The Duty to Act Fairly after Nicholson

I. Introduction

In the 1960's and 1970's, the role of government in everyday life grew by leaps and bounds. Officials began to hold and exercise power on a scale hitherto unknown. Because of the importance of the decisions made by them, the traditional distinction between judicial and quasi-judicial functions (which were subject to judicial review) and administrative functions (which were not) ceased to be satisfactory. It is arguable that it never was satisfactory, nor was it as firmly established as may have been thought. It is clear that by the mid-1960's the distinction was threatening to cause hardship and to prevent the courts from administering justice in vital areas of human endeavour.

In response to the problem, English courts at that time imposed a "duty to be fair" on certain administrative decisions, putting them within reach of judicial review.[1] Canadian courts reacted with surprising conservatism to this innovation. For ten years, the duty to be fair remained a controversial and marginal idea, restricted to *dicta* and equivocal cases,[2] while the voices criticizing Canadian administrative law for its backwardness grew in number and eloquence.[3]

In *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police*,[4] the Supreme Court of Canada has answered the critics by showing that it is now prepared to impose a duty to

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[1] See *Re H.K.* [1967] 2 Q.B. 617 (C.A.).

[2] See, *e.g.*, *M.M.I.* v. *Hardayal* [1978] 1 S.C.R. 470, 479, where Spence J. said: "It is true that in exercising what, in my view, is an administrative power, the Minister is required to act fairly and for a proper motive and his failure to do so might well give rise to a right of the person affected to take proceedings under s. 18(a) of the *Federal Court Act*, but, for the reasons which I have outlined, I am of the opinion that the decision does not fall within those subject to review under s. 28 of the said *Federal Court Act*".

[3] Mullan, *Fairness: The New Natural Justice* (1975) 25 U.T.L.J. 281 [hereinafter *Fairness*]; Mullan, *Martineau & Butters* v. *Matsqui Institution Inmate Disciplinary Board: Its Potential Impact on the Jurisdiction of the Trial Division of the Federal Court* (1978) 24 McGill L.J. 92 [hereinafter *Impact*]; Loughlin, *Procedural Fairness: A Study of the Crisis in Administrative Law Theory* (1978) 28 U.T.L.J. 215.

[4] [1979] 1 S.C.R. 311.

act fairly on administrative decision-makers. Nicholson was a police constable whom the Board of Commissioners dismissed, without notice and without giving reasons, before the expiry of his eighteen month probationary period. The *Ontario Police Act*[5] specifically exempts dismissal within the first eighteen months of service from the procedural protections afforded by the Act in disciplinary matters. This clearly meant that an administrative, and not a quasi-judicial, power had been exercised in dismissing Nicholson. A Divisional Court judgment for the plaintiff on the basis that the Board had breached a duty to be fair was overturned by the Ontario Court of Appeal. The Court of Appeal found that the firing of someone who in effect was an office holder at pleasure disclosed no grounds for review.[6] The Supreme Court reversed this decision. Chief Justice Laskin, speaking for the majority, challenged the notion that a probationary constable held office at pleasure, and proceeded to say:

> In short, I am of the opinion that although the appellant clearly cannot claim the procedural protections afforded to a constable with more than eighteen months' service, he cannot be denied any protection. He should be treated "fairly" not arbitrarily. I accept, therefore, for present purposes and as a common law principle what Megarry, J. accepted in *Bates* v. *Lord Hailsham*, [1972] 1 W.L.R. 1373, at p. 1378, "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness".[7]

As definitive as that statement is, a single decision could not be expected to clarify all issues and this one has not done so. A more recent Supreme Court judgment, in the case of *Martineau* v. *Matsqui Institution Disciplinary Board (No. 2)*,[8] has elaborated certain aspects of the fairness principle, but most remain unsettled. It is the purpose of this comment to discuss some of the more pressing questions. Three in particular deserve attention: (1) the extent of the duty to be fair; (2) the fate of the venerable distinction between administrative and quasi-judicial decisions; and (3) the difficulties with regard to remedies, especially under the *Federal Court Act*.[9]

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[5] R.S.O. 1970, c. 351; R.R.O. 1970, Reg. 680, s. 27(b).
[6] On this point, see Loughlin, *supra,* note 3.
[7] *Supra,* note 4, 324.
[8] S.C.C., Dec. 13, 1979 (unreported).
[9] R.S.C. 1970 (2d Supp.), c. 10.

II. The extent of the duty to be fair

In *Nicholson,* Chief Justice Laskin implied that "fairness" might serve as a "half-way house ... between the observance of natural justice aforesaid and arbitrary removal".[10] The same idea is present in the passage from de Smith's *Judicial Review of Administrative Action*[11] cited by the Chief Justice, and the appeal it has for courts is explained by Mullan:

> As long as some judges saw the rules of natural justice as always involving all the procedural protections of a court of law, it was difficult to convince them to imply that those rules applied in particular situations where the statute was silent. For such a judge, fairness and the opportunity to imply a lesser standard and only some of the rules presents an attractive alternative.[12]

This appears to be precisely the argument adopted in the majority opinion in *Martineau* v. *Matsqui Institution No. 2.*[13] There the influence of *Nicholson* is clearly reflected in the Supreme Court's recognition — despite a line of cases implying the opposite[14] — that a ground for reviewing purely administrative decisions does exist, the ground of procedural fairness.[15] While accepting this, the majority quickly added that the duty to act fairly was much less onerous than that to act in accordance with the rules of natural justice,[16] and that in the particular circumstances before the court — disciplinary action by prison officials — it would require "serious injustice"[17] before a breach of the duty could be found.

These authorities suggest that "fairness" is diluted "natural justice". The oft-quoted phrase from *Furnell* v. *Whangerei* hints at a greater ambiguity involved: "Natural justice is but fairness writ large and juridically".[18] Indeed, no hard and fast line separates the two concepts. What is "fair" in any single case must depend on the nature of the decision being made, which is the same flexible standard that has always been used in applying natural justice.[19]

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[10] *Supra,* note 4, 322.

[11] de Smith, *Judicial Review of Administrative Action* 3d ed. (1973); cited in *Nicholson, supra,* note 4, 324.

[12] Mullan, *Fairness, supra,* note 3, 315.

[13] *Supra,* note 8.

[14] *Howarth* v. *National Parole Board* [1976] 1 S.C.R. 453; *Mitchell* v. *The Queen* [1976] 2 S.C.R. 570.

[15] *Supra,* note 8, Reasons for Judgment of Pigeon J., 5.

[16] *Ibid.,* 8.

[17] *Ibid.*

[18] *Furnell* v. *Whangerei High Schools Board* [1973] A.C. 660, 679 (P.C.). See also *Inuit Tapirisat* v. *Governor-in-Council* [1979] 1 F.C. 710, 716, n. 4 (C.A.).

[19] See *Wiseman* v. *Borneman* [1971] A.C. 297 (H.L.); *Furnell* v. *Whangerei, supra,* note 18; *Selvarajan* v. *Race Relations Board* [1976] 1 All E.R. 13 (C.A.);

Similarly, fairness might possibly involve a widening of grounds for review. In *Nicholson,* for example, the Supreme Court required in one respect a higher procedural standard than that found in many judicial functions:

> In my opinion, the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond.[20]

The right to make representation prior to a final decision, and to know the complaint being made, have been consistent aspects of fairness in the British jurisprudence.[21] That Nicholson should be entitled to know the full reasons for his dismissal, however, could be a significant expansion.

> It has never been a principle of natural justice that reasons should be given for decisions. Since there is no such rule even in the courts of law themselves, it has not been thought suitable to create one for administrative bodies.[22]

Although it was probably not the intention of Chief Justice Laskin to overturn the age-old rule that reasons are not always required,[23] it will be progress indeed if it is established that, in appropriate cases, the furnishing of reasons is a necessary part of fairness.

One further theoretical question arises concerning "fairness". It has generally been assumed that "fairness" is a procedural protection and that it does not touch the substance of decisions made by officials.[24] However, the wording of the *Nicholson* decision suggests at least a gloss of some importance:

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quoted at length and with approval in *Nicholson, supra,* note 4, 327. An earlier Supreme Court decision reveals how the content of natural justice can be restricted. In *Quebec Labour Relations Board* v. *Canadian Ingersoll Rand Co.* [1968] S.C.R. 695, 701, Mr Justice Fauteux said: "Comme cette Cour l'a rappelé récemment [in *Ex p. Komo Construction Inc.* [1968] S.C.R. 172], la règle *audi alteram partem* n'implique pas qu'il doit toujours être accordée une audition. L'obligation est de fournir aux parties l'occasion de faire valoir leurs moyens".

[20] *Supra,* note 4, 328. See also *Re Gillingham & Metropolitan Toronto Bd of Commissioners of Police* (1979) 26 O.R. (2d) 77 (Div. Ct).

[21] One of the first cases on fairness was *Re H.K., supra,* note 1, and it, too, stressed this issue.

[22] Wade, *Administrative Law* 4th ed. (1978), 463. On the obligation to provide reasons, see *Monsanto Co.* v. *Commissioner of Patents* (1979) 28 N.R. 181 (S.C.C.).

[23] This is especially clear because in *Nicholson,* the reasons should have been furnished *before* the decision for rebuttal purposes, not afterwards, as on explanation.

[24] See Loughlin, *supra,* note 3; Mullan, *Fairness, supra,* note 3; Mullan, *Impact, supra,* note 3. But de Smith, *supra,* note 11, is less certain.

> The Board itself, I would think, would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination. Once it had the appellant's response, it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith.[25]

What if there is no good faith? It is generally accepted that no decision made in bad faith can be valid and that bad faith has, in administrative law, a broader meaning than dishonesty or intentional misdeeds.[26] Would the duty to be fair extend far enough to quash decisions made in ostensible compliance with procedural requirements, where no reasonable man could have decided in that way?

The problem can be explained as follows. The purpose of the "duty to be fair" is to allow the individual a chance to explain himself and to give the deciding body the capacity to make its decision on the fullest information. Presumably, that body should be sufficiently open at the time it hears representations to be swayed should the argument be convincing. If, after representations, there is no basis whatsoever for an unfavourable decision, but such a decision has been rendered, could one argue that the duty to be fair was not observed?[27]

If the answer is negative, then the duty can become a sham, legitimizing arbitrariness so long as this is accompanied by a prescribed ceremony. If it is positive, then fairness is not limited to procedure but applies, in extreme cases, to the substance of decisions.[28]

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[25] *Supra*, note 4, 328.

[26] See Grey, *Discretion in Administrative Law* (1979) 17 Osgoode Hall L.J. 107, 114-18. See also *Landreville* v. *Town of Boucherville* [1978] 2 S.C.R. 801.

[27] This would be akin to the "no evidence" grounds for review in cases of traditional natural justice. See Elliott, *"No Evidence": A Ground of Judicial Review in Canadian Administrative Law* (1972) 37 Sask. L. Rev. 48.

[28] Dickson J., however, declined the opportunity to expand fairness to substantive issues in *Martineau (No. 2)*, *supra*, note 8. Perhaps the substantive equivalent of fairness may be found in the notion of discretion to which he refers: "A purely ministerial decision ... will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion" (Reasons for Judgment, 25). The rules concerning abuse of discretion (see *Boulis* v. *M.M.I.* [1974] S.C.R. 875) may thus be the equivalent of "substantive" (as opposed to "procedural") fairness. Both deal with the limits beyond which officials invested with even the widest powers will not be permitted to go.

III. The distinction between administrative and quasi-judicial matters

With *Nicholson,* the non-reviewability of administrative functions has been replaced by review on the grounds of fairness; thus, whether any vitality remains in the distinction between administrative and quasi-judicial functions — a distinction on which so much of administrative law has up to now rested[29] — depends largely on the relationship between fairness and natural justice. If a conservative approach is adopted and fairness is seen as a lesser form of natural justice — as providing only a minimal standard of procedural protection in administrative matters — then the distinction will remain important.[30] However, if fairness and natural justice represent essentially the same flexible standard as applied to a range of decision-making modes, then the distinction loses much of its significance.

There are statements in the *Nicholson* majority opinion which imply both positions.[31] The case does coincide with a growing trend in Canadian jurisprudence to play down the distinction and to speak instead in terms of a continuum of decision-making powers. Perhaps the best example is found in the judgment of the Nova Scotia Court of Appeal in *Scott* v. *Rent Review Commission,* where, after a thorough review of recent thought on the issue, Chief Justice MacKeigan said:

> Modern Canadian courts also have tended to reject the "administrative" vs. "judicial" test, and have looked rather at the subject matter involved and the function of the tribunal or official involved to determine broadly what procedural rules should be followed to ensure fairness to those affected.[32]

The Supreme Court expressed the same view in the recent case of *M.N.R.* v. *Coopers & Lybrand*:

> Administrative decision does not lend itself to rigid classification of function. Instead, one finds realistically a continuum.[33]

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[29] See, *e.g., Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66 (P.C.); *Calgary Power Ltd* v. *Copithorne* [1959] S.C.R. 24.

[30] Loughlin, *supra,* note 3, 235-36.

[31] The Chief Justice quotes Megarry J.'s conservative formulation of fairness (at p. 324), but then adopts Mullan's concept of a continuum (at p. 325.)

[32] *Scott* v. *Rent Review Commission* (1977) 23 N.S.R. (2d) 504 (S.C. App. Div.). The Alberta Court of Appeal was more cautious in *Harvie* v. *Calgary Regional Planning Commission* (1978) 12 A.R. 505, a case which was decided after *Nicholson* and relied on it in part.

[33] [1979] 1 S.C.R. 495, 505 *per* Dickson J.

It is true that Mr Justice Dickson retains the administrative/judicial distinction by providing criteria for determining the latter, but it must be remembered that the case concerned the *Federal Court Act*[34] which presents special difficulties.

Canadian law therefore seems on the verge of taking the logical step of dispensing with the Platonic concept of administrative and judicial ideal forms and replacing it with a flexible, case-by-case approach. The argument that this will introduce uncertainty as to what procedures are necessary for any particular decision overlooks the confusion, and often the injustice, involved when the distinction is maintained.[35]

The approach taken by the Federal Court of Australia in *R.* v. *Wilson, Ex p. Donaldson*[36] recommends itself. The case also concerned the dismissal of a policeman. Bowen C.J. reviewed the history of natural justice and concluded that it was linked neither to the "super-added duty"[37] to act judicially, nor even to the nature of the function.[38] From the old case *Cooper* v. *Board of Works for the Wandsworth District*,[39] he took the principle that a man's rights cannot be taken away without his having an opportunity to express himself, and found it to be a presumption of all legislation, a presumption which may be displaced by appropriate drafting.[40] It may be more easily displaced in administrative than in quasi-judicial matters:

> The presumption that the legislature is not to be taken as intending that the right to a hearing (required by the rules of natural justice) should be ousted, is not confined to judicial or quasi-judicial proceedings. In any particular case it still remains necessary to interpret the particular legislative provisions. In provisions dealing with administrative action, it may, in the nature of things, be more often found that the presumption has been rebutted.[41]

This approach can bring back the simplicity which administrative law lost during its evolution in this century.

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[34] R.S.C. 1970 (2d Supp.), c. 10.

[35] See *Mitchell* v. *The Queen, supra,* note 14, 593, where Mr Justice Ritchie speaks of an "unfettered discretion".

[36] (1977) 32 F.L.R. 399 (F.C. of Austr.).

[37] *Ibid.,* 407.

[38] It may be surprising to see such a radical conolusion derived from *Ridge* v. *Baldwin* [1964] A.C. 40 (H.L.) and *Durayappah* v. *Fernando* [1967] 2 A.C. 337 (P.C.), but the view is plausible.

[39] (1863) 14 C.B. (N.S.) 180, 143 E.R. 414.

[40] See *Heatley* v. *Tasmanian Racing & Gaming Commission* (1977) 51 A.L.J.R. 703 (H.C. of Austr.) as well as the leading case of *Wiseman* v. *Borneman, supra,* note 19.

[41] *R.* v. *Wilson, Ex p. Donaldson, supra.* note 36, 409.

IV. Fairness, remedies and the Federal Court Act

The distinction between administrative and quasi-judicial functions seemed as though it would remain important after *Nicholson* in the area of remedies. It had long been considered that the prerogative writs of *certiorari* and prohibition could only issue in quasi-judicial matters[42] and that judicial review of administrative acts would have to use different remedies.[43] In *Nicholson,* the remedy granted was a statutory Ontario remedy,[44] so the case left unresolved the question of prerogative writs. It should be noted that the writ of evocation (the statutory remedy in Quebec) is likely unavailable for breaches of the duty to be fair, as article 846 of the Code of Civil Procedure, which provides for this writ, uses the word "court".[45]

The "restrictive" view of prerogative writs received strong support from the Federal Court of Appeal in *Matsqui Institution* v. *Martineau (No. 2)*:

> While the ambit of *certiorari* has expanded over the period that has elapsed since it was a writ whose sole function was to enable a superior court of law to review decisions of inferior courts of law, in our opinion, it continues to have application only where the decision attacked is either judicial in character or is required by law to be made on a judicial or quasi-judicial basis.[46]

This decision, traditional as it was, left Canadian administrative law in an unhappy state, saddled with unnecessary intricacies. First, it meant that success or failure in a judicial review application depended as much on choosing the right remedy as on the merits of the case. If Martineau had sought a declaratory judgment rather

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[42] See Grey, *supra,* note 26, 129-31.

[43] See *Alberta Union of Provincial Employees* v. *Alberta Classification Appeal Board* [1978] 1 W.W.R. 193 (Alta S.C.T.D.) *per* McDonald J. But in *McCarthy* v. *Board of Trustees* [1979] 4 W.W.R. 725, 737 (Alta S.C.T.D.), Laycraft J. specifically refused to follow McDonald J. on this point and said that *certiorari* would be available.

[44] *Judicial Review Procedure Act,* S.O. 1971, c. 48, s. 2(1).

[45] See *Chiquette* v. *Procureur Général du Québec* [1974] C.A. 118 for a confirmation of this. Fortunately, a direct action in nullity would be available instead of evocation. See *Vachon* v. *A.-G. Québec* [1979] 1 S.C.R. 555.

[46] *Matsqui Institution Disciplinary Board* v. *Martineau (No. 2)* [1978] 2 F.C. 637, 639 (C.A.). See Mullan, *Impact, supra,* note 3, 111. A lively and helpful exchange on this subject is found in a series of three articles: Fera, *Conservatism in the Supervision of Federal Tribunals: The Trial Division of the Federal Court Considered* (1976) 22 McGill L.J. 234; Evans, *The Trial Division of the Federal Court: An Addendum* (1977) 23 McGill L.J. 132; Fera, *Certiorari in the Federal Court and Other Matters: A Reply to the "Addendum"* (1977) 23 McGill L.J. 497.

than *certiorari,* he would not have encountered the same procedural barrier.[47]

A second problem concerned the *Federal Court Act,* the statute under which Martineau — a prisoner seeking review of a sentence of punitive isolation imposed by the prison Disciplinary Board — had to make his application. Even if the rest of the common law world were to abandon the strict distinction between administrative and quasi-judicial matters, Canada could not at the present because the distinction is enshrined in section 28 of the *Federal Court Act.* That section confers on the Appeal Division of the Federal Court jurisdiction over review of all decisions of a judicial or quasi-judicial nature, leaving review of administrative matters to the Trial Division under section 18. Martineau had been denied his original application under section 28 when the Supreme Court ruled that the action of the Disciplinary Board was merely administrative.[48] Section 18 of the Act specifies that the Trial Division can issue *certiorari.* The result of the Court of Appeal's decision on Martineau's application under section 18 led to this conundrum: *certiorari* was available only for quasi-judicial matters, yet section 28 excludes those matters from review in the Trial Division. Thus *certiorari* could never issue from the Trial Division, and the reference to it in section 18 is without meaning.[49]

Fortunately, the Supreme Court judgment overturned this reasoning.[50] In the majority opinion, Mr Justice Pigeon recognized what appears to be the logical solution, that *certiorari* should be available for challenges to purely administrative decisions on the grounds of fairness.[51] A concurring minority opinion by Mr Justice

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[47] The reason why the Court was unable to grant a declaration in lieu of *certiorari* is found in the view expressed by Addy J. in *B.* v. *Dept of Manpower & Immigration* [1975] 2 F.C. 602 (T.D.) that declaration had to commence by statement of claim rather than by motion.

[48] *Martineau & Butters* v. *Matsqui Institution Inmate Disciplinary Board* [1978] 1 S.C.R. 118. This case turned on the words "by law" in s. 28. See also *Hardayal, supra,* note 2; *Howarth, supra,* note 14; and *Mitchell, supra,* note 14.

[49] At this point, a statement by Mr Justice Dickson in *M.N.R.* v. *Coopers & Lybrand, supra,* note 33, 501 seems to hold out the only hope for reviewability: "Accordingly, administrative decisions must be divided between those which are reviewable, by *certiorari,* or by s. 28 application or otherwise, and those which are non-reviewable". The "otherwise" remains unexplained.

[50] *Supra,* note 8.

[51] "[T]he Federal Court of Appeal ... did not accept that the common law remedy of *certiorari* may be available in the case of violation of the duty to act fairly in an administrative decision .... With respect, I cannot agree with this view": *ibid.,* Reasons for Judgment, 4-5. See also Mullan, *Impact, supra,* note 3, 102, n. 31.

Dickson went even further by adopting the English view of *certiorari* as an expanding remedy.[52] He added:

> In my opinion, *certiorari* avails as a remedy wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person.[53]

The implication is that the distinction between administrative and quasi-judicial matters should lose its significance, apart from the question of court jurisdiction imposed by statute.

The peculiar drafting of sections 18 and 28 of the *Federal Court Act* has played a large role in all the "hard-line" decisions of the Supreme Court in the past six years.[54] In *Martineau (No. 2)*, the Supreme Court has indicated that the Act's drafting will no longer serve to deny all recourse to deserving applicants. Combined with the Court's liberal stance when not dealing with the Act,[55] it is now arguable that Canadian law is in essence as progressive as its British and Australian counterparts.

V. Conclusion

The *Nicholson* decision has the potential to usher in a new era in Canadian law. Whether that potential will be realized, or whether the case will become, like *Drybones*,[56] a historical footnote, depends of course on its future treatment by the judiciary. The initial reaction of the lower courts has been mixed. The Ontario Divisional Court has unreservedly accepted the *Nicholson* principle,[57] but other courts have demonstrated a disturbing tendency to minimize its effects. This has been achieved by reducing the content of fairness to something much less than natural justice,[58] and in one case, by linking fairness to the old distinction between rights and privileges — that is, by finding that fairness is available only where a right has been affected.[59] The majority opinion in *Martineau*

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[52] *Supra*, note 8, Reasons for Judgment, 12-19.

[53] *Ibid.*, 19.

[54] *E.g.*, *Howarth, supra*, note 14; *Mitchell, supra*, note 14.

[55] *E.g.*, *Saulnier* v. *Québec Police Commission* [1976] 1 S.C.R. 572; *Nicholson, supra*, note 4; *Vachon, supra*, note 45.

[56] *R.* v. *Drybones* [1970] S.C.R. 282.

[57] *Re Peterson & Atkinson* (1978) 23 O.R. (2d) 266 (Div. Ct). The Ontario Court of Appeal quoted *Nicholson* at length in *Re Webb* (1978) 22 O.R. (2d) 257, but did not apply it.

[58] See *Citizens' Health Action Committee Inc.* v. *Milk Control Board of Manitoba* [1979] 4 W.W.R. 431 (Man. Q.B.); *Bruce & Meadley* v. *Reynett* [1979] 4 W.W.R. 408 (F.C.T.D.).

[59] *Siclait* v. *M.E.I.* F.C.T.D. No. T-5569-78, Sept. 24, 1979 (unreported). Note that this is incompatible with Dickson J.'s judgment in *Martineau (No. 2)*, *supra*, note 8.

(No. 2) certainly tended more in this cautious direction, but the case fell short of definitively answering the question.

It is to be hoped that the fairness principle will not be too greatly fettered. An epoch of government intervention in all areas of human activity requires more, rather than less, judicial review. Any marginal loss of administrative efficiency[60] and of judicial predictability would be more than offset by the gain in justice and consequent respect for law.

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[60] See Mullan, *Fairness, supra,* note 3, 304.

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