Natural Justice and Self-Regulating Voluntary Associations

With the recent furor over the right of stock exchanges to sanction the actions of its members, certain questions surface once again with respect to the role and the power of self-regulating voluntary associations such as trade unions, stock exchanges, and real estate boards.

A recent judgment of The Honourable Mr. Justice Claude Bisson in the case of *Triangle Realties Inc.* v. *Montreal Real Estate Board* [1] is most informative in dealing with these questions. A word of caution must preface an analysis of this judgment in that the judgment dealt with an application for an interlocutory injunction and the issuance of a writ of mandamus; it was not a final judgment on the merits. Yet, this judgment deals exhaustively with the issues, the doctrine and the jurisprudence, and the acceptance of certain principles cannot be dispelled by the stage of proceedings at which they were accepted.

The salient facts of this case were that Petitioner Triangle Realties Inc., an amalgamation of two companies, one of which had been a charter member of the Montreal Real Estate Board, had notified the Board of its new name and organizational set-up and was advised by the Board that this new set-up was unacceptable and that "unless you are able to effect a re-arrangement of your firm satisfactory to the Board by December 31, 1969, all rights and privileges of (the predecessor company's) membership in the Board shall be withdrawn without further notice to you".

There were no charges; no hearing; no knowledge of what re-arrangement would be satisfactory to the Board; no opportunity to meet the Directors of the Montreal Real Estate Board. In this situation, Triangle Realties Inc. sought an interlocutory injunction to prevent the Board from depriving it of its membership privileges and the issuance of a writ of mandamus to order the Board to note the amalgamation and that Petitioner had all the rights of its predecessor and to continue these rights. The Montreal Real Estate Board, for its part, relied upon its discretionary power, according to its By-laws, to withdraw Triangle's membership upon the new application made by Triangle to change its name and set-up. It should be noted that membership in the Montreal Real

[1] S.C.M. 785,103. Judgment of January 20, 1970.

Estate Board entitles the member to participation in photo multiple listing service (MLS) — a very valuable service to its members.

That the Petitioner was entitled to be heard and to be made aware of the charges against it was affirmed by the Court:

> ...le concept de la simple justice naturelle ne semble pas avoir été respecté lorsqu'elle a refusé de recevoir et d'entendre la requérante.

A complete review of Quebec and other relevant and accepted jurisprudence[2] on the applicability of the rules of natural justice was made and accepted by the learned trial judge. In addition, the dictum of Lord Reid in the House of Lords decision of *Ridge* v. *Baldwin et al.*[3] was accepted, as was the ratio of Mr. Justice Gale in the Ontario case of *Posluns* v. *Toronto Stock Exchange et al.*[4]:

> Turning now to domestic tribunals, which term refers mainly to clubs, trade union groups, and committees thereof, the cases invariably relate to the expulsion or suspension of a member from one of those organizations. It can broadly be stated that all of the cases hold that before a member of a social club, trade union, trade or professional association, can be expelled or suspended therefrom, he must be given notice of the charges against him and be afforded an opportunity of answering those charges.

It is respectfully submitted that this judgment, albeit at the interlocutory stage, definitively deals with the question of the applicability of the rules of natural justice to self-regulating voluntary associations; and the answer is in the affirmative. But so that the issue and its answer not be applied incorrectly, it is useful to delineate the framework within which the judgment should be applied.

Firstly, one must differentiate between domestic tribunals and administrative tribunals in order to define the discussion to self-regulating voluntary associations. One definition of an administrative tribunal has been offerred as follows:

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[2] *Local Government Bd.* v. *Arlidge*, (1915), 84 L.J. K.B. 72 cited in *The King ex. rel. Lee* v. *Workmen's Compensation Board*, [1942] 2 D.L.R. 665 (B.C.C.A.); *Klymchuk* v. *Cowan*, (1964), 45 D.L.R. (2d) 587; *La Caisse Populaire de St-Grégoire Le Grand* v. *La Fédération de Montréal des Caisses Desjardins et al.*, (1964) R.P. 299; *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montréal*, (1906) C.R.A.C. 379; *Le Club de la Garnison de Québec* v. *Lavergne*, (1918), 27 B.R. 37; *Dussault et al.* v. *Association Internationale des débardeurs*, [1945] B.R. 353; *Association de Taxis La Salle et al* v. *Giller*, [1950] B.R. 622; *J. Léopold Gagner* v. *La Société St-Jean-Baptiste de Montréal*, (1957) R.L. 358; *Wyman* v. *Vancouver Real Estate Board*, (1959), 19 D.L.R. (2d) 336 (B.C. Sup. Ct.); *Andreas* v. *Edmonton Hospital Board*, [1944] 4 D.L.R. 747 (Alta. Sup. Ct.).

[3] [1963] 2 All E.R. 66, at pp. 74-75.

[4] (1965), 46 D.L.R. (2d) 210 (Ont. High Ct.), at p. 292.

> ...a tribunal may be defined as administrative if it is established and constituted by legislation, and is in effect an arm or branch of Government. The latter qualification that the legislature — established tribunal is virtually an arm of the Government, excludes from the term "administrative tribunals" such tribunals as the Discipline Committee of the Law Society, and the various other bodies that regulate the conduct of members of their respective professions...[5]

While in another decision the definition offerred was:

> If a minister is considering whether to make a scheme for say an important new road, his primary concern will not be with the damage which its construction will do to the rights of individual owners of land. He will have to consider all matters of public interest... His officers will have to gather and sift all the facts including objections by individuals and no individuals can complain if the ordinary accepted methods of carrying on public business do not give him as good protection as would be given by the principles of natural justice in a different kind of case.[6]

Where the functions of the tribunal are held to be administrative or executive, the tribunal is not bound by the rules of natural justice and need not afford a hearing to an individual whose rights are touched by its decision.[7]

Domestic Tribunals on the other hand have been defined as:

> ...committees or the councils or the members of trade unions, of members' clubs and of professional bodies... while acting in a *quasi*-judicial capacity.[8]

and as:

> ...the bodies or committees in whom authority is vested in professional or trade or sporting organizations, in various social groups or clubs or in various guilds or trade unions.[9]

It is inherent in the judgment of Bisson, J. that the Montreal Real Estate Board fell into the category of a domestic tribunal.

The next step is to determine whether the domestic tribunal is acting in a *quasi*-judicial capacity, that is to say, whether there are civil consequences of its action. This is accomplished:

> ...by examining the nature of the power exercised by the tribunal in order to ascertain whether the tribunal is acting in a *quasi*-judicial capacity on the one hand, or in what has been termed an 'executive'

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[5] *Ibid.*, at p. 290.

[6] *Ridge* v. *Baldwin, op. cit.*, n. 3, at p. 76 (*per* Lord Reid).

[7] *Calgary Power Ltd. et al.* v. *Copithorne,* (1958), 16 D.L.R. (2d) 241; [1959] S.C.R. 24.

[8] *Maclean* v. *Workers Union,* [1929] 1 Ch. 602, at p. 620 (*per* Maugham, J.).

[9] Lord Justice Morris, *The Courts and Domestic Tribunals,* (1953), 69 L.Q. Rev. 318, at p. 321.

> or 'administrative' capacity on the other, it is well established that in those instances where a tribunal acts in a judicial or *quasi*-judicial capacity, the rules of natural justice prevail.[10]

Or, as Mr. Justice Gale held:

> ...The determination of whether the function of a tribunal is judicial or *quasi*-judicial as opposed to administrative or executive is based upon the nature of the power exercised by it: see Lord Reid's judgment in *Ridge* v. *Baldwin,* [1963] 2 All E.R. 66, at pp. 78 and 79 where he refers to the judgment of Bankes, L.J., and of Atkin, L.J. in *The King* v. *Electricity Com'rs, Ex. p. London Electricity Joint Committee Co.* (1920), Ltd., [1924] 1 K.B. 171.[11]

This test to determine a *quasi*-judicial function, namely, the nature of the power exercised by the body was stated in *The King* v. *Electricity Commissioners,* and cited with approval by Lord Reid in *Ridge* v. *Baldwin*:

> ...'powers so far-reaching, affecting as they do individuals as well as property, are powers to be exercised judicially and not ministerially...' So he inferred the judicial element from the nature of power. (p. 78)

Thus, for Lord Reid, the *audi alteram partem* rule applies to every body with power "to adjudicate upon matters involving civil consequences to individuals".[12]

A more precise instance of a tribunal decision having civil consequences is the case where private property rights are affected by expulsion from a professional or business organization. Expulsion from a body which has control over the professional or working life of its members has been treated as a matter involving at least *prima facie* the exercise of a *quasi*-judicial function by the body in question.[13]

Being deprived of membership of a voluntary association by expulsion constitutes an infringement of the right of property and such expulsion is a *quasi*-judicial function.[14] In conducting such an inquiry, these voluntary associations are said to have:

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[10] *Posluns* v. *Toronto Stock Exchange et al, op. cit.,* n. 4, at p. 291.

[11] *Id.*

[12] (1964) 22 Faculty of Law Review, U. of Toronto 148.

[13] *Abbott* v. *Sullivan,* [1952] 1 K.B. 89; *Lee* v. *Showmen's, Build of Great Britain,* [1952] 2 Q.B. 329; *Barnard* v. *National Dock Labour Board,* [1953] 1 All E.R. 1113.

[14] *Rigby* v. *Connol,* 14 Ch. D. 482, at p. 487; *Baird* v. *Wells,* 44 Ch. D. 661, at p. 675; *Millican* v. *Sullivan,* (1888), 4 T.L.R. 203, at p. 204; *Weinberger* v. *Inglis,* (no. 2), 1919 A.C. 606; *Cookson* v. *Harewood,* [1932] 2 K.B. 478, at p. 481 and p. 489; *Donaldson* v. *Institute of Botano-Therapy,* (1937), L.T.J. 384, at p. 385; *Young* v. *Ladies Imperial Club, Ltd.,* [1920] 2 K.B. 523.

> ...occupied a *quasi*-judicial position and were bound to give reasonable notice to the member whose conduct was attacked of the precise nature of the charge upon which he was to be tried;...[15]

In other words, a function is held to be judicial or *quasi*-judicial when it effects the extinguishment or modification of private rights or interest.[16]

Once having established that we are concerned with a domestic tribunal exercising a *quasi*-judicial function, the last argument is that the rules of natural justice — *audi alteram partem* — apply principle as follows:

to such domestic tribunals. Thus Mr. Justice Gale stated the general

> Turning now to domestic tribunals, which term refers mainly to clubs, trade unions and professional groups, and committees thereof, the cases invariably relate to the expulsion or suspension of a member from one of these organizations. It can broadly be stated that all of the cases hold that before a member of a social club, trade union, trade or professional association can be expelled or suspended therefrom, he must be given notice of the charges against him and be afforded an opportunity of answering those charges.[17]

While in another case the rule was phrased in the following manner:

> But they are bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but it is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.[18]

Mr. Justice Goldberg talking of the Securities Act said that:

> No policy reflected in the Securities Exchange Act is, to begin with, served by denial of notice and an opportunity for hearing. Indeed, the aims of the statutory scheme of self-policy — to protect investors and promote fair dealing — are defeated when an exchange exercises its tremendous economic power without explaining its basis for acting, for the absence of an obligation to give some form of notice and, if timely requested, a hearing creates a great danger of perpetration of injury that will damage public confidence in the exchanges.[19]

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[15] *Kemerer* v. *Standard Stock & Mining Exchange*, (1927), 32 O.W.N. 295, at p. 297.

[16] *Alliance des Professeurs Catholiques de Montréal* v. *Labour Relations Board of Quebec*, [1953] 2 S.C.R. 140; appl'd in *Saltfleet Board of Health* v. *Knapman*, [1956] S.C.R. 877.

[17] *Posluns* v. *Toronto Stock Exchange et al., op. cit.*, n. 4, at p. 292. See also: *Innes* v. *Wylie*, (1844), 174 E.R. 800; *Fisher* v. *Keane*, (1879), 11 Ch. D. 353; *Dawkins* v. *Antrobus*, 17 Ch. D. 615; *Kemerer* v. *Standard Stock & Mining Exchange, op. cit.*, n. 15.

[18] *Wood* v. *Woad*, L.R. 2 Ex. 190.

[19] *Silver* v. *New York Stock Exchange*, [U.S. 1963] S. Ct. 1246, at p. 1259.

And Harman, J. spoke in the following terms:

> It seems to me that bodies like K.R.S. who exercise monopolistic powers and may ruin a man by their recommendations, ought not to act in an arbitrary manner, or at least that if they do, as this body did, set up an investigation committee which is a *quasi*-judicial body, they must be taken to hold out to those over whom they claim to exercise jurisdiction the assurance that the proceedings will be fair.[20]

Lord Reid *in Ridge* v. *Baldwin*[21] dealt specifically with this very situation:

> I shall now turn to a different class of case — *deprivation of membership of a professional* or *social body* (emphasis mine). In *Wood* v. *Woad* the Committee purported to expel a member of a mutual insurance society without hearing him and it was held that their action was void and so he was still a member. KELLY, C.B., said of *audi alteram partem:* 'this rule is not confined to the conduct of strictly legal tribunals but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.' This was expressly approved by Lord MacNaghten giving the judgment of the Board in *Lapointe* v. *L'Association de Bienfaisance etc.*
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> Then there are the club cases *Fisher* v. *Keane* and *Dawkins* v. *Antrobus.* In the former JESSEL, M.R., said of the committee: 'They ought not as I understand it according to the ordinary rules by which justice should be administered by committees of clubs, or by any other body of persons who decide upon the conduct of others, to blast a man's reputation for ever — perhaps to ruin his prospects for life without giving him an opportunity of either defending or palliating his conduct.' In the latter case it was held that nothing had been done contrary to natural justice. In *Weinberger* v. *Inglis* (no. 2) a member of enemy birth was excluded from the stock exchange and it was held that the committee had heard him before acting. LORD BIRKENHEAD, L.C., said: 'if I took the view that the appellant was condemned upon grounds never brought to his notice I should not assent to the legality of that course unless compelled by authority.' He said this although the rule under which the committee acted was in the widest possible terms — that the committee should each year re-elect such members as they should deem eligible as members of the stock exchange.[22]

The Quebec jurisprudence was summarized recently in the case of *Association de Taxis La Salle et al.* v. *Giller*[23] where Hyde, J.A. referring to the case of *Le Club de la Garrison de Québec* v. *Lavergne*[24] said:

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[20] *Byrne* v. *Kinematograph Renters Society Ltd.*, [1958] 1 W.L.R. 762.

[21] *Op. cit.*, n. 3, at p. 74 *et seq.*

[22] See: *Gray* v. *Allison,* (1909), 25 T.L.R. 531; *Lamberton* v. *Thorpe,* (1929), 141 L.T. 638.

[23] *Op. cit.*, n. 3, at p. 629.

[24] [1918] 27 K.B. 37, at p. 44.

> Speaking generally it can be said that the Court will not inquire into the merits or demerits of the reasons for expulsion from membership in a social club, except in so far as these may be involved in the question whether the decision was capricious or not. The Courts will limit the exercise of their jurisdiction to an inquiry into two questions, namely: did the member have an opportunity of being heard and second, was the decision capricious or not?

Mr. Justice Surveyer, *ad hoc*, cited with approval the authorities on the question of expulsion in the case of *Lamarche* v. *Le Club de Chassé à Courre Canadien*:[25]

> The Court in that case, was considering the expulsion of a member of a social club... The Appellant Association is not a social club, it is a cooperative syndicate to assist the members in earning their living. It is quite repugnant to one's sense of elementary justice that a member of such an organization should be subject to dismissal without having the opportunity of making his defence and apparently for the reason that he was not in agreement with the policies of the officials for the time being.[26]

If the rules of natural justice are to apply, need a hearing be granted where dismissal is in the discretion of the tribunal? In the *Posluns* case, Mr. Justice Gale stated:

> I am of the opinion, too, that a hearing must be granted where the power of dismissal is exercisable in the discretion of a domestic tribunal. *Ridge* v. *Baldwin*, [1963] 2 All E.R. 66, is certainly one of the most important cases on this whole subject.[27]

And further at p. 308 after referring to the jurisprudence he stated:

> The immediate effect of all of those authorities is to suggest to me that when dismissal is in the discretion of a domestic tribunal,... the person affected must be given reasonable notice of the complaint made against him and must have a fair hearing before being dismissed.

De Smith summarized the principle in the cases of *R.* v. *St. Pancras Vestry*[28] and *Nelson Catchment Board* v. *Wauinea County and Richmond Borough*,[29] at p. 323 of his text:[30]

> If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

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[25] (1901), 4 R.P. 75.

[26] *Association de Taxis La Salle et al.* v. *Gillier, op. cit.*, n. 3, at pp. 633-634.

[27] *Posluns* v. *Toronto Stock Exchange et al., op. cit.*, n. 4, at p. 298.

[28] (1890), 24 Q.B.D. 371, at p. 375.

[29] (1955) N.Z.L.R. 1126.

[30] S.A. de Smith, *Judicial Review of Administrative Action* (2nd ed., 1968), at p. 323.

For any such body to rely upon its discretion is illusory for no discretion can be so absolute as to avoid the rules of natural justice. A body which has discretion is obliged to exercise that discretion legally, or in accordance with the principle of *audi alteram partem.*

One might add to this comment that even an administrative inquiry must be conducted in a fair and impartial manner. Thus, Lord Halsbury, L.C. was of the opinion that:

> An extensive power is confided to the justices in their capacity as justice to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case;* according to law and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself: *Wilson* v. *Rastall.*[31]

Brossard, J. in similar language held:

> Considérant que, si en principe les tribunaux ne doivent pas intervenir par voie de *mandamus* ou autrement, en substituant leur jugement à celui des commissaires dans les cas d'exercice par une commission scolaire ou par un officier d'icelle du pouvoir discrétionnaire conféré par la loi, il est cependant de leur devoir et pouvoir d'intervenir dans les cas de vol ou de fraude, d'abus, d'arbitraire, d'erreur ou d'illégalité manifeste.[32]

Thus, even a private club, such as a golf or fishing club, where no proprietary rights or civil consequences are involved, must act in good faith.[33]

Samuel Wex.*

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[31] *Sharp* v. *Wakefield,* (1891) A.C. 173, at p. 179.

[32] *Brunet* v. *Les Commissaires d'Ecoles pour la Municipalité de St-Benoit,* (1962) C.S. 86.

[33] *Ville de Montréal* v. *Tourville,* (1949) R.L. 428, at pp. 437, 441, 447 and 448; *Simon* v. *City of Verdun,* (1956) R.P. 337; *Hopkinson* v. *Marquis of Exeter,* L.R. 5 Eq., at p. 68; *Lamarche* v. *Le Club de Chassé à Courre Canadien, op. cit.,* n. 25; *Le Club de Garrison de Québec* v. *Lavergne, op. cit.,* n. 24.

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