light of its own wording, four general types may be identified.

(a) Final and Binding Clauses

Many statutes contain provisions which state that the delegate's decision shall be "final", "binding", "conclusive", "not subject to appeal", "unappealable" or "not subject to be questioned". The courts have almost universally treated such provisions as meaning that no appeal lies from the delegate's decision, which merely reiterates the common law rule that no appeal lies without being specifically created by statute.[21] On this view, such clauses do not have the effect of depriving the superior courts of their inherent jurisdiction to review the legality of a delegate's actions. The courts' power in this regard undoubtedly extends to correct any jurisdictional defects in the delegate's actions, and one prevailing view is that "final and binding" clauses did not affect the courts' right to correct intra-jurisdictional errors of law as well.[22]

However, that does not answer the question as to how intensive a level of review should be applied. Laskin C.J.C. in *A.U.P.E. v. Alberta (Public Service*

20 Of course, not all administrative agencies have either expert members or expert staff. This has led to a considerable controversy about the amount of deference a court should pay to decisions by administrative agencies with different levels of expertise, specialization or policy-content. See *C.A.I.M.A.W. v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 at pp. 103-4 (per La forest J.), 134 D.L.R. (3d) 385, commented on by R.W. Macaulay, (1990-91) 4 C.J.A.L.P. 85; *B.C.G.E.U. v. Industrial Relations Council*, (1988) 32 Admin. L.R. 78 (B.C.C.A.) at 91 (per Taggart J.A.); *Ferguson v. A.T.U.*, (1990) 43 Admin. L.R. 18 (Fed.C.A.) at 38-40.

21 See the discussion on this point in chapter 13. This reasoning has been criticized as giving no meaning to the provision: *O.P.S.E.U. v. Forer*, (1985) 52 O.R. (2d) 705 at 722 (C.A.). For a decision reiterating the more traditional view, see *Dayco*, [1993] 2 S.C.R. 230 (*per* La Forest J.).

22 See the discussion on this point in sections 6 and 7 of chapter 11. In her dissent in *National Corn Growers Association v. Canada (Can. Import Tribunal)*, [1990] 2 S.C.R. 1324, Wilson J. suggests at 1370 that a final and binding clause should protect intra-jurisdictional decisions.

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23 [1982] 1 S.C.R. 923
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24 See note 37, *infra*, a

Employees' Relation Board) indicated that the privative "gloss" of a final and binding clause should restrict the courts to correcting only those intra-jurisdictional errors of law which are "patently unreasonable":[23]

> In the face of this explicit provision for review [by *certiorari* within 30 days of the decision], it is impossible to read it [judicial review] out of this statute or to subordinate it to ss. 9 and 11 [which provided respectively that the action or decision of the Board was "final and binding" and "final and conclusive for all purposes"] or even to limit it to questions of jurisdiction in the strict sense, as urged by counsel for the union and counsel for the Board. That being said, however, *it still remains to consider the scope of review on alleged errors of law, and it is my opinion that the commanding terms of s. 9(1) and especially of s. 11 cast a gloss on the extent to which decisions of the Board may be overturned by a court. Certiorari, considered in the light of ss. 9(1) and 11, is a long way from an appeal and is subject to restriction in accordance with a line of decisions of this court which, to assess them generally, preclude judicial interference with interpretations made by the Board which are not plainly unreasonable.* Jurisdictional errors, including want of natural justice, are clearly reviewable and subject to reversal as was conceded by the appellants, but they are not involved here.

Thus, even though the final and binding clause does not completely insulate a decision of tribunal from review, it may effectively raise the threshold for reviewing a decision made within the delegate's jurisdiction. The court may decide to review only those decisions which are patently unreasonable. Although, Laskin, C.J.C. noted the power of the courts to review for jurisdictional error (even in the face of such a "final and binding" provision), the Court has subsequently held in *Dayco (Canada) Ltd. v. National Automobile Aerospace and Agricultural Implement Workers Union of Canada* that the presence and strength of a privative clause may have an impact on the breadth of a tribunal's jurisdiction.[24] In the *Dayco* case, the Court found a "final and binding" clause to be a relatively weak privative provision, and that its wording did not indicate that the decision actually made by the delegate (a labour arbitrator) was intended to be within his exclusive jurisdiction, or that it was to be unreviewable by the court (even though it was said to be "final and binding").

(b) Exclusive Jurisdiction Clauses

A great deal of legislation goes further than stating that the delegate's decisions are final and binding by going on to provide that the delegate has exclusive jurisdiction to determine those matters remitted to him or her. This

23 [1982] 1 S.C.R. 923 at 927, emphasis added. This decision is criticized in section 7 of chapter 11.

24 See note 37, *infra*, and the *Bradco* case at note 35, *infra*.

literally implies that the courts have no jurisdiction to deal with any of those matters. Such a provision undoubtedly prevents an appeal to the courts on the merits. It also prevents judicial review for an intra-jurisdictional error of law. But it does not confer on the delegate the authority to determine which matters are within or outside of the delegate's jurisdiction: the courts assert the right to make such determinations,[25] notwithstanding such an "exclusive jurisdiction" clause. The courts use the same legal reasoning to reach this result as they apply to "*no certiorari*" clauses.

(c) No-*Certiorari* Clauses

Legislation also frequently contains a provision preventing the issuance of any prerogative remedy, declaration or other court order to call into question the validity of the delegate's actions.[26] Even though *certiorari* is primarily directed at jurisdictional errors, the courts have traditionally treated this type of clause as effective to prevent judicial review of any intra-jurisdictional error of law, but not effective to prevent judicial review of any jurisdictional defect in the delegate's actions. The constitutional rationale for holding that these clauses do not oust the courts' right to scrutinize jurisdictional defects is the assumption that Parliament cannot ever have intended inferior delegates to act outside their jurisdiction; any such action is *ultra vires* and void; and therefore there is in law nothing to be protected by the privative clause. As Lord Morris put it in the *Anisminic* case:[27]

> The control which is exercised by the High Court over inferior tribunals . . . is of a supervisory but not of an appellate nature. It enables the High Court to correct errors of law if they are revealed on the face of the record. The control cannot, however, be exercised if there is some provision (such as a "no *certiorari*" clause) which prohibits removal to the High Court. But it is well settled that even such a clause is of no avail if the inferior tribunal acts without jurisdiction or exceeds the limits of its jurisdiction.

To the extent that "no *certiorari*" clauses are still prevalent in Canada, the supervisory power of the courts depends upon the ability to characterize any alleged error by the delegate as being jurisdictional in nature. On the one hand, both the English and the Canadian courts recognize that a jurisdictional defect can occur at the very beginning of a delegate's functions (either due to the lack of statutory authority to carry out the act in question, or because some matter preliminary or collateral to the jurisdiction has not been obtained[28]), in the course thereof (either the delegate has breached the principles of natural justice and procedural fairness, or because of some

25 See the clear reasoning to this effect by Beetz J. in the decision of the Supreme Court of Canada in *Le Syndicat des employés de production du Québec et de l'Acadie v. C.B.C.*, [1984] 2 S.C.R. 412; and by Cory J. in *Econosult*, (1991) 80 D.L.R. (4th) 520 (S.C.C.).

26 *E.g.*, s. 45 of the *Energy Resources Conservation Act*, R.S.A. 1980, c. E-11.

27 *Anisminic v. Foreign Comp. Comm.*, [1969] 2 A.C. 147, [1969] 1 All E.R. 208 at 222 (H.L.).

28 See chapter 6.

not prevent the courts from asserting a right to review the decisions of the Labour Board for jurisdictional error.[33]

(e) The Effect of a Privative Clause

The last ten years have seen a shift of the pendulum of judicial review away from the interventionist approach of *Anisminic*[34] in favour of a greater degree of curial deference towards the decisions of administrative tribunals. Much of the debate over the proper level of supervision of statutory delegates by the superior courts has revolved around the meaning and scope of the "patently unreasonable" test. While this test had its historical origins in the "privative gloss" that a privative clause was said to put on the decision of a subordinate tribunal, the debate on the appropriate level of superior court supervision has largely proceeded without a particular focus on the existence or the exact wording of any privative clause. Rather, the courts have focused on the "heart of the specialized jurisdiction" of the tribunal, and a "pragmatic and functional approach" to identifying the jurisdiction of statutory delegates. Only recently have privative clauses become a central part of the formula, primarily in the three decisions of the Supreme Court of Canada (*Dayco*, *Mossop* and *Bradco*) discussed below. As can be seen from the detailed discussion of this topic in chapter 11, the debate is probably not over. Some general observations can, however, be made on the effect of privative clauses in Canadian Administrative Law.

(i) Jurisdictional errors

First, it seems clear that no privative clause, no matter how strongly worded, will bar review for jurisdictional error. As will be seen in the next section of this chapter, there are constitutional reasons for this conclusion:[35]

> In the presence of a full privative clause, judicial review exists not by reason of the wording of the statute (which is, of course, fully preclusive) but because as a matter of constitutional law judicial review cannot be ousted completely.

The Supreme Court of Canada has consistently stated that the superior courts can review jurisdictional errors, even though the definition of a jurisdictional error might have changed over time. This is confirmed by the judicial attitude of those courts that reviewed the delegate's decision even in the face of the "elastic jurisdiction" clause formerly found in the *British Columbia Labour Code*.[36]

33 See *C.A.I.M.A.W. v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *Lorne W. Camozzi Co. Ltd., v. I.U.O.E., Local 115*, (1985) 68 B.C.L.R. 338 (C.A.); and *G & L Transfer Ltd. v. General Truckdrivers and Helpers Union, Local 31*, (1981) 30 B.C.L.R. 258 (S.C.)

34 *Supra*, note 27. See the description of this history by Cory J. in *Econosult*, *supra* note 25.

35 *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at 333; commented on by D.J. Mullan at (1993) 12 Admin. L.R. (2d) 219.

36 *Supra*, notes 32 and 33.

But it does not follow that the existence or strength of a privative clause is of no consequence to jurisdictional issues. Rather than barring *per se* review for jurisdictional error, the existence of a privative clause may well have the effect of shrinking or expanding the court's perception of the jurisdiction given to the statutory delegate. In *Dayco (Canada) Ltd. v. CAW-Canada*,[37] Cory J. (dissenting) minimized the importance of the precise wording of the privative clause. The majority of the Supreme Court of Canada disagreed, however, holding that the wording actually used is an important component of the "pragmatic and functional" search for the "specialized jurisdiction" that has been given to the delegate by the legislature. La Forest, J., speaking for the majority, approached the jurisdiction of the labour arbitrator in that case as follows:

> A good starting point is to recall the strong privative clause in s. 108 [a no *certiorari* clause] which shields the Board from jurisdictional[38] review. It may at first glance seem inappropriate to consider the question of privity in the context of jurisdiction, but I do not think the scope of judicial review should be approached in a purely linear analysis of considering first jurisdiction and then searching for privative clauses shielding that jurisdiction. The process is more fluid than this, and the presence or absence of privative words is an indication of the scope of jurisdiction intended by the Legislature. . . . Here the privative clause in s. 108 applies only to the Board, and there is no comparable provision with respect to the arbitrator. The union contends, however, that the phrase "final and binding . . . between the parties" in s. 44 constitutes a privative clause, a contention accepted by the Court of Appeal. However, the most that can be said for the phrase is that it has limited privative effect on the issues in this appeal. . . .
>
> Whatever the status of the clause in s. 44, the section should be contrasted with the strong and explicit privative clause in s. 108 protecting decisions of the Labour Relations Board. Clearly, if the Legislature had intended to mandate the same judicial deference to an arbitrator as to the Board, it could simply have brought the arbitrator under the shelter of s. 108. That is not the case, and I am left with the conclusion that the legislation contemplates a more limited shield against judicial review for decisions of an arbitrator. . . .

Thus the Court found the weakness of the wording of the particular privative clause to be an important signpost in its "pragmatic and functional" search for the arbitrator's jurisdiction: the weak privative clause was seen as evidence of the legislature's intention to grant a limited jurisdiction. The old "linear analysis" of trying to determine the delegate's jurisdiction first

37 [1993] 2 S.C.R. 230.

38 Query: Does the Court mean "judicial"? Review for *jurisdictional* error is always available, even in the face of a "no *certiorari*" clause.

— without regard to the wording or effect of the privative clause (which could not protect a "void" decision made outside the delegate's jurisdiction) — was abandoned.[39] Rather, the wording of the privative clause was considered as part-and-parcel of the court's process of determining precisely what jurisdiction the legislature intended to grant to the delegate. The two issues are rolled up into one. The court's functional analysis then went on to examine what was held to be a relatively narrow level of expertise on the part of labour arbitrators, effectively limiting curial deference to that area of expertise. The weak privative clause, coupled with the court's view of the narrow expertise of the delegate, tended to shrink the arbitrator's jurisdiction, causing the issue in question (whether the collective agreement had expired) to be a "jurisdictional given", upon which the arbitrator had to be correct. Once the issue is found to be jurisdictional, the privative clause provides no further protection.

This approach helps integrate the existence and wording of particular privative clauses into the Court's overall theory of judicial review. The factors considered to determine jurisdiction include:[40]

> [In determining jurisdiction] the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

Now, the role of the particular privative clause is specifically recognized in the analysis.

(ii) Errors within jurisdiction

The third issue is the effect of a privative clause on intra-jurisdictional errors of law. As previously discussed in this chapter (and in chapter 11), it used to be generally accepted that "final and binding" clauses by themselves did not prevent judicial review of intra-jurisdictional errors of law (although they may provide a "privative gloss"), whereas "exclusive jurisdiction" and "no *certiorari*" clauses did protect intra-jurisdictional errors from judicial review. However, as a result of three decisions of the Supreme Court of Canada handed down in 1993, this distinction may be breaking down, in favour of the same "more fluid" approach to privative clauses used by the Supreme Court of Canada in determining the jurisdiction of the arbitrator in the *Dayco* case.

Dayco dealt with a jurisdictional error, but La Forest J. did say the following:[41]

39 The "linear analysis" was used as late as 1990: *Lester (W.W.) (1978) Ltd. v. U.A., Local 740*, [1990] 3 S.C.R. 644.

40 *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1088.

41 *Supra*, note 37, at 268, emphasis added. Compare this to Laskin C.J.C's approach in *Olds College, supra* note 23.

> On issues within jurisdiction, I do not attach the importance to the difference in the wording of "final and conclusive" and "final and binding" that Cory J. attributes to me. I do not believe that one is simply privative and the other not. The difference between these phrases is much less significant than that between either of them and the expansive privative clause in s. 108 [a no *certiorari* clause] that protects decisions of the Labour Board. More importantly, this small distinction is more significant in determining whether a question is a jurisdictional one or within jurisdiction than in considering the standard of review for questions within jurisdiction. *I cannot accept that courts should mechanically defer to a tribunal simply because of the presence of a "final and binding" or "final and conclusive" clause. These finality clauses can clearly signal deference, but they should also be considered in the context of the type of question and the nature and expertise of the tribunal.*

Thus the wording of the particular privative clause is relevant to determine whether the legislature intended the delegate's decision on a particular matter to be "final and binding" — that is, whether the matter lies within the delegate's discretion, or is a "jurisdictional given". La Forest J. makes it clear that the presence of a "final and binding" clause in the legislation does not always mean that the matter is within the delegate's jurisdiction, or that the court's should automatically defer to the delegate's decision on that matter. The entire Act must be construed in order to determine the intent of the legislature, including a consideration of the context in which the Act operates and the expertise (if any) of the tribunal with respect to the particular matter in question. This holistic and integrated approach effectively reverses what appeared to be the hard-and-fast rule established by Laskin C.J.C. in *Olds College* to the effect that a "final and binding" clause prevented judicial review unless the decision was patently unreasonable.

This approach to privative clauses was foreshadowed in the decision of the Court a few months earlier in *Canada (A.G.) v. Mossop*,[42] where the Court had to review a decision of a human rights tribunal that "family status" included a homosexual relationship, an issue clearly within the tribunal's jurisdiction. L'Heureux-Dubé J. dissenting, thought that the Court should defer to the decisions of the tribunal on questions of law, relying on cases where the Court had deferred to the decisions of other specialized tribunals. The majority of the Court, speaking through La Forest, J., disagreed:[43]

> First it must be recognized that these specialized tribunals frequently have strong privative clauses in their constituent legislation showing a legislative intention to limit judicial review. No such privative clause appears in the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (formerly S.C. 1976-77, c. 33 as amended)

42 [1993] 1 S.C.R. 554. See also the decisions of the S.C.C. in *Zurich Insurance*, [1992] 2 S.C.R. 321, 93 D.L.R. (4th) 346; and *Dickason*, [1992] 2 S.C.R. 1103, 95 D.L.R. (4th) 439.

43 *Ibid.*, per La Forest J. at pp. 583-4. Six of the seven justices agreed with this analysis.

> (the "Act"). The normal approach to interpreting a tribunal's enabling statute should be that the courts retain their general supervisory jurisdiction . . . The enabling statute of an administrative tribunal empowers that body to do the things that are set forth in the statute. That is why a privative clause, which specifically addresses the position of the administrative tribunal *vis-à-vis* the courts, is of importance in determining a legislative intent to limit the judicial supervision of the tribunal. In the absence of other provisions indicating a disposition to limit judicial review, the normal supervisory role of the courts remains.

But the mere absence of a privative clause did not end the analysis, as other factors such as expertise might nevertheless justify deference. However on the issue at hand, the Court could find no relevant expertise in the tribunal:

> But the position of a human rights tribunal is not analogous to a labour board (and similar highly specialized bodies) to which, *even absent a privative clause,* the courts will give a considerable measure of deference on questions of law falling within the area of expertise of these bodies . . . The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal. They must, therefore, review the tribunal's decisions on questions of this kind on the basis of correctness, not on a standard of reasonability.

Thus the absence of a privative clause was but one factor to be considered, along with the level of expertise of the tribunal and the closeness of the issue to its specialized jurisdiction, in deciding on the level of judicial review.

The Court returned to these issues for a third time in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*[44] Speaking for a panel of five, Sopinka, J identified the task at hand as that of interpreting the statutory language to see if the legislature intended to shield the particular decision from review:

> The question posed by the Court of Appeal seems to suggest that in the absence of a full privative clause, no judicial deference is accorded the decision of an administrative tribunal. The issue is not so straightforward. The standard of review to be applied to a decision of an administrative tribunal is governed by *the legislative provisions which govern judicial review, the wording of the particular statute conferring jurisdiction on the administrative body, and the common law relating to judicial review of administrative action*

44 *Supra*, note 35, emphasis added.

> *including the common law policy of judicial deference.* The remedy of *certiorari* at common law and statutory provisions which provide for judicial review permit review of administrative decisions for errors of law on the face of the record. Legislative provisions conferring jurisdiction upon a tribunal often purport to either broaden the scope of judicial review by providing for a statutory right of appeal or narrow it by invoking words of preclusive effect. Determining the appropriate standard of review, therefore, is largely a question of interpreting these legislative provisions in the context of the policy with respect to judicial deference. . . .
>
> Where the relevant legislative provision is a true privative clause, judicial review is limited to errors of jurisdiction resulting from an error in interpreting a legislative provision limiting the tribunal's powers or a patently unreasonable error on a question of law otherwise within the tribunal's jurisdiction. . . .
>
> Although their preclusive effect may be less obvious than that of the true privative clause, other forms of clauses purporting to restrict review may also have privative effect. Wording such as "final and conclusive" and the like may be found to restrict review to matters of jurisdiction if the court concludes that, taking into account the factors referred to above, the legislator clearly intended that the decision should be immune from review in the absence of an error as to jurisdiction.

In resolving this problem of legislative intention, the Court then took into account the statutory wording, the goal of the mandatory arbitration provisions that were in question, the expertise of the tribunal, and whether the issue to be decided was at the core of the tribunal's jurisdiction. The Court concluded there was no intention to limit judicial review.

In summary, privative clauses have no absolute effect on the reviewability of intra-jurisdictional errors of law. The strength of the clause is an important factor in determining whether a particular decision of a particular tribunal was intended by the legislature to be shielded from review. But of equal importance are the common law principles in support of curial deference: the expertise of the tribunal and its right to operate within its specialized field. Even in the absence of a privative clause these common law factors can lead to a significant level of judicial restraint.

What is still unclear is the relationship between this new approach to privative clauses and the "patently unreasonable" test. If, after considering all the factors, the court concludes that a particular decision was not intended to be shielded from review, is the standard of review one of correctness? That appears to be the (correct) approach taken in both *Dayco* and *Mossop*. But in *Bradco*, the court concluded that the legislature had not intended to shield the arbitrator's decision from review, yet it nevertheless held that the test for review should be patent unreasonability:

> Taking into account the relevant factors of statutory wording,

> expertise and the purpose of the tribunal, I am of the opinion that the legislator did not intend by s. 88(2) to restrict judicial review of the decisions of the arbitrator except as to jurisdictional matters. Judicial deference to the decision of the arbitrator is nonetheless warranted here. . . . Combined with the purpose and wording of s. 88, which confers upon the arbitrator exclusive jurisdiction to come to a final settlement of disputes arising out of the interpretation or application of the collective agreement, the arbitrator's relative expertise mandates that the court defer to the decision of the arbitrator in this case unless his decision is found to be patently unreasonably.

Thus by considering the wording of the privative clause, the nature of the issue and the expertise of the tribunal, the Court concluded that the tribunal was not shielded from review. But after considering the same privative clause, the same issue and the same expertise, the Court concluded that the tribunal was entitled to deference *unless its decision was patently unreasonable.*

With respect, this is circular reasoning. Even the strongest privative clause does not prevent review for jurisdictional errors, which include patently unreasonable decisions of law.[45] Using a sliding scale to decide if a particular decision of a particular tribunal should be shielded from review fits in well with the "pragmatic and functional" approach the Court now uses to identify true issues of jurisdiction. While perhaps somewhat difficult to apply, it has the advantage of giving at least some content to privative clauses, which previously were too often ignored by the Courts. But if the Court is going to blend pragmatically the statutory and common law indicators of insulation from review, the blending should take place on one level only. Once it is determined that a particular intra-jurisdictional question of law is not shielded from review, the standard of review should be correctness. If it is determined the decision is shielded from review, there would nevertheless be review for jurisdictional error, including the sub-category of patently unreasonable decisions. On this point, the approach in *Mossop* and *Dayco* should be preferred over the approach in *Bradco*.[46]

(iii) Errors of fact

Administrative tribunals are usually better situated to make findings of fact than are reviewing courts, and findings of fact will most often be one of the issues the legislature clearly intended to give to the tribunal. Accordingly a high degree of deference will be appropriate on findings of fact even absent a privative clause. However, the presence of a privative provision will undoubtedly serve to enhance curial deference, proportionally to the strength

45 *C.A.I.M.A.W. v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *Syndicat*, [1984] 2 S.C.R. 412; *Econosult*, (1991) 80 D.L.R. (4th) 520 (S.C.C.).

46 *Supra*, notes 35, 37 and 42.

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47 *Dickason v. Universi*
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48 *Blanchard v. Contro*

49 See D.P. Jones, "A
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50 [1981] 2 S.C.R. 22
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51 R.S.Q. 1977, c. C-
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of the clause and the expertise of the tribunal (if any).[47] That being said, a patently unreasonable finding of fact will be treated as being a jurisdictional error like any other unreasonable finding, and subject to full judicial review.[48]

(f) Constitutional Limitations on Privative Clauses in Canada

As explained in greater detail in chapter 2, there are certain constitutional limitations in Canada affecting the validity of privative clauses.[49] The most important is section 96 of the *Constitution Act, 1867*, which requires the judges of all superior, district and county courts to be appointed by the federal Governor in Council. This has the effect of limiting the range of persons to whom certain judicial powers can be granted. It also has the effect of preventing the legislative branch from granting unlimited or unreviewable jurisdiction to a statutory delegate, because one of the hallmarks of a superior court is its inherent power to determine the jurisdiction of statutory (or "inferior") tribunals. This proposition can be used to argue that a privative clause which purports to oust the ordinary superior court's inherent power to review a decision of an administrative tribunal effectively gives that tribunal power to determine its own jurisdiction, and thus makes that tribunal into a superior court whose members must be appointed in accordance with section 96. This argument allows the courts either to strike down the validity of such a privative clause, or to strike down every action taken by the administrative tribunal because its members have not been appointed correctly in accordance with section 96.

On the one hand, the latter view appears to be more correct in theory, because there is no doubt that the legislative branch could lawfully enact a stringent privative clause provided the members of the administrative tribunal are appointed by the federal Governor in Council under section 96. Thus, the privative clause would appear to be valid; only the appointment of the delegates could be questioned.

Nevertheless, the Supreme Court of Canada has used section 96 to strike down the validity of a privative clause. In *Crévier v. Attorney General of Quebec*,[50] sections 194 and 195 of the *Professional Code of Quebec*[51] purported to preclude the availability of any of the remedies normally available from the Superior Court for the purpose of questioning the validity of any action taken by a wide range of officials and tribunals to whom various powers had been granted under the *Code*. Laskin C.J.C. held that the mere attempt

47 *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103 at 1124-7 (an appeal, not judicial review); *W.W. Lester (1978) Ltd. v. U.A., Local 740*, [1990] 3 S.C.R. 644.

48 *Blanchard v. Control Data Canada Limited*, [1984] 2 S.C.R. 476 at 494.

49 See D.P. Jones, "A Constitutionally guaranteed Role for the Courts", (1979) 57 Can. Bar. Rev. 669; P.W. Hogg, "Privative Clauses", Part 7.3(f) in *Constitutional Law of Canada* (3rd ed; Carswell; 1992).

50 [1981] 2 S.C.R. 220. The rule has been affirmed since, as for example in *United Nurses of Alberta v. Alberta (A.G.)*, [1992] 1 S.C.R. 901 at 936 and the *Bradco* case, *supra* note 35.

51 R.S.Q. 1977, c. C-26, s. 194 [re-en. 1982, c. 16, s. 2], and s. 195 [re-en. 1982, c. 16, s. 3].