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## The Jurisdictional Fact Doctrine in the Supreme Court of Canada-a Mitigating Plea

## THE JURISDICTIONAL FACT DOCTRINE IN THE SUPREME COURT OF CANADA — A MITIGATING PLEA

By DAVID MULLAN\*

In a recent article in the *Osgoode Hall Law Journal*,<sup>1</sup> Professor P. W. Hogg criticized the decision of the Supreme Court of Canada in *Bell v. Ontario Human Rights Commission*.<sup>2</sup> Principally his criticisms were threefold. First, he disapproved of the wide view the Court took of its powers to review decisions for jurisdictional error. Secondly, he took issue with the Court's finding that the accommodation in question was not a "self-contained dwelling unit".<sup>3</sup> Finally, he rejected the Court's decision to inquire into the merits of the case in favour of the decision of the Ontario Court of Appeal<sup>4</sup> that review was untimely until the board of inquiry had had an opportunity of determining the jurisdictional question.

On the question whether the accommodation came within the Act, I accept Professor Hogg's analysis and agree with him that the Supreme Court was wrong at this point. However, with respect to the issues of the authority of the Court to review for jurisdictional fact and the timeliness of judicial review, there are certain points at which I find Professor Hogg's conclusions difficult to accept.

The general basis upon which the courts define their power to review decisions for jurisdictional error is that in the conferring of statutory powers the legislature attributes tentative decision-making authority to the statutory decision-maker with respect to some issues and final decision-making authority with respect to other issues. Those over which the decision-maker has only tentative authority are issues affecting his jurisdiction. Those over which he has final authority are those within his jurisdiction and are not generally subject to review.<sup>5</sup> The principal difficulty in classifying various stages of the decision-making process into one of these two categories is caused by the fact that the legislature seldom, if ever, indicates which issues it considers jurisdictional and which it considers to be intra-jurisdictional.

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<sup>1</sup> P. Hogg, *The Jurisdictional Fact Doctrine in the Supreme Court of Canada* (1971), 9 O.H.L.J. 203. Further comment on *Bell* from another perspective is contained in Ian A. Hunter, *Judicial Review of Human Rights Legislation: McKay v. Bell* (1972), 7 U.B.C.L.R. 17.

<sup>2</sup> [1971] S.C.R. 756; (1971), 18 D.L.R. (3d) 1.

<sup>3</sup> Under *The Ontario Human Rights Code* certain discriminatory practices in relation to the occupancy of "self-contained dwelling units" are forbidden. See R.S.O. 1970, c. 318, section 3.

<sup>4</sup> *Sub nom. R. v. Tarnopolsky; Ex parte Bell*, [1970] 2 O.R. 672; (1969), 11 D.L.R. (3d) 658. The unanimous judgment of a five man Court of Appeal was delivered by Laskin J.A.

<sup>5</sup> See a recent statement of this proposition in the judgment of Lord Wilberforce in *Anisimic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 at 207.

The conclusion Professor Hogg derives from such a failure on the part of the legislature is that the legislature therefore intended all questions to be determined exclusively by the decision-maker and that he should not be subject to judicial scrutiny for any form of preliminary or collateral jurisdictional error.<sup>6</sup> Thus, in relation to *Bell's* case, the question of whether the accommodation was self-contained becomes a matter exclusively for the Ontario Human Rights Commission and the Board of Inquiry appointed under the Act,<sup>7</sup> since the courts are given no specific role in relation to this issue by the Act. This, of course, is not the view the courts have taken of their role in relation to jurisdictional error and Professor Hogg acknowledges that it is now too late for the courts to deny their authority to review for jurisdictional error.<sup>8</sup> Indeed, whatever may have been the position initially, even legislatures have both impliedly and explicitly acknowledged the role of the courts in relation to jurisdictional error. Continued legislative inactivity in the face of court assumption of power to review for jurisdictional error must be taken to provide some indication of legislative acquiescence in the system. This is particularly so when legislatures presumably have authority to include privative clauses in legislation specifically denying the courts review power for jurisdictional error. Instead legislatures have seldom gone beyond standard types of privative clause despite persistent judicial holding that these do not affect review for jurisdictional error.<sup>9</sup> In recent months this implicit legislative acceptance of the system has been given more specific acknowledgement in relation to statutory decision-makers both in Ontario and at the federal level. The Judicial Review Procedure Act, 1971 of Ontario,<sup>10</sup> which creates a new judicial review remedy in this province, continues all the grounds for review presently available at common law while by virtue of the Federal Court Act, the Federal Court of Appeal is specifically given authority to review for jurisdictional error.<sup>11</sup>

Aside from legislative acceptance of the jurisdictional issue basis for judicial review, it can be questioned whether an alternative to such a system was ever open to the courts. Professor Hogg is full of admiration for the

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<sup>6</sup> *Supra*, note 1 at 210 and ff.

<sup>7</sup> *The Ontario Human Rights Code*, R.S.O. 1970, c. 318, particularly sections 13 and 14.

<sup>8</sup> *Supra*, note 1 at 216.

<sup>9</sup> One Ontario example of such a privative clause is section 9(5) of the National Selective Service Mobilization Regulations, P.C. 10924 ([1942] C.W.O.R. 573) which was in issue in the case of *R. ex rel Sewell v. Morrell*, [1944] 3 D.L.R. 710 (Ontario H.C.). This specifically excluded jurisdictional error from the ambit of judicial review and was given effect to by the court in that case. Such examples are, however, rare. See also *R. v. Commissioner of Police for The Northern Territory; Ex parte Holroyd* (1965), 7 Fed. L.R. 8 (Supreme Court of the Northern Territory) and the recent Supreme Court of Canada decisions in *Pringle and Department of Manpower and Immigration v. Fraser* (1972), 26 D.L.R. (3d) 28 and *Woodward Estate v. Minister of Justice* (1972), 27 D.L.R. (3d) 608.

<sup>10</sup> S.O. 1971, c. 48. See section 2.

<sup>11</sup> Section 28, S.C. 1970-72, c. 1. Jurisdictional error is also legislatively recognized in a number of sections creating statutory rights of appeal to the courts from decisions of administrative tribunals. See e.g. section 26(1) of the Broadcasting Act, R.S.C. 1970, c. B-11, as amended by section 64(3) of the Federal Court Act, S.C. 1970-72, c. 1.

writings of D. M. Gordon, Q.C.<sup>12</sup> who for many years has been exposing the frailties of the "jurisdictional fact" doctrine. Yet, the writings of Gordon are equally open to criticism and do not really offer a solution to the problem. In his 1929 *Law Quarterly Review* article, Gordon reveals himself as a supporter of the "pure" theory of jurisdiction.<sup>13</sup> De Smith gives a definition of the pure theory of jurisdiction:

Jurisdiction means authority to decide. Whenever a judicial tribunal is empowered or required to inquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for certiorari but are binding till reversed on appeal.<sup>14</sup>

The principal element in this definition is "authority to decide" or, as Lord Reid has recently described it, "entitle[ment] to enter on the inquiry in question."<sup>15</sup> If this authority or entitlement does not exist, the tribunal is without jurisdiction and its decisions stand liable to be quashed.

In contrast to this pure theory are the wider theories of jurisdiction. The basis on which these theories operate is stated by de Smith in the following terms:-

... it must not be assumed that when Parliament empowers an inferior tribunal to inquire into certain facts it intends that the tribunal's conclusions on every one of those facts shall be unimpeachable.<sup>16</sup>

Accordingly there are certain questions, which while under the "pure" theory of jurisdiction do not go to the tribunal's authority to decide the matter, are of such importance that they are described as jurisdictional. In the recent House of Lord's decision in *Anisminic v. Foreign Compensation Commission*, Lord Reid catalogued these errors which in his terms render a decision a nullity. Beside collateral or preliminary questions affecting jurisdiction he also listed the following:

It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.<sup>17</sup>

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<sup>12</sup> *Supra*, note 1 at 210-211. Gordon's contributions to this debate are listed in footnote 26 of Professor Hogg's article. A more recent contribution is *What Did the Anisminic Case Decide?* (1971), 34 *Mod L. Rev.* 1. Indeed, though Mr. Gordon is critical of the result reached in that case, his general attitude towards issues of jurisdiction appears to have mellowed somewhat as indicated by the following extract:

The majority law lords, up to a point, take a very orthodox view of what amounts to excess of jurisdiction, a view that no one could quarrel with. They say that jurisdiction is a matter of field or area of cognisance and of course excess of jurisdiction will be going outside that field or area (*Id.* at 6).

<sup>13</sup> D. M. Gordon, *The Relation of Facts to Jurisdiction* (1929), 45 *L.Q.R.* 459.

<sup>14</sup> S.A. de Smith, *Judicial Review of Administrative Action* (London: Stevens, 2nd ed., 1968) 96.

<sup>15</sup> In *Anisminic Ltd. v. Foreign Compensation Commission*, *supra*, note 5 at 171.

<sup>16</sup> *Supra*, note 14 at 97-98.

<sup>17</sup> *Supra*, note 5.

Lord Reid concluded by saying that this list was not intended to be exhaustive<sup>18</sup> but, even so, on their face they initially seem to indicate a much broader range of jurisdictional errors than that covered by the "pure" theory of jurisdiction.

Gordon, in espousing the "pure" theory of jurisdiction as opposed to the wider theories, takes the example of an assault charge.

If, therefore, an adjudication has been made by any tribunal that an assault within the statute mentioned has been committed, it is idle, so far as jurisdiction is concerned, to inquire whether the assault actually was committed; the only relevant question is, Was the tribunal that so found the tribunal whose opinion was made the test?<sup>19</sup>

In other words, a reviewing court may inquire as to whether the tribunal concerned had jurisdiction in matters of assault but may go no further. How much scope does this afford the courts? Presumably it allows the court to decide whether this is a tribunal which has any jurisdiction at all in relation to assault. It would also seem to allow a reviewing court to decide whether the particular charge comes within the territorial jurisdiction of the tribunal<sup>20</sup> and also whether the person charged with assault is a person amenable to the tribunal's jurisdiction. All these questions would seem to be elements in the issue whether this was "the tribunal whose opinion was made the test." Translating this example into terms of *Bell's* case, is there any essential difference between the issue of whether accommodation is a "self-contained dwelling unit" and that of whether this is a tribunal which has jurisdiction over charges of assault? Certainly, issues of the kind raised by the assault example are seldom litigated. The tribunal normally will assume jurisdiction without question. Nevertheless, if the tribunal's competence in relation to the subject matter of assault is put into issue, it will be forced to make a preliminary determination of law and fact before proceeding, a determination which is essentially the same as that in issue in *Bell*. For Professor Hogg the beauty of Gordon's theory rests in the notion that once a tribunal has power to decide an issue it has jurisdiction to decide that issue conclusively either way without court intervention. Yet Gordon himself destroys the symmetry of that theory by admitting of some scope for jurisdictional inquiries by a court, the subject matter of which may have already been the subject of a preliminary determination by the tribunal under challenge. Once some kind of jurisdictional review by the courts is accepted then the whole question of how far that inquiry should extend comes into focus and in terms of his own criticisms Gordon becomes involved in the problem of delineating questions affecting jurisdiction from those which do not. Indeed, the "pure" theory of jurisdiction rather than being "an uncompromising rejection of the jurisdictional fact doctrine"<sup>21</sup> is a theory which states that the courts can review for "very" preliminary or collateral matters as opposed to the normal position

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<sup>18</sup> *Id.*

<sup>19</sup> *Supra*, note 13 at 461-62.

<sup>20</sup> e.g. *R. v. Dowling* (1889), 17 O.R. 698. See however Gordon's views on this point. *Supra*, note 13 at 484-488.

<sup>21</sup> *Supra*, note 1 at 210.

that all preliminary or collateral matters are subject to review and there is "no acid test"<sup>22</sup> for distinguishing what are "very" preliminary questions from preliminary questions.

Basically the problem is that even Gordon, despite his rejection of the wider theories of jurisdiction is not completely prepared to acknowledge a tribunal's authority to err at will and to function in complete disregard of empowering legislation. So he admits of exceptions and by opening the door to jurisdictional error even minutely he raises all the problems of the jurisdictional theory. It is not clear whether Professor Hogg agrees with Gordon in this matter and it may well be that Professor Hogg completely rejects any notion of preliminary or collateral jurisdictional error and in doing so goes further even than Gordon. However, the notion that a tribunal or any statutory decision-maker may do anything to the limits of enforcement authority is difficult to accept completely and impossible to justify historically, save in relation to the highest court in the land.

The growth of statutory decision-making powers and the movement towards specialist tribunals rather than courts as decision-making agencies was not accompanied by the creation of a coherent system of appeals. Traditionally the superior courts of the land were at common law responsible for supervising the affairs of inferior tribunals on the basis of such matters as jurisdiction.<sup>23</sup> Given this state of affairs and given the early criticisms levelled at decision-making through tribunals rather than the ordinary courts,<sup>24</sup> it is difficult to argue that legislatures generally intended such decision-making processes to be immune from judicial review on the basis of jurisdictional error. Rather, the courts' historical position as protectors of the citizenry from excesses of executive power and the perceived need for confining statutory decision-makers within the limit of their powers dictated the continuation of review for jurisdictional error. Moreover, the existence of these traditional review powers militated against the need for a system of appeals to be worked out in the context of individual statutory powers.

Beyond questions of legislative intention, review for jurisdictional error can be justified on a more basic level yet. Notions of the Rule of Law and

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<sup>22</sup> Professor Hogg adopts this expression from H.W.R. Wade, *Anglo-American Administrative Law: More Reflections* (1966), 82 L.Q.R. 226, 231 (*Id.*, at 211).

<sup>23</sup> For illuminating accounts of the development of the common law of judicial review in England see Edith Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Cambridge: Harvard University Press, 1963); Amnon Rubinstein, *Jurisdiction and Illegality* (Oxford: Clarendon Press, 1965) and Louis L. Jaffe, *Judicial Control of Administrative Action* (Boston: Little, Brown and Co., 1965) at 624-633. For a time, as pointed out by both Jaffe (*Id.* at 630-631) and de Smith (*Supra*, note 14 at 96-99), the English courts appear to have adopted the pure theory of jurisdiction but this was contrary to earlier authority and was eventually abandoned.

<sup>24</sup> See e.g. Gordon Hewart, *The New Despotism* (London: E. Benn, 1929) and the Donoughmore Committee's Report (*Report of the Committee on Ministers' Powers*, Cmnd. 4060 (1932)). The Donoughmore Committee was set up in 1929, partly in response to Lord Hewart's criticism in his book of the growth of administrative power in England.

the position of the courts in constitutional history<sup>25</sup> point to the desirability of providing a method by which statutory authorities can be confined within the limits of their statutory mandate. As yet our legal system has not reached the degree of sophistication or anarchy (depending on your legal philosophy)<sup>26</sup> which permits statutory authorities to unilaterally determine which statutory directions they will obey and which they will not. Legislative supremacy still dictates that power must be exercised within the scope of statutory authority and, in the absence of alternative methods, the common law of judicial review developed by the courts remains a necessary safeguard in ensuring adherence to this basic principle.

Times have, however, changed. First, the functions exercised by statutory decision-makers are so many and varied nowadays that it is not possible to accommodate them all within the single system of judicial supervision developed by the common law. Secondly, the concept of jurisdiction has burgeoned to such an extent that the courts have now reached the stage where virtually any error can be classified as jurisdictional should the courts so desire. The Lord Reid formula from *Anisimnic* is ample evidence of this.<sup>27</sup> Because of this the old methods have outlived their usefulness. In a relatively unsophisticated system of statutory power they were most useful. Today they are inadequate.

What are the solutions? Unilateral abandonment by the courts of the jurisdiction doctrine never was and never could be the solution. Too much legislative action has been predicated in reliance on it. Moreover, in terms of current jurisprudence it would only switch emphasis from jurisdictional error to abuse of discretion as a ground for judicial review, a change of no real effect since, in recent years, the right to review for jurisdictional error has

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<sup>25</sup> The role of the superior courts of Canada as supervisors of the actions of inferior courts, tribunals and statutory decision-makers is implicitly recognized in the preamble to the British North America Act, 1867, 30-31 Vict., c. 3 which creates in Canada a "constitution similar in principle to that of the United Kingdom". This notion is further augmented by section 129 of the B.N.A. Act, which specifically preserves the pre-Confederation jurisdiction of provincial superior courts and, also, by the arguments that the B.N.A. Act guarantees the "jurisdiction of provincial superior courts respecting interpretation and application of laws within s. 92 of the B.N.A. Act". See W. R. Lederman, *The Independence of the Judiciary* (Part 2) (1956), 34 Can. Bar Rev. 1139 at 1166 and generally at 1166-1175.

<sup>26</sup> The notion that all laws need not be obeyed is probably most clearly developed in the area of selective enforcement of criminal statutes. For a recent discussion of prosecutorial discretion and the problems involved in the decisions of enforcement agencies not to prosecute for certain breaches of the law see Chapter 6 of K. C. Davis, *Discretionary Justice* (Baton Rouge: Louisiana State University Press, 1969).

<sup>27</sup> *Supra*, note 13. Such is the scope for review afforded by this list that it seems to make any error at all potentially classifiable as jurisdictional. See Gordon, *What Did Anisimnic Decide?* (*Supra*, note 12 at 7) and H. W. R. Wade, *Constitutional and Administrative Aspects of the Anisimnic Case* (1969), 85 L.Q.R. 198, 211. This wide definition of jurisdictional error was also accepted by the Supreme Court of Canada in *Metropolitan Life Insurance Co. v. International Union of Operating Engineers*, [1970] S.C.R. 425 at 435-436; (1970), 11 D.L.R. (3d) 336 at 344-345, discussed by Professor Hogg (at 211-213).

subsumed review powers for abuse of discretion anyway.<sup>28</sup> Professor Hogg states that the right to review for abuse of discretion "insists upon a measure of deference to the agency"<sup>29</sup> and "requires serious error"<sup>30</sup> yet, where there can be an abuse of discretion for failure to take account of relevant factors or taking account of irrelevant factors, the measure of control attributed to the courts is considerable. Judicial judgment of what constitute relevant and irrelevant factors allows for a wide degree of interference in the merits of tribunal decisions.

Indeed, the only feasible solution is for the legislature to work out the proper scope, if any, for court intervention within the context of particular empowering statutes. In particular, an attempt should be made to amalgamate appeal and review powers and to specifically clarify in the context of that amalgamation which matters should be subject to judicial scrutiny and which should not. In other words, matters affecting jurisdiction should be specifically defined or, alternatively, (depending on the nature of the statutory authority) all errors of law should be subject to attack. This mammoth task has generally been eschewed by the legislatures of Canada which currently seem prepared to acquiesce in present systems of judicial review. The message of the McRuer Commission Report,<sup>31</sup> the remedial reforms in Ontario<sup>32</sup>

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<sup>28</sup>See for example the grounds for review for abuse of discretion listed in the House of Lords' decision of *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 per Lord Morris of Borth-y-Gest at 1040-1041. These are virtually identical to the grounds for review for jurisdictional error listed by Lord Reid in *Anisminic*. This point is developed in J. S. Smillie, *Judicial Review of Abuse of Discretionary Power* (1969), 47 Can. Bar Rev. 623.

<sup>29</sup>*Supra*, note 1 at 216.

<sup>30</sup>*Id.*

<sup>31</sup>See *Inquiry into Civil Rights, Report No. 1, Volume 1* (Toronto: Queen's Printer, 1968) 308 and ff., where the Royal Commission recommends extensions of the scope of judicial review of administrative action, extensions substantially accepted in *The Judicial Review Procedure Act*, S.O. 1971, c. 48.

<sup>32</sup>*The Judicial Review Procedure Act*, S.O. 1971, c. 48 creates a new comprehensive remedy of judicial review which extends to all errors of law on the face of the record, irrespective of whether the tribunal concerned is judicial or administrative, and also to all findings of fact unsupported by evidence, when the tribunal concerned is obliged to base its findings on evidence presented or on the basis of facts of which it is entitled to take notice (see section 2(2) and (3)). This is in contrast to the generally accepted common law position whereby non-jurisdictional error of law was only reviewable by certiorari if it appeared on the face of the record of a tribunal obliged to act judicially (see *Re Ontario Labour Relations Board, Bradley v. Canadian General Electric Co.*, [1957] O.R. 316, 8 D.L.R. (2d.) 65 (Ont. C.A.) and a complete absence of evidence in a matter within jurisdiction was not subject to review at all (see *R. v. Nat Bell Liquors*, [1922] 2 A.C. 128). In addition to establishing this new comprehensive remedy which increases the scope of judicial review, the new Act also fails to make any attempt to amalgamate review and appeal rights. This new remedy is available "notwithstanding any right of appeal" (section 2(1)) so that where appeal rights and review rights are available for the same error the aggrieved person may invoke either remedy and where the appeal right does not cover the error alleged it may be challenged under the Act notwithstanding the fact that the legislature in specifically directing its mind to an individual tribunal has seen fit not to create an appeal right in respect of that particular kind of error.

and the Federal Court Act<sup>33</sup> is very largely the message of increased judicial protection of citizens' rights against agency action. Legislative intention, if anything, points towards maintenance of current modes of review — indeed, a possible increase. Accordingly, Professor Hogg's plea for judicial self-restraint is to a great measure counter to the general tenor of legislative activity in this area. The search for legislative intention, which Professor Hogg ardently espouses, leads to the conclusion, whatever its merits, that legislatures are countenancing increased judicial activity.

Given such a legislative policy, how should the courts react to arguments based on judicial self-restraint? Efficiency, expertise and costs may all point in the direction of conclusive tribunal determination of particular issues, yet legislative intention seemingly leads in the opposite direction. Accordingly, the criticism, if any, of judicial intervention in the *Bell* case should rest not so much with the Supreme Court of Canada as with the legislatures of this country. They have basically given up on the issue of trying to tailor the proper scope of judicial intervention to the needs of particular decision-makers.<sup>34</sup> Indeed, the legislation in question in *Bell* does not even make a token effort at restricting judicial review by the inclusion of a standard private clause.

Even allowing for the argument that weight should be given to an expert tribunal's finding in relation to issues, be they jurisdictional or not, this has diminished relevance in relation to the Ontario Human Rights Code. In *Bell's* case, the Ontario Human Rights Commission apparently did not consider the issue of the status of Bell's accommodation prior to referring the matter to a board of inquiry under S. 4 (1) of the Act.<sup>35</sup> Moreover, the board of inquiry as an *ad hoc* body appointed to deal with matters only on a single case basis,<sup>36</sup> arguably is in a worse position to interpret the application of the Code than is a reviewing court. At least a reviewing court will presumably have some experience in questions of statutory interpretation,

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<sup>33</sup> In the case of tribunals obliged to act judicially, the Federal Court Act, S.C. 1970-82, c. 1, section 28 provides that the Federal Court of Appeal may review for all errors of law and also factual errors made in a perverse or capricious manner without regard to the evidence. Once again it can be argued that this constitutes an increase in the common law scope of judicial review. Additionally, while the Federal Court cannot intervene by way of judicial review where a ground for a statutory right of appeal exists, to the extent that statutory appeal rights do not cover rights of review available under the Act, a remedy by way of review may still be sought (section 29). Here too the grounds for judicial intervention have been made the same irrespective of the character of the particular decision-maker and regardless of the limits the legislature chose to impose on judicial intervention when creating appeal rights with respect to particular decision-making powers.

<sup>34</sup> The notion that the scope of judicial intervention in statutory decision-making should be individualized within the context of empowering statutes to meet the particular needs of varying types of decision-making processes is one advocated by Professor John Willis, in *The McRuer Report: Lawyers' Values and Civil Servants' Values* (1968), U. of T. L.J. 351 at 359 — "The principle of 'uniqueness' is the principle for me".

<sup>35</sup> Previously section 13(1), S.O. 1961-62, c. 93.

<sup>36</sup> Under section 14 (1), the Minister of Labour on the recommendation of the Human Rights Commission appoints a board of inquiry each time the Commission is unable to effect a settlement of the matter complained of.

something which may not be possessed by a Board of Inquiry by virtue of the fact that there is no requirement for legal representation on the Board. In practice, of course, as Professor Hogg points out, there is in fact normally a lawyer on the Board<sup>37</sup> and this perhaps lessens somewhat the weight of the above argument. However, to the extent that Professor Hogg criticizes the attitudes of Stewart J.<sup>38</sup> towards human rights in this case, it is also possible to point to Dean Tarnopolsky's record as a champion of human rights in this country. In terms of neutrality there is an argument against either Stewart J. or Dean Tarnopolsky deciding this issue finally. Certainly, with an Act forwarding the cause of human rights it may be highly desirable to have known champions of human rights sitting on boards of inquiry, but in terms of ensuring that such boards function within proper statutory limits there is an argument for some degree of judicial supervision, which hopefully would be more depoliticized than the type of judgment delivered by Stewart J.

This part of the discussion brings into focus the whole question of timeliness. Even accepting the jurisdiction theory as a basis for judicial review, there is considerable merit in Professor Hogg's argument that the courts should generally not intervene until such time as the tribunal has had an opportunity to make a preliminary determination of the matter. In terms of time and cost, Bell should normally have given the Board of Inquiry the chance of looking at the matter before commencing on a path of judicial review. A preliminary decision would also have given the courts something from which to articulate more convincingly their decision to review. However, in the context of the particular dispute in *Bell's* case, it is significant that a Board headed by Dean Tarnopolsky had in the case of *Mitchell v. O'Brien* in 1968 decided that accommodation of the kind offered by Bell came within the ambit of the Act.<sup>39</sup> Similarly, in 1969 another Board of Inquiry in *Duncan v. Szoldatits*<sup>40</sup> had reached the conclusion that accommodation of a less self-contained nature than that in issue in *Bell* came within the Act. Though, of course, rules of *stare decisis* are not applicable in these circumstances, the matter at issue was virtually predetermined against Bell at the Board level and in the circumstances an initial determination by the Board would have been of dubious use and would involve unnecessary expenditure of money and time. Judicial settlement had become an obvious necessity prior to the Board hearing and it is not really correct to say that the court had insufficient factual information to determine the issue. The fact that Bell's affidavit as to the nature of the premises went unanswered by

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<sup>37</sup> *Supra*, note 1 at 207, note 16.

<sup>38</sup> *Id.*, at 206. Stewart J. delivered the judgment of the Ontario High Court in this case ([1969] 2 O.R. 709 and 6 D.L.R. (3d) 576) and in the course of that judgment criticized the content of *The Ontario Human Rights Code* (at 718 and 585 respectively).

<sup>39</sup> See Report of the Board of Inquiry of Tarnopolsky on the complaint of Miss Mitchell, July 1968.

<sup>40</sup> See Report of the Board of Inquiry of Krever on the complaint of Duncan, January 1969. Here the accommodation in issue included not only a shared entrance hall (as in *Bell*) but also a bathroom shared between the owner and the second and third floor tenants.

the second respondent in the courts<sup>41</sup> would seem to indicate that this was not a matter of dispute. Rather, the case proceeded on the basis of legal argument on generally agreed facts.<sup>42</sup>

In a footnote, Professor Hogg refers to the American cases on time-liness<sup>43</sup> but even the Supreme Court of the United States has acknowledged that the exhaustion of domestic remedies is not a necessity in cases of obvious defects of jurisdiction and where the invocation of the administrative process would be costly and wasteful.<sup>44</sup>

The jurisdiction concept is so much a part of judicial review of administrative action in Canada that it was really not open to the Supreme Court of Canada to overturn it in *Bell*. Even accepting that *Anisminic* and *Metropolitan Life* take jurisdictional error too far, the same kind of criticism cannot really be made of *Bell* where the issue was clearly one coming within the traditional notions of preliminary or collateral error. Because of the nature of the error alleged and because of Board determination of this question on other occasions the normally acceptable argument that *Bell* should await preliminary Board determination does not carry the same weight, and in the circumstances judicial intervention was not only appropriate but also timely, even if ultimately incorrect on the merits of the statute's interpretation. Cure, if any, for excessive judicial intervention rests to a large extent with legislatures rather than the courts. Moreover, such is the present attitude of legislatures that intervention is encouraged rather than discouraged, particularly in circumstances such as *Bell* where there is not even a standard privative clause in the empowering statute. Given such a situation, it is somewhat unrealistic to expect the courts to temper legislative policy by the exercise of adjudicative self-restraint.

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<sup>41</sup> Professor Hogg seems to argue (*Supra*, note 1 at 217) that the Supreme Court was only represented with one side of the facts and was therefore not in a position to make a proper determination of the factual matters involved.

<sup>42</sup> This is implicit in the judgment of the Court delivered by Martland J. when he stated:

In a case involving a conflict of evidence a court to which an application for prohibition was made might well decline to interfere (*Supra*, note 2 at 775 and 19 respectively).

<sup>43</sup> *Supra*, note 1 at 220, note 61.

<sup>44</sup> See e.g. *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943). Of particular appropriateness in the discussion of *Bell* is the United States Court of Appeals, 2nd Circuit decision in *Wolff v. Selective Service Local Board No. 16*, 372, F. 2d 817 (1967). This concerned an action by two students against their classification for military service by a Selective Service Board. In response to an argument that the two students pursue their administrative or domestic remedies before seeking relief in the courts, Medina, Circuit Judge held that because the classification of similar students had been upheld by the final authority in the administrative hierarchy,

.... we are most reluctant in a case of this importance to require appellants to proceed along the same futile path that others have trod before.

When there is nothing to be gained from the exhaustion of administrative remedies and the harm from the continued existence of the administrative ruling is great, the courts have not been reluctant to discard this doctrine. (at 825).