Reopenings, Rehearings and Reconsiderations in Administrative Law: Re Lornex Mining Corporation and Bukwa

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Traditionally, those who argue for restraint by the courts in the exercise of their power of judicial review are put in the position of seeming to claim that protecting the integrity of the administrative process is a higher value than doing “judicial justice” to individual litigants. Much of their defence rests on demonstrating that alternatives to review by the courts can be equally effective in superintending or controlling the activity of public authorities. Expanded political or legislative supervision is one option often advocated. However, it is the deployment of an appropriate array of administrative reme-
dies that is usually suggested as the most effective way of ensuring the orderly development of agency policy, the strict adherence to the principles of legality, and the expeditious redress of legitimate grievances. Not surprisingly, deference by the courts to attempts to develop these nonjudicial procedures is a first corollary of this perspective. Rather than restrict the number or scope of these remedies, judges ought to encourage agency responsibility by facilitating the expansion of mechanisms through which the obvious advantages of the administrative process can be extended to appeal or review proceedings.

Current theory would have it that there are three distinct forms of administrative control in Canadian law: the general power of superintendence and review within agency hierarchies, internal second-guessing by way of statutory appeals, and self-policing by a public authority through its reconsideration of a matter already decided. But because most constitutional and administrative law courses tend to focus on judicial review of legislation and government action, the teaching of administrative remedies is rather underdeveloped; in particular, agency reconsiderations have received little doctrinal attention. Moreover, due to the relative infrequency of litigation in this area, in the past it has been difficult to predict judicial reactions with much certainty. The recent British Columbia Supreme Court decision in Re Lornex Mining Corporation and Bukwa provides an excellent starting point for the analysis of when an agency should be permitted to reopen a matter already disposed of.

The facts can be summarized briefly. On December 25, 1973, Dr. Bonnie Ann Bukwa, a research chemist employed by Lornex Mining Corporation, complained to the Human Rights Commission of British Columbia, alleging a breach by Lornex of section 4 of the Human Rights Act. The essence of her complaint was that:

[C]o-workers of Lornex of the male sex in positions comparable to hers had available to them, gratuitously and as part of their employment, accommodation and board in a camp at the mine site, while such accommodation and board was not available to her as a female.

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4 See Garant, *Le contrôle de l'administration provinciale sur les administrations décentralisées au Québec* (1967), 8 C. de D. 175, and bibliography therein.
11 *Supra* note 1, at 706 (D.L.R.), 555 (W.W.R.).
A hearing before the Commission was held on May 1, 1974. Following receipt of the Commission's decision to dismiss her complaint, Dr. Bukwa wrote to the Vice-Chairman of the Commission in the following terms:

I wish to appeal the decision of the Commission on my case on the basis that I have new and further evidence and wish to be represented by counsel. I therefore request a new hearing.\(^\text{12}\)

A new hearing (or rehearing) was held on August 13, 1974 and, by an order dated the following day, the Commission not only cancelled its decision of May 1, but also required Lornex to:

[C]ease the contravention by making camp accommodation available to female employees on the same terms and conditions as male employees and ... to rectify the contravention by paying to Dr. Bonnie Ann Bukwa the sum of Two Thousand, Seven Hundred and Thirteen Dollars ($2,713.00). ...\(^\text{13}\)

Lornex then applied for certiorari to quash the August 14th order of the Commission on the grounds:

[F]irstly, that as the Commission had, prior to August 14, 1974, heard the parties and rendered its decision, it had become functus officio and hence without jurisdiction to conduct an appeal, a rehearing, or a new hearing; and that, in any event, there was no jurisdiction in the Commission to alter its previous decision in the absence of new evidence; secondly, that the presence of an allegedly interested party in the person of the director during the Commission's private deliberations was a breach of natural justice and voided the decision of the Commission; and thirdly, that, in any event, the Commission had no power to order payment of $2,713 as “costs incurred by Dr. Bukwa” or at all.\(^\text{14}\)

On June 30, 1976, Verchere J. gave judgment quashing that part of the order respecting the payment of money to Dr. Bukwa, but rejected Lornex's allegation of bias and upheld the cease and desist order. More importantly, the judge confirmed the jurisdiction of the Commission to have reopened the hearing of Dr. Bukwa's complaint.\(^\text{15}\)

Although this decision expands the conditions under which agency reconsiderations will be permitted, and for that reason alone is probably to be welcomed, for those concerned that the courts develop a coherent theory of administrative self-review, it is disappointing both in its legal and its policy justifications. Technically, the judgment is deficient in two respects. First, it repeats without analysis the questionable proposition that, absent some statutory authority, an agency never has the power to reassess a matter already determined by it,\(^\text{16}\) and, secondly, it uncritically adopts a suspect interpretation of the Supreme Court of Canada decision in Grillas v. MMI.\(^\text{17}\) From a policy perspective, the judgment is weak because it contributes little to the development of a workable framework for agency redeterminations and offers no general principles to guide public authorities as to when or how their powers of reconsideration should be exercised: the Court neither considers

\(^\text{12}\) Id. at 707 (D.L.R.), 556 (W.W.R).
\(^\text{13}\) Id.
\(^\text{14}\) Supra note 1, at 708 (D.L.R.), 557 (W.W.R).
\(^\text{15}\) Id. at 712 (D.L.R.), 562 (W.W.R).
\(^\text{16}\) Id. at 708 (D.L.R.), 557-58 (W.W.R).
the potential justifications for permitting or forbidding redeterminations, nor suggests what powers agencies undertaking rehearings should exercise, nor does it discuss how concepts of estoppel or the vesting of rights may limit agency second-guessing.

A. Validity, Finality and Functus Officio

In *Re Lornex*, Verchere J. begins his discussion of agency reassessments with the proposition that express statutory authorization is required before a public authority may review one of its prior acts. He notes that:

The normal rule relating to the jurisdiction of an administrative tribunal to re-hear a matter already heard and determined by it is that, in the absence of some statutory power, such jurisdiction does not exist ... .

Although this principle has been a traditional starting point for judicial treatments of agency reconsiderations, it grossly oversimplifies the analytical complexity in this area by confusing concepts such as validity, finality and functus officio. In particular, it presupposes the two most important conclusions a court must draw: namely, that a given act is valid, and that it is final vis-à-vis the agency making it.

Strictly speaking, the question of agency reconsiderations cannot arise when a prior act is void. If a first attempted determination is a nullity, any second consideration is legally only the original exercise of an agency’s power. However, courts have often treated the problem of nullities as an exception to the rule requiring authorization to reconsider. This probably arises because of the limited ways in which judicial tribunals may render decisions that are nullities. At common law, courts were permitted to set aside any of their orders made without jurisdiction. But since these jurisdictional defects were invariably rationes materiae, there was never any question of courts' redetermining the matter. On the other hand, agency nullities may result from the breach of mandatory procedural requirements, failure to afford natural justice, the making of ultra vires orders, or the improper exercise of a discretionary power. In these cases there can be no question that agencies have jurisdiction to make a proper determination. Although this

18 *Supra* note 1, at 708 (D.L.R.), 557-58 (W.W.R.).


21 *Craig v. Kanssen, [1943]* K.B. 256, [1943] 1 All E.R. 108 (C.A.); *Marsh v. Marsh, [1945]* A.C. 271 (P.C.). The common law also permitted courts to reopen decisions on the grounds of fraud: *Johnston v. Barkley (1905)*, 10 O.L.R. 724 (C.A.). Although there seems to be no reason why this principle should not also apply to agency activity, there is no Canadian authority directly on point.

reassumption of jurisdiction has usually induced courts into viewing such determinations as reconsiderations, 23 logically, the general principle requiring authorization to reopen a matter can only apply to valid acts.

Yet the mere fact that agency action is valid does not mean that the power to reconsider is contingent upon an express statutory provision; such a clause should be necessary only where an act is also final or conclusive. Reliance on abstract or general theories of finality would not be fruitful, however, since in administrative law this concept has at least five differing meanings: an act may be final in the sense that findings and conclusions contained therein are binding against everyone, an act may be final in that it is res judicata between parties to a litigated dispute, an act may be final in that it conclusively disposes of a dispute, i.e., is not interlocutory, an act may be final in the sense that a court or any other body may not review its merits, and an act may be final in that the agency making it is precluded from reconsidering or revoking it. 24 Consequently, for purposes of administrative reopenings, it is necessary to determine specifically when administrative acts are final vis-à-vis the agency making them.

Analytically, two competing approaches to finality in this sense may be taken. From one viewpoint, it could be argued that finality is not an inherent attribute of statutory power and, therefore, no agency act is final except to the extent and for the purposes set out by statute. On the other hand, it might be suggested that finality is the natural corollary of a grant of power and, therefore, all acts are final vis-à-vis the agency making them unless the legislation provides otherwise. It should be noted, however, that both approaches treat finality purely as a jurisdictional concept; that is, on either view, the nature of the statutory power, or the effect of its exercise on parties, is not considered to bear on the issue of conclusiveness. To this extent, both confuse agency finality with functus officio and suggest that an act is not final vis-à-vis the agency making it as long as such agency is not functus officio. 25 Nevertheless, since a determination is obviously final (in the sense that the agency making it cannot revoke or amend it) if the agency is functus officio, an assessment of these two approaches is a good starting point for any analysis of finality.

The first of these perspectives is supported by the fact that legislatures often expressly provide that certain agency acts are final. For example, section 95(1) of The Labour Relations Act of Ontario states:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act, and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes .... 26 (Emphasis added.)

23 Each of the cases cited in footnote 19 is an example of the courts treating invalid decisions as an exception to the principle of conclusiveness. Also see Woldu v. MMI (1977), 18 N.R. 46 per LeDain J. (F.C.A.).

24 Rubinstein, supra note 20, mentions three of these.

25 Functus officio is defined as “discharged of his authority.” See Words and Phrases, Vol. 2 (2d ed. Toronto: DeBoo, 1964) at 686. That is, it is descriptive of the situation that arises when a statutory power holder is formally deseized of a matter over which he once had jurisdiction.

26 R.S.O. 1970, c. 232, s. 95(1).
If finality were a necessary concomitant of the exercise of a statutory power, these provisions would be redundant. Consequently, it is argued that in their absence no determinations are final in any respect.

In response to this view, it is suggested that, while such provisions do stipulate conclusiveness, they are intended only as privative clauses directed to the courts and are not addressed to the issue of finality generally. However, four factors militate against this interpretation. First, the provisions clearly state “for all purposes.” Second, since judges have traditionally treated finality clauses as only precluding appeals to courts, and since such appeals must be authorized in all cases by statute, if finality provisions were intended simply as privative clauses they would be unnecessary. Third, some statutes provide both for “finality” and grant agencies “exclusive jurisdiction,” while others stipulate only that an agency has “exclusive jurisdiction.” Finality clauses, therefore, must be directed to problems in addition to jurisdictional control by the courts. Fourth, many finality clauses are also accompanied by provisions expressly permitting reconsidertions. Since these express rehearing clauses are rarely attached to “exclusive jurisdiction clauses” which do not also provide for “finality,” it may be assumed that legislatures normally perceive their utility where decisions are stated to be final. The above analysis would appear to suggest that there are good arguments for never treating an agency as functus officio vis-à-vis its determinations unless an express clause stipulates conclusiveness.

The second general approach, that finality is the natural corollary of a legislative grant of power, and, therefore, that in principle no agency exercises a continuing jurisdiction, has found considerable favour with the courts. This view is justified on three grounds. First, the maxim interest republicae ut finis litem and analogies to the procedures of trial courts are used to support the view that statutory jurisdictions are exercisable only once. Second, it is suggested that since statutory bodies have no inherent jurisdiction, once a subordinate body which is given a limited jurisdiction acts, it exhausts its jurisdiction.

Third, it is argued that the very presence of express rehearing provisions is evidence that legislatures intend agency acts to be final in prin-

28 Cf. section 14b(6) of The Ontario Human Rights Code, R.S.O. 1970, c. 318, as am. by S.O. 1971, c. 50, s. 63:
[T]he board of inquiry has exclusive jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act. . . .
29 For example, section 95(1) of the Ontario Labour Relations Act, R.S.O. 1970, c. 232 states:
But nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, declaration or ruling.
30 A rare exception is The Milk Act, R.S.O. 1970, c. 273, where s. 26(13) provides for rehearings even though no finality clause is present. Also see the Immigration Act, R.S.C. 1970, c. I-2, s. 28; and Re Sparrow and MMI (1977), 75 D.L.R. (3d) 158 (F.C.T.D.).
Thus an agency loses jurisdiction once it performs its statutory mandate, and decisions are final vis-à-vis the agency simply because it has no continuing power to amend them, i.e., is functus officio.

Unfortunately, neither of these approaches makes much sense when applied as an absolute. The fact that legislatures often expressly enact finality provisions does not necessarily mean that in their absence an agency exercises a continuing jurisdiction, for it is probably the case that such clauses appear only when decisions are intended to be final for all purposes. Where the legislature wishes agency determinations to be final in only one or two senses, great confusion would be caused by enacting a general finality provision. As a result, although a finality clause should operate to make determinations unassailable by the agency making them, the result suggested by a contrario reasoning, i.e., absent such a clause an agency cannot be functus officio, does not logically follow.

On the other hand, the judicial presumption that the exercise of a statutory power automatically renders an agency functus officio seems to be based on a rather uncritical extrapolation from the principles applicable to the courts under the Judicature Acts. This approach fails to take into account the differing kinds of consequences which administrative acts may produce, the diversity of agency activity, and various legislative presumptions set forth in the Interpretation Acts. A brief preliminary review of the three usual agency functions reveals clearly the fallacy of the approach traditionally adopted by the judiciary.

Insofar as the acts of a public authority are legislative in nature, this presumption of finality should have no application whatsoever. Not only is a continuing jurisdiction the essence of a legislative power, but, in addition, most Canadian Interpretation Acts contain provisions clearly stating that an agency exercising legislative powers may revise, revoke or amend any of its acts. With respect to administrative functions, the authorities appear equally as certain. Jurisdictionally, there seems to be no reason in principle why all

84 The traditional threefold classification as legislative, administrative and judicial for the purposes of reconsiderations is suggested by Ouellette and Pépin, supra note 9, at 145-49.
36 See Read et al., Materials on Legislation (3d ed. Minela, N.Y.: Foundation Press, 1973) c. 1, especially at 58-75. In the text I am distinguishing between acts that are legislative in nature, and those that, although legislative in form, are really judicial in nature. See further, Moffat, The Legislative Process (1930), 24 Cornell L. Rev. 223.
88 For example, section 27(g) of the Ontario Interpretation Act, R.S.O. 1970, c. 225 states:

In every Act, unless the contrary intention appears, . . .

(g) where power is conferred to make by-laws, regulations, rules or orders, it includes power to alter or revoke the same from time to time and make others . . .

A similar provision is found in section 26(4) of the federal Interpretation Act, R.S.C. 1970, s. I-23:

(4) Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the like manner, and subject to the like consent and conditions, if any, to repeal, amend or vary the regulations and make others.
such decisions and determinations cannot be freely reconsidered; most of these powers are continuing or repetitive, and tend to be exercised within the larger framework of general agency policy. Moreover, the majority of Canadian Interpretation Acts expressly recognize the continuing nature of the standard functions performed by public authorities.

Where an agency determination, be it either legislative or nonlegislative in form, gives rise to a duty to act judicially, it is not illogical to infer that the power granted is intended to be exercised only once, for it is the


8 In Ontario, section 27 of The Interpretation Act, R.S.O. 1970, c. 225 provides:

(e) where a power is conferred or a duty is imposed on the holder of an office as such, the power may be exercised and the duty shall be performed from time to time as occasion requires;

(1) words authorizing the appointment of a public officer or functionary, or a deputy, include the power of removing him, reappointing him, or appointing another in his stead or to act in his stead, from time to time in the discretion of the authority in whom the power of appointment is vested; . . .

Section 26(3) of the federal Interpretation Act, R.S.C. 1970, c. I-23 states:

(3) Where a power is conferred or a duty imposed the power may be exercised and the duty shall be performed from time to time as occasion requires.

89 The locus classicus as to these situations is Wiswell v. Winnipeg, [1963] S.C.R. 512, 51 D.L.R. (2d) 754. Although the Wiswell case concerned only the question of whether notice and a hearing were required prior to the enactment of a by-law, there are dicta in other judgments to the effect that in such circumstances all other concomitants of a judicial or quasi-judicial classification will follow. For example, in Cloverlawn Investments Ltd. v. Corporation of District of Burnaby, [1972] 1 W.W.R. 628 (B.C.S.C.); and in Re Birnamwood Investment Ltd. and Town of Mississauga (1973), 2 O.R. (2d) 421, 43 D.L.R. (3d) 165 (H.C.), it was held that a failure to give notice of a by-law hearing gave rise to a nullity that could be corrected upon a rehearing.


41 See, for example, the decision in Cité de Jonquière v. Munger, supra note 19. Compare 22 Hals. (3d) para. 1660; and Williston and Rolls, The Law of Civil Procedure (Toronto: Butterworths, 1970) at 1061-62:

[A] formal judgment which is not ex parte and which clearly sets out the intention of the . . . officer making it, cannot, after entry, be varied, amended or rescinded on a new application to the same court, because, after his judgment has been entered, a judge is functus officio.

In R. v. Development Appeal Bd., Ex parte C.I.L., supra note 19, at 731 (D.L.R.), 639 (W.W.R.), Johnson J.A. stated:

The Courts of Chancery at an earlier time did rehear cases. No doubt this practice accounted in part for the delays that were one of the criticisms levelled at that Court. It is clear that no such right has been permitted since the Judicature Acts, "the power to re-hear being part of the appellate jurisdiction which is transferred by the Acts to the Court of Appeal": Re St. Nazaire Co. (1879), 12 Ch. D. 88. The application of this restriction to administrative boards appears to have been recognized by the Legislature because we find in Acts setting up a number of these boards express provision for rehearing is made.

Although there is nothing in conventional doctrine to suggest that the principles of the Judicature Acts apply to administrative agencies, most courts seem to take this position. For example, in Bowen v. City of Edmonton, supra note 31, the Court applies the principles of the Judicature Acts so precisely that it held that an agency became functus officio only upon formal entry of its decision.
essence of a judicial power that disputes between parties be finally settled. Although no Interpretation Act speaks to the issue, Canadian jurisprudence in this area invariably seems to support such a view. As a result, the conclusion that an agency is functus officio once it exercises any statutory power cannot be sustained.

Substantial logical difficulties arise, therefore, if either of these approaches to determining when an agency should be functus officio is adopted absolutely. Yet in combination they do provide certain general guidelines. First, where agency acts are expressly stated to be final, an agency normally will be functus officio once it acts. Second, where no finality provision is present, an agency will be functus officio upon acting only where it exercises powers giving rise to a duty to act judicially. Third, in either of the above situations, an express clause permitting reconsiderations will negative any conclusion that an agency is functus officio.

A simple analysis of the concept of functus officio does not, however, provide a complete understanding of agency finality, for this concept is descriptive only of when an agency formally has no jurisdiction to reopen a matter. There can be many other factors that might affect the finality of administrative activity. Considerations of estoppel, res judicata or retroactivity may preclude an agency that formally exercises a continuing jurisdiction, i.e., is not functus officio, from tampering with its prior determinations.

In light of this discussion, it is obvious that the approach adopted by Verchere J. is analytically unsound. Even though it reflects the position advanced by many Canadian courts, it should be rejected as a theoretical framework for evaluating when agency self-review should be permitted.

B. The Grillas Decision

It is because courts usually have failed to distinguish validity from finality, to assess the implication of finality clauses, or to recognize the diversity of functions performed by agencies, that the law of reconsiderations has often been punctuated by judicial decisions that seem to depart from the accepted, even if unsound, doctrine in the area. In recent years, the most renowned of these anomalies has been Grillas v. MMI, where the Supreme Court held that the Immigration Appeal Board could reconsider one of its decisions, even though no express rehearing clause was present in the governing statute. In Re Lornex, Verchere J. viewed Grillas as an exception to the general rule requiring statutory authorization, and relied on this decision to justify holding

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44 Classification of functions as judicial or administrative for the purpose of determining when agency acts should be final is not a very satisfactory approach, for the courts have often suggested that a key test for distinguishing a judicial act is its finality. See, for example, *Guay v. Lafleur*, [1965] S.C.R. 12, 47 D.L.R. (2d) 226; and *Saultier v. Québec Police Comm'n*, [1976] 1 S.C.R. 572, 57 D.L.R. (3d) 545. No analytical insight may be gained from propounding a tautology.

45 These matters are discussed fully in part C of this comment.

46 *Supra* note 17.
that the British Columbia Human Rights Commission had jurisdiction to re-hear Dr. Bukwa's complaint.47

In most discussions of the Grillas case, it is assumed that (1) the absence of an appeal as of right, and (2) the "beneficial" or "compassionate" nature of the statutory power under review, were the determinative reasons why the Immigration Appeal Board was deemed to exercise a continuing jurisdiction.48 This interpretation was fully accepted by Verchere J. However, two of the judgments in Grillas suggest other rationes decidendi, which, if adopted, would mean that the case is rather unexceptional.

First, it may be that the language of section 15 of the Immigration Appeal Board Act49 can be read as impliedly authorizing a reconsideration. Both Abbott J., writing for the majority, and Martland J., dissenting, seem to have adopted this approach, the latter noting:

[The Act] ... goes on, in s. 15(1), to give to the Board what might be called an "equitable" jurisdiction, to be exercised at its discretion, in certain circumstances, even though it has dismissed an appeal against a deportation order.

... In my view, this "equitable" jurisdiction of the Board, under s. 15(1), is a continuing jurisdiction, and not one which must be exercised once and for all. The intention of the Act was to enable the Board, in certain circumstances, to ameliorate the lot of an appellant against whom a deportation order had lawfully been made. It is in accordance with that intent that the Board should have jurisdiction, in cases which it deems proper, to hear further evidence on the issues involved under s. 15(1), even though it has made an order dismissing the appeal. In my view, the Board had jurisdiction to reopen the hearing of the appellant's appeal to permit him to present additional evidence.50

In other words, it appears to be the opinion of the Court that the reconsideration is authorized not because of the nonexistence of an appeal right from the exercise of the power under section 15, but rather, because that section implied that the Board's jurisdiction was "continuing"; i.e., the rehearing provision was tacit, rather than express.51 Further support for this position

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47 Supra note 1, at 708 (D.L.R.), 558 (W.W.R.).
48 See, for example, Ouellette and Pépin, supra note 9, at 146; Dussault, supra note 3, at 1310; Reid, supra note 9, (1976 supp.) at 12; and Re Lugano and MMI, supra note 40.
49 Section 15(1) of the Immigration Appeal Board Act, 1966-67 (Can.), c. 90 provided:

15. (1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that ... (a list of exceptions follows) [in which case] ... the Board may direct that the execution of the order of deportation be stayed, or may quash the order and direct the grant of entry or landing to the person against whom the order was made.

50 Supra note 17, at 590 (S.C.R.), 11 (D.L.R.).
51 This interpretation is supported by the recent Federal Court of Appeal decision in Re Lugano and MMI, supra note 40, at 628, where Jackett C.J. observed:

As I understand it, what the Supreme Court of Canada decided in Grillas v. Minister of Manpower and Immigration ... was that there was a continuing authority to grant s. 15 relief, which was not terminated by an earlier refusal.56 There was no question of setting aside an earlier decision of the Board. What was held, in effect, was that, even though relief was refused on one body of evidence, there was still jurisdiction to grant relief on other evidence.

* (The footnote refers to section 26(3) of the federal Interpretation Act.)
may also be derived from the wording of section 22 of the Immigration Appeal Board Act, which grants the Board exclusive jurisdiction, but does not provide that any of its determinations shall be final or conclusive.

A second orthodox basis upon which the decision in Grillas may be explained is suggested by Abbott J. in his observation that:

Whether the discretion to be exercised by the Board under s. 15 be described as equitable, administrative or political, it is not in the strict sense a judicial discretion, but it would appear it should be exercised essentially upon humanitarian grounds. (Emphasis added.)

That is, if the function of the Board cannot in any way be qualified as judicial, the principles of the Judicature Acts should not apply, and, consequently, the Board should have jurisdiction to reconsider its determination.

If either of these grounds is accepted, the Supreme Court decision is neither novel nor bizarre. Although it departs from the view that express statutory authorization is required to vest an agency with a continuing jurisdiction, the case is consistent with the more sophisticated analysis presented above. More importantly, a further explanation of the judgment in Grillas, which has not been raised in any subsequent decision or commentary, would suggest that the case is irrelevant to the question of agency reconsiderations. In Tsantili v. MMI, the Immigration Appeal Board noted that it was constituted as a superior court of record. Since superior courts exercise all the powers that formerly were vested in both Chancery and Common Law Courts,

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62 1966-67 (Can.), c. 90, s. 22 provided: “Subject to this Act and except as provided in the Immigration Act, the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction....”

63 Supra note 17, at 581 (S.C.R.), 4 (D.L.R.). This interpretation is also supported by a proposed amendment, which was later withdrawn, to the Immigration Appeal Board Act. See Draft Bill C-24, November 1976, s. 84:

Where the Board has declared an appeal to be abandoned pursuant to section 78 or has disposed of an appeal by allowing it or dismissing it, the Board shall not hear any further evidence relating to the appeal or vary any other the terms of its decision.

The marginal notes to this proposed amendment state:

In the absence of anything to the contrary in the law, the Board has felt obliged to reopen hearings particularly with respect to its compassionate jurisdiction, whenever requested to do so, even if the request appeared to be frivolous and designed only to produce delay. S. 84 specifically bars the reopening of cases which have been declared abandoned by the Board or on which the Board has made a conclusive decision.

64 In several other decisions, the Immigration Appeal Board has held that it possesses jurisdiction under section 15(1) to reconsider a refusal to exercise its discretion to stay a deportation order. See Chan v. MMI (1968), 6 L.A.C. 429; Caudill v. MMI (1968), 6 L.A.C. 426; and Xaviera Allen (Hollander) v. MMI (1976), 11 L.A.C. 156.

65 (1968), 6 L.A.C. 80.

66 Despite the fact that the Immigration Appeal Board considers that it is a superior court of record, there may be some dispute on this point. Section 7(1) of the Immigration Appeal Board Act, 1966-67 (Can.), c. 90 states: “The Board is a court of record and shall have an official seal, which shall be judicially noticed.” Section 7(2) of the Act provides: “The Board has, ... all such powers, rights and privileges as are vested in a superior court of record. ...” It is not clear from these provisions whether the Board is a superior court of record, or is merely a court of record vested with the powers, rights and privileges of a superior court. See note 58, infra.
the Board concluded that the unfettered right to reconsider, which Chancery possessed prior to the Judicature Acts, is now exercisable by any superior court of record. The reasoning in *Tsantili* has been expressly adopted by the Immigration Appeal Board in several subsequent cases, and has never been directly disputed in either the Federal Court or the Supreme Court of Canada. As a result, notwithstanding the failure of the Supreme Court in *Grillas* to advert to this point, it would appear that the “continuing jurisdiction” of the Immigration Appeal Board arises in law from its constitution as a “court of record” with “all such powers, rights and privileges as are vested in a superior court of record. . . .”

Given these explanations of the Supreme Court decision, to what extent can the judgment in *Grillas* be used to justify the decision in *Re Lornex*? From an analysis of the reasons of Martland J., the primary question would appear to be whether the British Columbia Human Rights Act can be read as implicitly authorizing reconsiderations. Although section 4 of the Act creates the offence alleged, the powers of the Human Rights Commission are set out in section 14(6), which provides:

If, in the opinion of the commission, a person named in a complaint referred under subsection (4) has contravened any provision of this Act, the commission may . . . (a list of powers follows) . . . and the order is final.

When compared with the statutory provisions in *Grillas*, two distinct reasons would militate against construing this section as impliedly vesting the Commission with a continuing jurisdiction. First, section 14 provides expressly that decisions of the British Columbia Human Rights Commission are final.

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68 There have, nevertheless, been several cases that, by implication, would suggest that the Board is not a superior court. For example, in *Wilby v. MMI*, [1975] F.C. 636; and *MMI v. Jolly*, [1975] F.C. 216, the Federal Court of Appeal, under Rule 1314, heard combined section 28 and 29 applications; and in *Fogel v. MMI*, [1975] F.C. 121; and *Re Lugano and MMI, supra* note 40, the Court entertained section 28 applications alone; and in *Lugano v. MMI*, [1976] 2 F.C. 438; and *Mojica v. MMI*, [1977] 1 F.C. 458, the Court suggested that section 28 review was unavailable only because of section 29. Each of these cases suggests indirectly that the Board is not a superior court since it is subject to judicial review. Nevertheless, there is a plethora of cases where the Court has said that the Board is subject to control only by appeal: *Prata v. MMI*, [1976] 1 S.C.R. 376; *Marlel v. MMI*, [1977] 1 F.C. 194; *Russo v. MMI*, [1977] 1 F.C. 325; *Boulis v. MMI*, [1974] S.C.R. 875, 26 D.L.R. (3d) 216; *MMI v. Brooks*, [1974] S.C.R. 850, 36 D.L.R. (3d) 522; *Button v. MMI*, [1975] F.C. 277; *Eggen v. MMI*, [1976] 2 F.C. 643; *Kalaam v. MMI*, [1976] 1 F.C. 112; *Adamusik v. MMI*, [1976] 2 F.C. 63. In light of this confusing jurisprudence, it is difficult to conclude whether the Board is a superior court of record. That it exercises such powers, however, has never been contested.

69 S.B.C. 1969, c. 10, s. 14.
whereas no corresponding provision can be found in the *Immigration Appeal Board Act*. Secondly, the power granted to the Human Rights Commission is the power to make a binding determination after preliminary negotiations or settlement attempts have failed. The power exercised by the Immigration Appeal Board is, on the other hand, the power to mitigate the effects of a binding determination already made. In one case, a formal decision arises after consensual measures have failed; in the other, equitable considerations are structured to temper formal decision. Viewed in this light, the former procedure cannot be seen as impliedly permitting reconsiderations, since its principal thrust is to determine authoritatively a dispute that cannot be settled amicably.

If the reasoning of Abbott J. is adopted, can the decision in *Re Lornex* be justified by an appeal to the *Grillas* case? Are there any aspects of the powers granted to the Human Rights Commission that would suggest that it does not exercise a judicial discretion? On the contrary, the determination under section 14 has all the elements of an adjudicative decision. There are facts to be applied to pre-existing norms which set out the rights between individuals. The Act is structured so as to produce pleadings and a "record" upon which a decision may be taken.60 Finally, the determination to be made is not "equitable" or "beneficial." In *Grillas*, the Board was performing an appellate function in which it was granted the power to ameliorate the lot of a person under order of deportation for "compassionate or humanitarian" reasons. It is in this sense only that section 15 is "beneficial" legislation. In *Re Lornex*, however, the Commission was empowered to impose a substantial civil sanction upon an offender. That the *Human Rights Act* had the "beneficial" purpose of inhibiting job discrimination cannot, of itself, mean that the discretion exercised under section 14 is "beneficial" and not "judicial" in the sense intended by Abbott J.61

The most significant difference between the two cases lies in the fact that the Immigration Appeal Board exercises the powers of a superior court of record, whereas the Human Rights Commission is a provincially constituted administrative tribunal.62 Any suggestions of inherent jurisdiction possessed by the federal Board and deriving from the Chancery Courts, therefore, cannot be applicable to a provincial agency that is not established as a superior court of record.

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60 See, in particular, sections 13, 14(1) through 14(4), and 15.

61 Normally, one associates "beneficial" with the notion of granting a benefit such as welfare or parole, or with the mitigation of state power, as in citizenship or immigration matters. Beneficial legislation is such that Hohfeldian rights, privileges, powers and immunities are vested in a private party, and the corresponding duties, no-rights, liabilities or disabilities are imposed upon the state. From the perspective of Dr. Bukwa, the B.C. *Human Rights Act* may be "beneficial" legislation, but to Lornex Mining, the statute is far from "beneficial." Since almost all statutes are "beneficial" from the point of view of one party to the dispute, the comments of Abbott J. are meaningless unless they are restricted to those cases where Hohfeld's duties, no-rights, etc., reside in the state.

62 For some of the problems associated with attempts by provincial governments to invest administrative tribunals with the powers of superior courts, see *Re Howard Investments and South of St. James Town Tenants' Ass'n.*, [1973] 1 O.R. 20, 30 D.L.R. (3d) 148 (H.C.).
Consequently, the reliance of Verchere J. in *Re Lornex* upon the *Grillas* case as creating a general exception to the ordinary principles of reconsiderations, which he advances as the basis for his decision, is to be questioned. If the result in *Re Lornex* is to be considered as correct, it will require justification by an appeal to the underlying policies and principles that ought to animate the law of agency reconsiderations, and not to any supposed rules that courts have heretofore purported to establish.

C. A Framework for Agency Reconsiderations

The general reliance of Canadian courts on the principle that agency reconsiderations may only be authorized by express statutory provisions has led to a very erratic law of rehearings. The judiciary has often treated the concept of finality as a premise, rather than a conclusion, and judges have failed to appreciate fully the diversity of tasks assigned to administrative agencies. Hedged in by a framework that bears little connection to either the justification for, or the merits of, reopening a decision, courts have sometimes rendered curious judgments in their attempts to individualize justice. *Re Lornex* demonstrates how this inability to develop a coherent policy of reconsiderations is likely to create real confusion for agencies seeking to evaluate their powers of redetermination.

If the traditional approach, which is vaguely tied to the classification of functions model, should be rejected whenever statutes do not expressly set out powers of reconsideration and are silent on the issue of agency finality, what factors ought to guide the law of rehearings in such cases? Perhaps the most

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63 For example, in *Re Carde and the Queen* (1977), 34 C.C.C. (2d) 559 (Ont. H.C.), the Court found that Parliament, "by inference," had granted the National Parole Board the implicit power to correct any injustice created by its own act or orders. On the other hand, in *Bowen v. City of Edmonton*, supra note 31, the Court attached no consequence to an informal public announcement relied upon by the parties, on the grounds that agency decisions may always be amended before formal entry.


> When statutes are silent and legislative intent unclear, agencies and reviewing courts must work out the practices and the limits on reopening. The considerations affecting reopening to take account of new developments or of new evidence of old developments often differ from those affecting the correction of mistakes or shifts in judgment about law or policy. Usually the search for a basic principle to guide reopening is futile; the results usually must reflect the needs that are unique to each administrative task. Factors to be weighed are the advantages of repose, the desire for stability, the importance of administrative freedom to reformulate policy, the extent of party reliance upon the first decision, the degree of care or haste in making the earlier decision, the general equities of each problem.

In Canada, the best general approach to the problem of review of agency action, and the policy that ought to sustain it, is Abel, *supra* note 5. Professor de Smith also seems to have concluded that the matter is incapable of detailed analysis. He notes at page 94 of his *Judicial Review of Administrative Action*, *supra* note 34 that:

> The interests of fairness to individuals whose interests will otherwise be directly and prejudicially affected may lead courts to attribute binding effect to administrative acts and decisions which the competent authority wishes to repudiate or rescind. Indeed, it would seem that the legal competence of administrative bodies to rescind their decisions depends (in the absence of statutory provision for this matter) at least as much on considerations of equity and public policy as on conceptual classification.
appropriate place to begin such an inquiry is by asking what are the circumstances (short of simply wishing a second look at the matter) under which the reopening of a matter already disposed of may be appropriate? Eight such situations might be suggested: correction of clerical errors or slips, fraud, *ultra vires*, error of fact, discovery of new evidence, change of circumstances, error of law or policy, and change of law or policy.\(^6\) There is little doubt that clerical errors or mistakes may be corrected on reopening since, in such cases, it is not a determination, but merely its recording that is being revised.\(^6\) Furthermore, it is indisputable that if a fraud is perpetrated upon an agency, or if it acts *ultra vires*, it should have the power to reconsider its action, for, in such cases, the issue is validity, not finality.\(^6\) Insofar as the five other grounds are concerned, all of which presuppose a valid act, it is necessary to weigh reasons in favour of reopening against reasons opposing reopening a determination.\(^6\) Agency finality, therefore, should depend on both the potential effect of revised action and the reasons why revision is sought.

Over the past thirty years, various courts have advanced four distinct reasons, apart from the concept of *functus officio*, to justify denying agencies the power to reconsider in particular circumstances. First, they have suggested that the principle of estoppel should operate so as to prevent a public authority from altering any act where there has been a detrimental reliance by a party privy to it.\(^6\) Although this view that the Crown or its agencies may be estopped has found some favour in England,\(^7\) it does not appear to have been totally incorporated into Canadian law.\(^7\) In any event, the restrictive conditions attaching to a plea of estoppel would limit the occasions when such an argument might be raised successfully.

A second reason for denying agencies the power to reconsider is the view that once a determination affecting the rights of an individual is made, it

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\(^6\) See 22 Hals. (3d) para. 1669; and Williston and Rolls, *supra* note 41, at 1065-66 for technicalities of reopening in such cases.

\(^6\) See 22 Hals. (3d) para. 1666; and Williston and Rolls, *supra* note 41, at 1062. This position was expressly confirmed by *Re City of Kingston and Mining and Lands Comm't* (1977), 18 O.R. (2d) 166 at 169 (H.C.).

\(^6\) This approach to the problem of finality has been suggested by several authors, but no criteria beyond the most abstract generalization have been offered. See Davis, *supra* note 64; de Smith, *supra* note 37; and Ganz, *supra* note 65.


\(^7\) In *Re Rothmans of Fall Mall Can. Ltd. and MNR* (1976), 67 D.L.R. (3d) 505 at 511, the Federal Court of Appeal seemed to suggest that the estoppel in the Liverpool case arose only with respect to the promise of a hearing. Similarly, in *Re Multi-Malls Inc. and Min. of Transp. and Commun.* (1976), 14 O.R. (2d) 49, the Ontario Court of Appeal also offered the opinion that the principle in the Liverpool case would apply so as to estop the Minister from reneging on a promise to hold a hearing before deciding. However, there is clearly a difference between holding that the Crown may be estopped with respect to the procedures it proposes to follow (a jurisdictional issue) and holding it estopped *vis-à-vis* decisions validly taken.
should not be interfered with except by appeal. As Vaisey J. said in Re 56 Denton Road:

[Where Parliament confers upon a body ... the duty of deciding or determining any question, the deciding or determining of which affects the rights of the subject, such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot ... be altered or withdrawn by that body.]

The difficulty with this approach, however, is that it ties reconsiderations to a preliminary classification of functions. Furthermore, why should the fact that a decision affects rights alone be sufficient to brand a determination with the stamp of finality? Surely, no one suffers if an act is withdrawn or revised before it is acted upon. The proposition advanced in Re 56 Denton Road must consequently be rejected, insofar as it is not tied to the estoppel principle.

The courts have also suggested that the principle of res judicata will preclude an agency from tampering with a decision already taken. Yet res judicata is merely a description of the relationship between parties to a lis. The rationale for the doctrine relates to the necessity of preventing further litigation with respect to the same dispute or cause of action. In other words, the concept is designed to prevent a party from collaterally impeaching the validity of a previous decision to which he was privy, but does not bear on the powers of an agency to reopen one of its determinations.

A fourth reason for precluding agencies from reopening their prior determinations is tied to the maxim interest republicae ut finis litem. Yet this idea itself does not represent an independent principle supporting or opposing reopenings. Rather, it is the Latin tag attached to the conclusion that the reasons compelling a reconsideration do not outweigh those for denying a reassessment. Surely the interest republicae cannot be derived formalistically, but must be tied to particular factors such as delay, cost, reliance, etc., factors that will vary in each particular case.

Of the usual reasons advanced by courts for preventing agency reconsiderations, only the doctrine of estoppel seems to have any cogency from an overall policy perspective. But there are other factors that should be considered by a public authority wishing to reopen a decision, and these may, in particular circumstances, either enlarge or restrict the scope of the estoppel principle. In support of the power to reconsider, it may be suggested that the original decision maker is better situated than anyone else to comprehensively review his own determinations. Moreover, delay and expense can be avoided by resubmitting a question to an institution that has the power to make a decision on the merits, rather than seeking jurisdictional control from a body
whose powers are restricted to requiring a redetermination of the issue.\textsuperscript{78} On the other hand, individual statutes may provide for alternative remedies that are better than reconsiderations. For example, informal appeals on the merits may be preferable since they would not appear to offend the \textit{nemo iudex} rule. A requirement of homologation may also guarantee expedient and effective review. Finally, if agencies are to be permitted substantial powers of reconsideration, problems of unending reassessments may arise.\textsuperscript{79} Because of their variability, the balancing of the above factors can never be the subject of abstract definition. It is clear, however, that the answer in each case should depend to some degree on the reasons why a reconsideration is being sought. As a result, it is necessary to review the circumstances advanced earlier that may support the reopening of a valid decision.\textsuperscript{80}

The arguments in favour of permitting the reconsideration of a valid act are probably strongest insofar as errors of law are concerned. Since determinations tainted with such errors are susceptible to quashing on judicial review, there is no logical justification for denying an agency, which becomes aware of such an error, the power of rectification.\textsuperscript{81} Similarly, when a decision results from a misappreciation of the facts, the reasons for granting agencies the jurisdiction to correct such mistakes are persuasive. After all, which institution is in the best position to put all the evidence into context?\textsuperscript{82} In any event, reopenings on the grounds of error of law or misappreciation of the facts present an obvious issue requiring essentially a yes or no response, so that interminable requests for reconsideration in such cases are unlikely.

Where the law, agency policy, or circumstances have changed, the arguments in favour of permitting reopenings are less cogent. First, the reopening of a decision in order to apply an amended legislative provision or to take into account changed circumstances would offend the retroactivity principle. Second, a reconsideration in such cases would logically involve more than the simple revision of an agency act. A reconsideration presupposes a further analysis of materials extant at the time of the initial consideration. Consequently, review on the basis of changed law, policy or fact would seem to be tied to situations where the prospective amendment of a prior act would not retroactively annul an existing determination.

\textsuperscript{78} This is especially true where the issue involves an alleged intra-jurisdictional error of law or fact.

\textsuperscript{79} See the quotation in \textit{R. v. Development Appeal Bd., Ex parte C.I.L., supra} note 33, respecting the low repute of the Chancery Courts.

\textsuperscript{80} See text accompanying note 65, \textit{supra}.

\textsuperscript{81} Recent statutory amendments to the grounds for judicial review have widened the scope of reviewable intra-jurisdictional errors of law. For example, the Ontario \textit{Judicial Review Procedure Act, S.O. 1972, Vol. 2}, c. 48 envisions review for errors on the face of the record where a "statutory power of decision" is implicated, while section 281(b) of the \textit{Federal Court Act, S.C. 1970 (2d supp.)}, c. 10 permits review whether or not the error appears on the face of the record.

\textsuperscript{82} Review under section 28 of the \textit{Federal Court Act} encompasses factual errors, as does section 2(4) of the \textit{Judicial Review Procedure Act} of Ontario. Moreover, as D.W. Elliot has demonstrated, even at common law courts often reviewed administrative decisions on this basis. See Elliott, "No Evidence": \textit{A Ground of Judicial Review in Canadian Administrative Law} (1972), 37 Sask. L. Rev. 48.
Finally, where a reopening is predicated upon the subsequent discovery of evidence that existed at the time of the first decision, additional factors require weighing. If material evidence was suppressed by a party adverse to the one seeking the reconsideration, an agency will have the power to reopen, since its first decision was tainted by fraud. If a rehearing is sought in order to present evidence that was not withheld, and that conceivably might have been offered at a first hearing, the arguments against reconsiderations are persuasive. First, there is no certainty that the additional fact-finding process will not be prolonged indefinitely. Second, the reason upon which the reconsideration is being sought rests entirely in the hands of the applicant (unlike any of the other cases where the act of the tribunal or some other third party gives rise to the desire to reconsider). Third, reconsideration on this ground would permit an agency to escape the effect of appellate reversal by subsequent alteration of the record. Nevertheless, depending on factors such as the continuing nature of the event which generates the original agency act, the diligence of the party seeking a reconsideration in his original evidence and the importance of the evidence sought to be introduced, reopenings to consider fresh evidence may be justifiable.

Unfortunately, none of these considerations appear to have been addressed in Re Lornex. The express finality clause of section 14 was not even adverted to by the Court. Furthermore, the rehearing was sought solely to present more evidence, yet nothing in the record indicates reasonable diligence by Dr. Bukwa in her original quest for evidence, and there is no indication whether the additional evidence to be adduced was material or persuasive. Finally, the Court did not address the question of whether Lornex Mining had in any way relied upon the original determination. On the facts of this case, the first two factors would militate against reopening the hearing; in fact, the finality clause should preclude absolutely a reconsideration by the Commission. Consequently, the decision of Verchere J. is likely to lead to considerable confusion in the law of rehearings and should not be relied upon as an authoritative analysis of the area of administrative law.

84 In any event, rehearings should never be permitted once an appellate or review process has been initiated. On the other hand, the requirement that reconsiderations be requested as a precondition of review may prevent such cases from arising.
85 For example, in Re Lornex the first decision taken by the Human Rights Commission would not preclude Dr. Bukwa or anyone else from refiling a complaint based on similar circumstances that continued to exist after the date of the decision. On this very point, see In the Matter of a Complaint by Jean Tharp Against Lornex Mining Corp., an unreported and undated decision of the B.C. Human Rights Commission against which judicial review was sought, sub nom. Lornex Mining Corp. v. Ruff, unreported, June 3, 1977 (B.C.S.C.).
87 For an indication of the confusion this decision is likely to produce, see Ouellette and Pépin, supra note 9, at 146-47:

Dans le cas des décisions sans appel, la juridiction accordée à l'administration pourrait être considérée comme se prolongeant dans le temps plutôt que s'exerçant une fois pour tout [sic]... Dans un arrêt récent, cette règle a été appliquée à la "Human
D. Conclusion

Fundamentally, one's approach to agency reconsiderations is a product of underlying views about the utility of judicial review, the calibre and integrity of public servants, and the exportability of the adjudicative model of decision making. Unfortunately, the courts have not been willing to erect a theoretical framework within which these underlying beliefs could be articulated. This failure has contributed to an erratic pattern of judicial intervention that bears little connection to the merits of reconsideration in any given case. Moreover, commentators have usually restricted their remarks to vague generalizations that really do not focus attention on the policy issues requiring ventilation.

The decision in Re Lornex is both a symptom and a cause of these problems. However, analysis of and extrapolation from the judgment of Verchere J. would permit the following tentative conclusions to be drawn. First, any act which is a nullity, either because it is tainted by fraud or because it is ultra vires, may be reconsidered. Second, the classification of agency functions does not really aid in determining when a reconsideration should be permitted, since many of the factors that affect classification are themselves directly relevant to the determination of when a reopening should be permitted. Third, an agency granted the powers of a superior court of record and exercising appellate functions has an inherent jurisdiction to reopen any matter. Fourth, where legislation provides that agency acts are final, reconsiderations may only be undertaken if expressly permitted. Fifth, in the absence of a finality clause, the principle of estoppel may preclude reconsiderations. Sixth, reviewable errors of law, fact or policy may, if a request is timely, be reconsidered upon application. Seventh, changes of law, fact or policy may justify a reopening where an agency act is projected on a continuing basis into the future and the revised order operates prospectively. Eighth, reopenings to consider fresh evidence may be permitted where, despite reasonable diligence by the applicant, such evidence was not discoverable at the time of the original determination.

Increased judicial sympathy for the desire by agencies to reconsider matters already disposed of is evidence of a growing sophistication in Canadian administrative law, yet, a more subtle approach requires careful analysis of the underlying reasons for a given doctrinal position. To the extent that the judgment in Re Lornex represents a departure from insensitive judicial interference with agency activity, it is to be welcomed; to the extent that the decision fails to provide a satisfactory analysis of agency reconsiderations, it merits criticism.

Rights Commission" de Colombie-Britannique et en conséquence, on peut raisonnablement prédire qu'elle fera tache d'huile.

88 Organic criteria such as the abstract nature of the power exercised, and procedural criteria such as the existence of a lis inter partes, are becoming less important in the classification process, while material criteria such as conclusiveness, the application of preexisting rules, and the effect of the exercise of a power, are becoming more significant. Each of the latter three criteria is relevant to the determination of when an act should be final.