# A NOTE ON THE RELATIONSHIP OF WAIVER AND ESTOPPEL TO JURISDICTIONAL DEFECTS IN ADMINISTRATIVE LAW

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## I. INTRODUCTION

Two conflicting principles clash in the attempt to use the doctrines of waiver and estoppel[1] to prevent judicial review of the actions of a statutory delegate.

On the one hand, there is a strong constitutional policy that no inferior body can increase the jurisdiction granted to it by legislation.[2] In principle, therefore, judicial review is always available to correct jurisdictional errors.[3] As a result, there is a strong policy argument to say that waiver and estoppel should not be used to prevent judicial review of jurisdictional errors — even if the successful attack on the decision of the statutory delegate in effect permits the applicant to resile from the position which he took in the course of the delegate's process for making his decision, perhaps to the detriment of other parties who have relied on the validity of that decision.

On the other hand, the policy underlying both waiver and estoppel is to prevent a party from adopting one position and then resiling from it. This policy clearly applies to prevent a willing[4] participant in an administrative procedure from thereafter attempting to repudiate the outcome by pointing to some defect in the procedure which he has specifically accepted. Even though the very same defect would undoubtedly have permitted a successful application for judicial review if the applicant had objected to the defect (or at least done so in a timely manner[5]), it makes good sense to permit the statutory delegate — and perhaps other parties affected by the decision — to assert that the applicant has waived his right to object or is estopped from raising the defect.

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1. Both the definition and the distinction between waiver and estoppel is set out in this passage from Brown and Beatty, *Canadian Labour Arbitration* (2d ed., 1984) 82 - 83 (footnotes omitted):

   > Thus, the essentials of estoppel are: a finding that there was a representation by words or conduct, which may include silence, intended to be relied on by the party to which it was directed; some reliance in the form of some action or inaction; and detriment resulting therefrom. So defined, this doctrine is to be distinguished from the closely related concept of waiver which arises, for example, where there is failure by one party to object to a procedural irregularity, thus preventing it from later being raised as a bar to the arbitrability of the grievance. For the invocation of this latter doctrine all that is required is an intentional relinquishment of some known right or advantage. Indeed, because it is not necessary to show reliance and detriment for the doctrine of waiver or acquiescence to apply, in almost all cases, simply proceeding to the next step will satisfy those requirements.

2. The classic statement of this proposition is contained in *County Council* v. *Essex Incorporated Congregational Church Union* [1963] A.C. 808 (H.L.)
3. Although the courts may exercise their discretion to refuse a remedy in certain circumstances. For a discussion of these circumstances, *see* D.P. Jones, "Discretionary Refusal of Judicial Review in Administrative Law" (1981) 19 *Alta. L. Rev.* 483.
4. Thus no issue arises about the inability of a person to waive a defect of which he was ignorant.
5. Delay is a ground for refusing judicial review. For a recent case, see *AUPE* v. *The Queen in Right of Alberta* (1986) 43 Alta. L.R. (2d) 387 (C.A.).

The purpose of this article is to attempt to identify those circumstances in which important constitutional considerations compel judicial review to prevent the acquisition of jurisdiction by a statutory delegate — notwithstanding the existence of waiver or estoppel, and those contrasting circumstances in which it is appropriate to apply the doctrines of waiver or estoppel to preclude judicial review. It is helpful to focus our analysis on two cases: *Scivitarro* v. *Ministry of Human Resources and Attorney-General of British Columbia,* [6] which stands for the proposition that waiver and estoppel cannot be used to overcome a defect in the acquisition of jurisdiction by a statutory delegate; and *Re Energy & Chemical Workers' Union, Local 916 and Atomic Energy of Canada Limited,* [7] which provides an example of the use of waiver or estoppel to defeat an application for judicial review on the basis that there is a reasonable apprehension of bias by the statutory delegate. The differences in these cases inevitably raise the question of whether the effect of the existence of waiver or estoppel differs according to the nature of the grounds upon which judicial review is sought — which is assisted by consideration of the catalogue of different types of "jurisdictional" errors identified by Lord Reid in the famous *Anisminic* case.[8] The *Atomic Energy Case* also raises the question whether a breach of either the Canadian Bill of Rights or the Canadian Charter of Rights and Freedoms can be waived. Finally, one must consider the applicability of waiver or estoppel in the context of the courts' abiding discretion to refuse a prerogative remedy even in cases involving the strongest types of jurisdictional error.

## II. THE SCIVITARRO CASE

The *Scivitarro* [9] case provides an example of the primacy of jurisdictional considerations over equity.

Under British Columbia welfare legislation,[10] the Ministry of Human Resources may pay moving expenses for a person to leave that province to take up employment elsewhere. The legislation provides for an appeal from any decision of the Ministry to a three-member arbitration board (one member appointed by the applicant, one by the Ministry, with these two appointing the chairman). It also provides for a "re-hearing" of the appeal by the *original* arbitration board (although provision is made for nominating substitutes for any member of the original board who is unable — or unwilling — to act), provided there is new evidence.

Mrs. Scivitarro had originally applied unsuccessfully to the Ministry for $12,000 assistance to cover her moving costs to Ontario. She appealed this decision unsuccessfully to the first arbitration board. Later, she sought to have a re-hearing to consider her reduced claim for $6,000. Two members of the first board refused to re-hear the matter; and the third member (the

6. [1982] 4 W.W.R. 632 (B.C.S.C.).
7. (1985) 17 Admin. L.R. 1 (F.C.A.); leave to appeal to the Supreme Court of Canada refused, July 1986).
8. [1969] 2 A.C. 147 (H.L.) at 171.
9. *Supra* n. 6.
10. Guaranteed Available Income for Need Act, R.S.B.C. 1979, c. 158, ss. 25 and 26 and regulations made thereunder.

nominee of Mrs. Scivitarro) was never contacted about the re-hearing.[11] In fact, a second arbitration board was constituted — with completely different membership from the first board. At the commencement of the hearing before this second board, both parties expressly acknowledged that it had jurisdiction and was properly constituted. The second board declined to be bound by the proceedings before the first board; and, instead of looking only at *new* evidence as required by statute, conducted a complete hearing of its own, and granted Mrs. Scivitarro the full $6,000 which she was then requesting. Dissatisfied, the Ministry of Human Resources petitioned the Court to set aside the decision of the second board.

The Ministry relied on two technical grounds. First, the Ministry submitted that the second board did not acquire jurisdiction to "re-hear" the case because its membership did not comply with the statutory requirements — notwithstanding the Ministry's specific acceptance of the composition of the second board at the beginning of its hearing. Secondly, the Ministry submitted that the absence of "new evidence" meant that there was no statutory authority for the second board to deal with the matter at all[12] — and certainly not to re-hear the identical case in its entirety.

Not surprisingly, Mrs. Scivitarro pleaded that the Ministry was estopped from raising the first alleged defect as the basis for obtaining judicial review of the second board's decision: after all, the Ministry had specifically agreed at the commencement of the second board's proceedings that it was properly constituted and that it had jurisdiction to deal with her application to it. After examining the authorities, however, Mr. Justice Andrews of the Supreme Court of British Columbia held that non-compliance with the statutory requirements prevented the second board from acquiring any jurisdiction to deal with the matter at all, and that it was impossible to use the doctrines of waiver or estoppel in such a manner as in effect to confer additional jurisdiction on the second board by consent. On the one hand, the Court held that common law does not allow a statutory delegate to re-hear matters once it has reached a final decision on the matters remitted to it,[13,14] apart from an inherent power to correct purely clerical errors.[15] Accordingly, specific statutory power is necessary

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11. She later recieved a copy of a letter stating that he was "unable" to continue as a member of the board and that a replacement had been selected.

12. In effect, a "preliminary" or "collateral" matter upon which the delegate's jurisdiction depended. For a discussion of this concept, *see* Jones & de Villars, *Principles of Administrative Law* (1985) 111 - 115.

13. *See Re Lornex Mining Corp. Ltd.*; and *Canadian Industries Ltd.* v. *Development Appeal Board of Edmonton* (1969) 71 W.W.R. 635, 9 D.L.R. (3d) 727 (Alta. S.C.A.D.).

14. With respect to whether a "final decision" has been reached, or whether there is a continuing matter before the statutory delegate, *see Grillas* v. *Minister of Manpower and Immigration* [1972] S.C.R. 577, (1971) 23 D.L.R. (3d) 1 at 11 (1971) per Martland J.; and *Re Lornex Mining Corp. Ltd.* [1976] 5 W.W.R. 554, 69 D.L.R. (3d) 705 (B.C.S.C.).

15. *See Posluns* v. *Toronto Stock Exchange* [1964] 2 O.R. 547, 46 D.L.R. (2d) 210 (Ont. H.C.); *Ridge* v. *Baldwin* [1964] A.C. 40, [1963] 2 All E.R. 66 (H.L.), which some statutes also reproduce — e.g. the Labour Relations Act, S.A. 1980, c. 72, s. 126(1)(c).

to create a right either to an appeal[16] or to a re-hearing[17] or re-consideration. In the present case, the statute in question contained two specific limitations on the circumstances in which there could be a re-hearing of Mrs. Scivitarro's application: the re-hearing had to go to the same board, and it could only be made on "new evidence". In effect, Andrews J. held that these two matters were conditions precedent to the existence of a re-hearing;[18] if either was not complied with, there was no lawful authority for the re-hearing. His Lordship then referred to this famous dictum by Lord Reid in *Essex County Council* v. *Essex Incorporated Congregational Church Union*:[19]

> . . . [I]t is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction.

Accordingly, it was irrelevant that the Ministry had specifically agreed that the second board had been properly constituted. The Court rejected Mrs. Scivitarro's submission that the Ministry could waive its right to object to this jurisdictional defect or be estopped from raising it. In the result, the Court quashed the decision of the second board.[20]

## III. THE ATOMIC ENERGY CASE

The Federal Court of Appeal reached a completely different result in *Re Energy & Chemical Workers' Union, Local 916 and Atomic Energy of Canada Ltd. Limited,* [21] where the acquiescence of the parties was held to prevent an attack on the jursidiction of the Tribunal on the basis of a reasonable apprehension of bias on its part.

This case arose as a direct result of the Federal Court of Appeal's earlier decision in *MacBain* v. *Canadian Human Rights Commission et al.,* [22] which held that section 39(1) of the Canadian Human Rights Act[23] was inoperative against Mr. MacBain to the extent that this provision purported to permit the Canadian Human Rights Commission (the "Commission") to appoint a Human Rights Tribunal (the "Tribunal") to conduct an inquiry into an allegation of sexual harassment against Mr. MacBain. The Commission would in effect be the prosecutor in these proceedings; and, in addition, it had already made a determination that the complaint had been substantiated. The Court held that this legislative framework offends

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16. *A.G.* v. *Sillem* (1864) H.L.C. 704; and *R.* v. *Special Commissioners of Income Tax* (1888) 21 Q.B.D. 313 at 319. *See also* H.W.R. Wade, *Administrative Law* (5th ed.) 787 ff.
17. *See* R.A. Macdonald, "Reopenings, Rehearings and Reconsiderations in Administrative Law" (1979) 17 *Osgoode Hall L.S.* 207; and *see* R.F. Reid and H. David, *Administrative Law and Practice* (2d ed. 1978) 105 - 115. For examples of specific statutory power for a delegate to rehear a matter, *see B.C. Govt Employees Union* v. *Labour Relations Bd. of B.C.* (1986) 19 Admin. L.R. 175 (B.C.C.A.); *Re Martin and Brant (County)* [1970] 1 O.R. 1 (Ont. C.A.); Labour Relations Act, S.A. 1980, c. 72, s. 18; Public Service Employee Relations Act, R.S.A. 1980, c. P-33, s. 11; Public Utilities Board Act, R.S.A. 1980, c. P-37, s. 56.
18. At 640.
19. [1963] A.C. 808 (H.L.), [1963] 1 All E.R. 326 at 330.
20. At 644.
21. *Supra* n. 6.
22. (1985) 16 Admin. L.R. 109, 22 D.L.R. (4th) 119, 62 N.R. 117 (F.C.A.).
23. S.C. 1976-77, c. 33, especially ss. 11, 35, 36(3), 39(1), 39(5) and 41(1).

against the "principles of fundamental justice" guaranteed in section 2(e) of the Canadian Bill of Rights,[24] and therefore allowed MacBain's application to quash both the Tribunal's decision that he had committed sexual harassment as well as its monetary order against him.

As a result of the *MacBain* decision, another Human Rights Tribunal appointed by the Commission in the *Atomic Energy* case sought the court's advice[25] as to whether it too was prevented by section 2(e) of the Canadian Bill of Rights from having jurisdiction to hear its case dealing with a similar complaint against Atomic Energy of Canada Limited ("A.E.C.L."). However, the Federal Court of Appeal[26] unanimously held that A.E.C.L. had waived its right to challenge the jurisdiction of the Tribunal on the grounds of bias.

With respect to whether the particular facts of the case could support a plea of waiver, MacGuigan J. found as follows:

> Unlike the appellant/applicant in the *MacBain* case, who commenced proceedings alleging bias even before the first hearing of the Tribunal on the complaint against him and in fact withdrew from the hearing, AECL, in the view I take of the facts, both expressly and impliedly waived its right to challenge the jurisdiction of the Tribunal here. AECL was in possession of all the pertinent facts which formed the basis of this Court's decision in the *MacBain* case before the first public hearing in this matter in December, 1984. In fact, the anomalous role of the Commission vis-a-vis the Tribunal was very much on the mind of counsel for AECL on the first day of the hearing, when he argued that the Commission was not entitled to take an advocate's position before a Tribunal unless the complainant could not carry the case. However, in the course of his extensive submission on this point, counsel for the AECL said to the commission . . .:
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> > [W]e do not dispute . . . your independence — we are not challenging your independence . . . we are not saying that you are going to be biased or in any way tainted by the fact that your get your life from my opponent . . .
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> However, even apart from this *express* waiver, AECL's whole course of conduct before the Tribunal constituted an implied waiver of any assertion of a reasonable apprehension of bias on the part of the Tribunal. The only reasonable course of conduct for a party reasonably apprehensive of bias would be to allege a violation of natural justice at the earliest practicable opportunity. Here, AECL called witnesses, cross-examined the witnesses called by the Commission, made many submissions to the Tribunal, and took proceedings before both the Trial Division and this Court, all without challenge to the independence of the Commission. In short, it participated fully in the hearing, and must therefore be taken impliedly to have waived its right to object.

After reviewing a number of cases which establish the principle that a reasonable apprehension of bias will invalidate the actions of a statutory delegate,[27] MacGuigan J. then had to deal with A.E.C.L.'s submission that such invalidity creates a total lack of jurisdiction,[28] renders the Tribunal's decision void, and is capable of being waived. MacGuigan J. rejected this approach:[29]

> Unfortunately, therefore, for AECL's contention that the error in the *MacBain* case goes to the inherent jurisdiction of the Commission and so cannot be waived, the Courts have not approached issues of bias in terms of jurisdiction at all, even when as in the *French* and *Ringrose* cases, they could easily have done so.
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> From the point of view of logic there may well be a certain ambiguity in this approach. The most recent Canadian text, Jones and de Villars, *Principles of Administrative Law*,

24. R.S.C. 1970, App. III, s. 2(c), (e) - (g).
25. Pursuant to section 28(4) of the Federal Court Act, R.S.C. 1970, c. 10 (2d Supp.).
26. Composed of Pratte, Marceau and MacGuigan JJ.
27. *Supra* n. 6 at 5 - 6 (emphasis added).
28. *Id.*
29. *Supra* n. 6 at 10ff.

> Carswell, 1985, p. 97, asserts that "in principle, all *untra vires* administrative actions are void, not voidable, and there are no degrees of "invalidity", but acknowledges, at p. 98, that the view of the Supreme Court majority in *Harelkin* v. *The University of Regina*, [1979] 2 S.C.R. 561 is to the contrary. The same ambiguity runs through Halsbury . . . and de Smith . . . as well as through the Supreme Court of Canada cases themselves in that most of those on point have issued from a divided Court. Perhaps the Courts have been restrainted by a concern about the practical consequences of an overly rigid application of logic . . .
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> In any event, counsel for the AECL, when challenged by the Court, was unable to cite any case which supported his legal contention. He was forced to rely solely on his interpretation of the logical necessity inherent in the Court's ruling in the *MacBain* case. Such an interpretation cannot stand in the face of either the express holding in *MacBain* [where the Court specifically restricted its applicability] or the general law.
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> Taken against the background of the law as a whole, the *MacBain* decision can therefore be put in context in three simple propositions: (1) had it not been for the *Bill of Rights*, the legislative scheme alone would have been a complete answer to the allegation of reasonable apprehension of bias; (2) the *Bill of Rights* applies to nullify such a legislative infringement of rights *to the extent that the rights have been invoked in time*; and (3) because the *Bill of Rights* here acts only negatively, by preventing deprival [sic] of rights, *it affords no protection to those who even impliedly waive their rights*. In the result, the reasoning in the *MacBain* decision, based as it is on the effect of the *Canadian Bill of Rights*, cannot apply to AECL, which until now has never claimed its fundamental right to be free from a reasonable apprehension of bias . . . [and] has not asserted its rights from the earliest practicable time.

Marceau J. took a somewhat different tack, and appeared to make a distinction between actual bias, to which the doctrine of waiver cannot apply, and the mere apprehension of bias, which His Lordship thought was a defect which *could* be waived:[30]

> The position taken by AECL is that the Tribunal is without jurisdiction regardless of whether it might have waived its right to object or not. Its contention is based on the premise that the *ratio decidendi* of the *MacBain* decision is that defects in the legislation were then rendering the scheme of the Act inherently biased in its adjudicative structure. The argument in effect is that in view of such constitutive shortcomings, Tribunals set up under the Act . . . were necessarily lacking in jurisdiction *ab initio* and a want of jurisdiction *ab intitio* is obviously incapable of being cured afterwards by waiver.
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> If the *MacBain* decision were to be interpreted as contended by AECL, the validity of the argument would, I believe, be practically indisputable. A scheme "inherently biased" can only produce a result where actual bias or at least a real likelihood of bias will be found. Such a direct breach of the *nemo judex in causa sua* maxim by a Tribunal where actual bias or real likelihood of bias is present cannot, I believe, be cured by the mere silence of the aggrieved party until the hearing is over: the breach of natural justice may be too fundamental and its decision always open to impeachment (see *de Smith's Judicial Review of Administrative Action* (4th ed.) p. 273. But I do not think the *MacBain* decision can be interpreted as suggested by AECL . . .
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> The Court [in *MacBain*] gave no indication that actual bias or a real likelihood of bias was present; on the contrary it took pains in discarding such an interpretation of its views. It is true that the Court added to its basic conclusion a declaration of "inoperability" of the statute but such a declaration has to be correctly understood . . .

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30. *Id.* at 12ff (emphasis added). There is no justification for Marceau J.'s distinction between actual bias and a reasonable apprehension of bias. The Supreme Court of Canada in recent years has consistently stated that the test for bias is a reasonable apprehension thereof: *see National Energy Board* case [1978] 1 S.C.R. 369; *P.P.G. Industries Canada Ltd.* v. *A.G. Canada* (1975) 65 D.L.R. (3d) 354 (S.C.C.); and *Ringrose* v. *College of Physicians and Surgeons of Alberta* [1976] 4 W.W.R. 712 (S.C.C.). It is clear that Marceau J. would not permit waiver to be argued in a case where *actual* bias is shown. In light of the Supreme Court's clear rulings that the proper (and only) test for bias is a reasonable apprehension thereof, why would the same result not obtain? In other words, it is submitted that *Atomic Energy's* interpretation of the *MacBain* decision is unanswerable in theory, notwithstanding the distinction which Marceau J. attempts to draw between different types of bias.

> So, the *MacBain* decision, in my view, is simply to the effect that when under the Act a complaint has been substantiated after investigation, the selection by the commission itself of the Tribunal which will inquire into it can raise a reasonable apprehension of bias and violates, as a result, the right of the individual against whom the complaint was made to be judged by a Tribunal whose objectivity is above all reasonable doubt. *The question then is what is the situation of a Tribunal set up in such a way that a reasonable apprehension of bias may arise: is the Tribunal without jurisdiction? It cannot seriously be contended that it be so. Actual bias almost certainly affects the capacity of the Tribunal to act and could possibly be seen as going, for that reason, to jurisdiction, the more so since the decision of such a biased Tribunal would likely never be allowed to stand; but simple apprehension of bias is another matter altogether in that it does not strike at the very capacity of the Tribunal to act properly. A Tribunal appointed so as to give rise to an apprehension of bias is, as I understand the jurisprudence, only susceptible of being disqualified. Correlatively, the right of the individual who apprehends bias on the part of the Tribunal before which he is brought has always been, again as I understand the jurisprudence, a right to object to being judged by the Tribunal, but a right that exists only until he expressly or impliedly submits to it.* It is only because Mr. MacBain raised his objections at the outset that his attack on the proceedings could be successful.

Pratte J. concurred in the disposition of the case by holding that the Bill of Rights only applied to prevent a person being[31]

> tried *without his consent* by a tribunal appointed in a manner that gave rise to a reasonable apprehension of bias. The *MacBain* decision, therefore, has no application in a case like the present one where the person to be tried by the Tribunal has . . . expressly and impliedly waived his right to challenge the jurisdiction of the Tribunal.

Thus, the *Atomic Energy* case provides an excellent example of the application of the doctrine of waiver to prevent judicial review of the actions of a statutory delegate which *prima facie* were illegal. How does the reasoning in *Atomic Energy* square with the apparently contradictory reasoning in *Scivitarro*? If one accepts the (erroneous) view that a breach of the *nemo judex* rule is not "jurisdictional" in nature although it may invalidate the delegate's proceedings, it is possible to assume away any conflict in *Atomic Energy* with the *ratio decidendi* of the *Scivitarro* case which prevents the application of the doctrine of waiver to shield a delegate's actions from attack on the grounds of lack of jurisdiction. In other words, because the Court (incorrectly, it is submitted) saw no "jurisdictional" issue in *Atomic Energy*, it was free to apply the doctrine of waiver to prevent judicial review of the Tribunal's proceedings.

This approach invites an analysis of the following issues: (1) what we mean when we say that a delegate's error is "jurisdictional" in nature — with particular reference to Lord Reid's distinction between "jurisdiction" used in its "narrow" and "wide" senses; (2) whether the applicability of waiver differs according to the type of jurisdictional error involved — e.g., an error preventing the delegate from acquiring jurisdiction (in the "narrow" sense), or a subsequent error which causes the delegate to lose jurisdiction (in the "wider" sense); (3) what type of error is involved in a breach of the Canadian Bill of Rights or the Canadian Charter of Rights and Freedoms, and whether such a breach is capable of being waived; and (4) whether there are circumstances in which the courts should nevertheless exercise their discretion to refuse a prerogative remedy when the parties have waived a jurisdictional matter (i.e., the opposite of *Scivitarro*), or to grant the remedy notwithstanding the waiver of a matter which would otherwise take the delegate outside of his jurisdiction in the "wide" sense (i.e., the opposite to *Atomic Energy*).

31. *Id.* at 15.

## IV. LORD REID'S DISTINCTION BETWEEN "NARROW" AND "WIDE" MEANINGS OF "JURISDICTION"

It might be thought that *Scivitarro* stands for the proposition that waiver can never be used to confer jurisdiction on a statutory delegate; and that *Atomic Energy* stands for the proposition that waiver can be pleaded to prevent judicial review when the alleged defect in the delegate's proceedings is not jurisdictional in nature, such as a breach of the Rule against Bias. In other words, characterizing the alleged defect as non-jurisdictional is a necessary condition for successfully being able to plead waiver. It is useful, therefore, to consider what "jurisdiction" means in this context.

"Jurisdiction" is one of the most elusive concepts in administrative law. In its broadest sense, "jurisdiction" means the power to do every aspect of an *intra vires* action. In a narrower sense, however, "jurisdiction" means the power to commence or embark on a particular type of activity. A defect in the acquisition of jurisdiction "in the narrow sense" is thus distinguised from other errors — such as a breach of natural justice, fairness, or the Rule against Bias; considering irrelevant evidence; or acting for an improper purpose — which take place *after* the delegate has lawfully started his activity, but which cause him to leave or exceed his jurisdiction. Lord Reid's analysis of these difficulties in defining "jurisdiction" in *Anisminic Ltd.* v. *Foreign Compensation Commission* is particularly useful:[32]

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it has 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. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *Reg.* v. *Governor of Brixton Prison, Ex parte Armah* [1968] A.C. 192, 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law. I think that, if these views are correct, the only case cited which was plainly wrongly decided is *Davies* v. *Price* [1958] 1 W.L.R. 434. But in a number of other cases some of the grounds of judgment are questionable.

It is important to remember that virtually all grounds for judicial review of administrative action depend upon an attack on some aspect of the delegate's jurisdiction — in the wider sense — to do the particular activity in question.[33] Consequently, it is equally important to remember that any

32. *Supra* n. 8.

33. The only exception to the jurisdictional basis for judicial review is the anomalous use of *certiorari* to correct an error of the law on the face of the record. *See* Jones & de Villars, *Principles of Administrative Law* (1985) Chapter 10.

behaviour which causes the delegate to *exceed* his jurisdiction is just as fatal as any error which means that he never had jurisdiction "in the narrow sense" even to commence his action.

How does Lord Reid's distinction between the narrow and wide meanings of "jurisdiction" assist in analysing the cases on waiver?

In the first place, it is clear that *Scivitarro* dealt with a jurisdictional error "in the narrow sense" — i.e., the error prevented the delegate from *acquiring* jurisdiction at all. Because of the constitutional importance of making sure that statutory bodies keep strictly within the ambit granted to them by legislation, it makes some sense to say that a plea of waiver should not succeed so as to permit a delegate to increase or acquire jurisdiction (in the narrow sense) which it otherwise would not have. This reasoning applies to all matters which are preliminary or collateral to the acquisition of jurisdiction "in the narrow sense" (however one determines what constitutes a "preliminary" or "collateral" matter[34]). Accordingly, *Scivitarro* appears to be correctly decided on the waiver point. Nevertheless, as discussed below,[35] it does not necessarily follow that a prerogative remedy should therefore automatically issue, because there may be some circumstances in which the court should exercise its discretion to refuse such a remedy, even if a plea of waiver strictly cannot succeed.

Secondly, it is submitted that the *Atomic Energy* case makes a great deal of sense if it can be said to stand for the proposition that a plea of waiver can succeed if the delegate's error involves the "wider" aspect of his jurisdiction — i.e., something which would cause him to go outside of or lose the "narrow" jurisdiction which he had otherwise properly acquired. It is true that the Federal Court of Appeal in *Atomic Energy* did not refer to Lord Reid's "wide" concept of jurisdiction to permit the application of waiver. Indeed, Mr. Justice MacGuigan went out of his way to suggest that breaches of the Rule against Bias are not jurisdictional in nature at all.[36]

On the one hand, Lord Reid indicates in *Anisminic* that these types of errors render the delegate's decision void, not voidable.[37] On the other hand, MacGuigan J.'s approach is demonstrably wrong if one considers the theoretical basis for reconciling the availability of judicial review for breaches of natural justice or fairness (including the Rule against Bias),

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34. For a discussion of the concept of a preliminary or collateral matter, *see* Jones & de Villars, *Principles of Administrative Law* at 111 and 285; P.P. Craig, *Administrative Law* (1983) esp. at 301 - 304. Many Canadian Administrative lawyers appear to be hostile to the concept of preliminary or collateral matters because it widens the scope for judicial review: *see* e.g., the works cited by Mullan at (1986) 31 *McGill L.J.* 557 - 8. While the Supreme Court of Canada has recently indicated its preference to avoid characterizing a matter as being preliminary or collateral if there is any doubt, it nevertheless has recognized the continuing existence of these concepts: *see C.U.P.E. Loc. 963* v. *N.B. Liquor Corp.* (1979) 97 D.L.R. (3d) 417 (S.C.C.) at 422 (per Dickson J.):

> The question of what is and is not jurisdictional is often very difficult to determine. The Courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

For a discussion of the reasons for retaining the concepts of preliminary and collateral matters, see the *McRuer Report* at 71 - 76 and 250 - 252.

35. *See* Part 6 below.

36. *See* text accompanying n. 29 *supra*.

37. *Supra* n. 32.

abuse of discretion, improper motives, and the like,[38] with the effect of privative clauses which manifest Parliamentary Sovereignty — a reconciliation which can only be achieved by holding that these errors cause the delegate to go outside the ambit of the jurisdiction otherwise conferred on him — and protected by privative clause — by Parliament. In other words, the constitutional rationale for judicial review makes it impossible to avoid characterising these errors as jurisdictional in Lord Reid's "wide" sense — unless one is prepared always to be bound by even the weakest form of privative clause. Can MacGuigan J.'s analysis ever be used to permit judicial review of (say) the most outrageous example of bias (or any other breach of natural justice) which has not been waived by the relevant participants in the proceedings? On what basis would the Court have authority to set aside such a proceeding? With respect, it is no answer (and incorrect) to suggest that such a proceeding is merely voidable, not void, because where does the Court derive authority (whether or not there is a privative clause) to set aside "voidable" decisions?

On the other hand, it is important to note that defining away the jurisdictional aspect of bias allowed His Lordship to avoid dealing with the constitutional principle — illustrated in *Scivitarro* — that waiver cannot be used to extend the narrow jurisdiction of a delegate. This approach in effect defines away the problem of whether the inability to plead waiver applies (a) only to defects in *acquiring* jurisdiction (as in *Scivitarro*), or (b) also to those other errors which cause a delegate to *exceed or lose* the jurisdiction which he otherwise has properly acquired. It is a fallacy to suggest that the constitutional objection to waiver applies to both of these categories. After all, in the second category waiver does not operate so as to confer ("narrow") jurisdiction on the delegate; it merely prevents a person (whether a party or the delegate himself) from resiling from a procedure openly adopted[39] by the delegate in the course of exercising the ("narrow") jurisdiction which the delegate otherwise undoubtedly possessed. Accordingly, there is no constitutional objection to permitting a plea of waiver to succeed in the second category of cases. It was certainly not necessary for Mr. Justice MacGuigan to hold that a breach of the Rule against Bias does not involve any jurisdictional issue in order for him to hold that Atomic Energy had waived its right to object to this aspect of the hearing by the Human Rights Tribunal.

## V. CAN ONE WAIVE THE PROTECTION OF THE CANADIAN BILL OF RIGHTS OR THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS?

The Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms both provide important constitutional limitations on the type of legislation which can be enacted and on certain forms of administrative

38. *Id.* for other examples. *See also* the useful way in which Lord Diplock groups the various bases for judicial review into three categories in *Council of Civil Service Union* v. *Minister for the Civil Service* [1984] 3 All E.R. 935 (H.L.): (i) illegality, (ii) irrationality, and (iii) procedural impropriety.

39. Or else waiver could never apply, because one cannot waive something about which one is ignorant.

actions; and breaches of these constitutional principles give rise to judicial review. The question is: can a breach of the Canadian Bill of Rights or the Canadian Charter of Rights and Freedoms be waived?

The previous analysis suggests the following answer: to the extent that a breach of one of these constitutional principles prevents legislation from being effective, it must prevent an administrator from acquiring jurisdiction, and — like in *Scivitarro* — there is therefore theoretically no room in which the doctrine of waiver can operate. Using an analogy from the context of federalism, if unconstitutional legislation is passed by one level of government (for example, if the Federal Parliament purported to enact legislation taxing the property of a province, contrary to section 125 of the Constitution Act, 1867), that legislation is void *ab initio*, as is every act done by delegates pursuant thereto. It is no answer to suggest that the party raising the constitutional invalidity has acquiesced in or waived the defect. In principle, the same result should flow from a breach of either the Canadian Bill of Rights or the Canadian Charter of Rights and Freedoms: to the extent that they present the enactment of certain types of laws, they prevent any delegate from acquiring jurisdiction under those invalid laws — with the result that there is no room in which the doctrine of waiver or acquiescence can operate. This analysis appears to be impeccable in terms of constitutional law.

As a result of the Court's previous holding in the *MacBain* case that the provisions of the Canadian Human Rights Act contravened section 2(e) of the Canadian Bill of Rights that "no law of Canada shall be construed or applied so as to . . . deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations", it is not surprising that Counsel for AECL argued that this defect created a total lack of jurisdiction in the Human Rights Tribunal. As MacGuigan J. paraphrased the argument:[40]

> In support of its allegation of a total want of jurisdiction in the Commission, AECL urges this interpretation of the *MacBain* decision: that this Court there found that the *Act* gives rise to a suspicion of influence or dependency in two ways, the intitial substantiation of the complaint under subsection 36(3) amounting to the same determination required of the Tribunal under subsection 41(1), and the direct connection between the Commission as prosecutor and the Tribunal as the decision-maker; that both defects preceded the commencement of the inquiry and so rendered the scheme of the *Act* inherently biased in its adjudicative structure; that, despite this Court's attempt to limit the inoperability of the statute to the complaint filed by the complainant, the logic of its reasoning as to the constitutive shortcomings of the *Act* compels the conclusion that, in all cases, tribunals set up under the Act are lacking in jurisdiction *ab initio*; and finally, that such a want of jurisdiction is incapable of being cured by waiver.

Similarly, Marceau J. summarized A.E.C.L.'s position as follows:[41]

> The position taken by AECL is that the Tribunal is without jurisdiction regardless of whether it might have waived its right to object or not. Its contention is based on the premise that the *ratio decidendi* of the *MacBain* decision is that defects in the legislation were then rendering the scheme of the Act inherently biased in its adjudicative structure. The argument in effect is that in view of such constitutive shortcomings, Tribunals set up under the Act, as it then was, were necessarily lacking in jurisdiction *ab initio* and a want of jurisdiction *ab initio* is obviously incapable of being cured afterwards by waiver.

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40. At 7 - 8.
41. At 12.

However, the Federal Court of Appeal went out of its way to avoid this conclusion in the *Atomic Energy* case. As MacGuigan J. said:[42]

> The protection afforded by the *Bill of Rights* is . . . a limited one, particularly where, as in subsections 2(c) and 2(3) - (g), it is formulated in the terms "no law of Canada shall . . . deprive a person . . .", because *it does not purport to confer rights but merely to inhibit their deprival* . . . The protection from infringement by federal statute has been held not to avail a person who does not initially invoke his rights under these subsections.
>
> .....
>
> Taken against the background of the law as a whole, the *MacBain* decision can therefore be put in context in three simple propositions: (1) had it not been for the *Bill of Rights*, the legislative scheme alone would have been a complete answer to the allegation of reasonable apprehension of bias; (2) the *Bill of Rights* applies to nullify such a legislative infringement of rights to the extent that the rights have been invoked in time; and, (3) because the *Bill of Rights* here acts only negatively, by preventing the deprival of rights, it affords no protection to those who even impliedly waive their rights. In the result, the reasoning of the *MacBain* decision, based as it is on the effect of the *Canadian Bill of Rights*, cannot apply to AECL, which until now has never claimed its fundamental right to be free from a reasonable apprehension of bias. Thus the *MacBain* decision will . . . "affect only the appellant/applicant in this case and possibly several other cases where the fact situation is identical to this case." Those other identical fact situations can be only those where the party affected asserted its rights from the earliest practical time.

Similarly, Marceau J. attempted to distinguish between the legal inability of Parliament to pass effective legislation which contravenes the Bill of Rights, on the one hand, and the mere "inoperability" of such legislation, on the other hand:[43]

> . . . [T]he basic conclusion of the Court . . . [in *MacBain*] . . . was that the selection by the Commission itself of the members of the Tribunal called upon to inquire into the complaint laid against Mr. MacBain, when that complaint had already been the subject of an investigation and a "substantiation" in accordance with section 35 and 36 of the Act, had rightly created in the mind of the "accused" a reasonable apprehension of bias and therefore contravened rules of natural justice. . . . It is true that the Court added to its basic conclusion a declaration of "inoperability" of the statute but such declaration has to be correctly understood. A declaration of inoperability, as I see it, is merely a type of remedy applicable when the protection given by the *Bill of Rights* is relied upon, which was the case here since the allegation of bias was of course to be countered by the consideration that the legislation itself was responsible for it. It is indeed only since the *Bill of Rights* and because of the protection this special statute assures to basic rights that Courts are entitled to remedy a breach of natural justice arising from legislation itself. . . . And when the Courts do so provide a remedy, they usually speak of "inoperability" of the legislation, a term drawn from section 2 of the Bill. . . . Such a declaration of inoperability, although always formally limited to the case at bar, may be, in practice, more or less authoritative, depending on whether the legislation is found to be directly and by itself in breach of a protected right or whether it is found to have only contributed towards causing a breach of such a right. In any case, a declaration of inoperability is not a declaration that the statute is invalid or has no force and effect (as in the case of a statute which is found to run afoul of the *[Canadian] Charter of Rights and Freedom[s]* enshrined in the Constitution). *Counsel's argument that what is inoperative at the outset cannot become operative afterwards is obviously not valid, if the term "operative" is taken in its proper sense.*

Three aspects of this passage need to be scrutinized particularly closely: (a) the distinction between legislation itself and other forms of administrative activity which contravene the Bill of Rights; (b) the suggestion that the Bill of Rights does not invalidate legislation but merely makes it "inoperative" in some circumstances, which implies that the protection of the Bill of Rights can be waived; and (c) the suggestion that the situation is different

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42. At 9 - 10, and 11.

43. At 12 - 13 (emphasis added).

under the Canadian Charter of Rights and Freedoms, whose protection apparently cannot be waived. Let us consider each one of these points separately.

## A. DISTINGUISHING BETWEEN LEGISLATION AND OTHER FORMS OF ADMINISTRATIVE ACTIVITY WHICH CONTRAVENE THE BILL OF RIGHTS

First, Mr. Justice Marceau — perhaps correctly — makes the distinction between circumstances in which the legislation which *itself* directly breaches the rights protected by the Canadian Bill of Rights, and other cases where the legislation itself does not cause the breach but only indirectly contributes to it. Surely the purpose for making such a distinction is aimed at determining whether the Bill of Rights affects the legislation itself, or only some subsidiary administrative activity whose particular manifestation contravenes the Bill although the legislation in question could authorize some other form of administrative activity which would not breach the protections contained in the Bill. In the first case, the legislation itself must be "inoperative" — i.e., ineffective, invalid, not capable of authorizing the breach of the protections guaranteed by the Bill of Rights. In the second case, the legislation itself would not be affected by the Bill of Rights, but rather only the particular form of the administrative action taken pursuant to the legislation because that action (and not the legislation itself) causes the breach. Into which category does the present case fit? It is clear that the Canadian Human Rights Act itself undermines the right to a fair hearing by purporting to authorize the Commission to appoint the members of the Tribunal after the Commission has already determined that the accused is guilty. The unfairness does not arise merely out of the way the statutory delegate chooses to exercise its powers, when the delegate could have chosen some other manner in which to exercise its powers which would not be unfair; on the contrary, the statute itself dictates the sole method by which the Tribunal is to be constituted — and that method on the face of the statute breaches the protection contained in the Bill of Rights. Accordingly, this analysis by Marceau J. inescapably drives one to conclude that these provisions of the Canadian Human Rights Act itself — and not just the actions taken pursuant thereto by the Commission — must be rendered "inoperative" by the Bill of Rights.

## B. THE SUGGESTION THAT THE BILL OF RIGHTS DOES NOT INVALIDATE LEGISLATION BUT MERELY MAKES IT "INOPERATIVE" IN SOME CIRCUMSTANCES, WHICH IMPLIES THAT THE PROTECTION OF THE BILL OF RIGHTS CAN BE WAIVED

Secondly, it is difficult to understand Marceau J.'s statement that[44]

> . . . Counsel's argument that what is inoperative at the outset cannot become operative afterwards is obviously not valid, if the term "operative" is taken in its proper sense.

With respect, His Lordship does not give any reason why Counsel's argument is not valid, nor what is the "proper sense" to be given to "operative". This phrase does seem to me to make sense if applied to the second category identified by His Lordship in which the Bill of Rights can

44. At 13.

apply: namely, to administrative actions which breach the rights enumerated in the Bill, which without legislative amendment could be recast into another format which would not breach the Bill. Although the first set of administrative procedures would be rendered inoperative by the Bill of Rights, the second set would not. Thus, it would make sense to speak of administrative arrangements which are inoperative due to the Bill of Rights being changed so as to become operative — without any change in the legislation itself. However, it is much more difficult to apply this analysis to a legislative provision which itself inexorably breaches the Bill of Rights: without any change to the legislation bring it into accord with the Bill of Rights, how can such an inoperative provision subsequently ever become operative? How can waiver possibly breathe life into an inoperative legislative provision?

It seems to me that the fallacy in this line of reasoning lies in focussing on whether the inoperative provisions of the Canadian Human Rights Act are somehow capable of being revivified.

Rather, a much clearer analysis emerges if one concentrates instead on whether the Bill of Rights has been breached. After all, section 2(e) of the Bill only renders federal legislation inoperative to the extent that the federal legislation would deprive A.E.C.L. of its "right to a fair hearing in accordance with the principles of fundamental justice for the determination of . . . [its] . . . rights and obligations". Precisely because AECL had waived its right to object to the fairness of the hearing, section 2(e) of the Bill of Rights cannot apply to this factual situation. Accordingly, the Bill of Rights cannot render the federal legislation in this case "inoperable". Thus, it is not a case of that which is "inoperable" suddenly becoming "operable".

## C. CAN THE PROTECTION OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS BE WAIVED?

Mr. Justice Marceau suggests that the Canadian Charter of Rights and Freedoms is much more powerful than the Bill of Rights because the former does not result in a mere declaration of inoperability of legislation, but rather renders an offending statutory provision "invalid" and "of no force and effect". This result flows from section 52 of the Constitution Act, 1982[45] which provides as follows:

> 52(1) The Constitution of Canada is the supreme law of Canada, and *any law that is inconsistent with the provisions of the Constitution is,* to the extent of the inconsistency, *of no force or effect.*
>
> (2) The Constitution of Canada includes
>
> (a) the *Canada Act 1982*, including this Act;
>
> (b) the Acts and orders referred to in the schedule;
>
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).
>
> (3) *Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.*

Section 52 of the Constitution Act, 1982, therefore, has the effect of limiting the sovereignty of the federal Parliament to enact provisions in the Canadian Human Rights Act which contravene the protections contained in the Canadian Charter of Rights and Freedoms: the federal law itself is

45. As enacted by Schedule B to the Canada Act 1982 (U.K., 1982) c. 11.

void (and not merely "inoperative" as under the Canadian Bill of Rights) to the extent that it purports to prescribe an administrative structure which (say) breaches the "principles of fundamental justice" referred to in section 7 of the Charter. Thus the administrator (i.e., the Human Rights Commission) never obtains any jurisdiction (e.g., to appoint the Tribunal), and — as in *Scivitarro* — there is no opportunity for the doctrine of waiver to apply.

Of course, the issue would still have remained under the Canadian Charter of Rights and Freedoms as to whether, as a matter of fact, it could be said that the legislative scheme in the Canadian Human Rights Act had the effect of depriving A.E.C.L. of the right not to be deprived of "life, liberty and security of the person" except in accordance with the "principles of fundamental justice" (section 7 of the Charter). On the one hand, the Federal Court of Appeal clearly held that the statutory scheme allowing the Human Rights Commission to appoint the members of the Tribunal breached the common law Rule against Bias (which forms part of the "principles of fundamental justice"), that prior to the Canadian Bill of Rights it was competent for legislation specifically to do this, that the Canadian Bill of Rights would only render such legislation "inoperative" if the affected party (A.E.C.L.) had not waived its right to claim the protection of the Canadian Bill of Rights; and hinted that the situation would be different under the Canadian Charter of Rights and Freedoms because it strikes down the validity of the legislation itself, instead of rendering it merely "inoperative" in certain circumstances. On the other hand, is it really so clear that waiver cannot be successfully pleaded under the Canadian Charter of Rights and Freedoms, using precisely the same analysis adopted by the Federal Court of Appeal with respect to the Canadian Bill of Rights? After all, there is a factual question of whether a person (such as A.E.C.L.) *is* being deprived of his rights contrary to the principles of natural justice.

## VI. SHOULD THE COURT EVER EXERCISE ITS INHERENT DISCRETION TO REFUSE A REMEDY WHEN THERE IS A DEFECT IN ACQUIRING JURISDICTION?

It is one thing for the Court to say that a Respondent cannot plead the doctrine of waiver to prevent an applicant from seeking judicial review of a statutory delegate's proceedings on the basis that there is a defect in its acquisition of jurisdiction. It is quite a different proposition to assert that the Court must always quash the statutory delegate's actions in such a circumstance. In particular, the discretionary nature of almost all remedies in administrative law[46] means that the Court is *not* bound to issue a remedy in all circumstances — not even if a preliminary jurisdictional defect exists. Should this discretion to refuse a remedy be exercised when one party has waived its right to object to a defect in the delegate's acquisition of jurisdiction?

The recognized category of circumstances in which the Court may exercise its discretion to refuse a remedy includes: (i) unreasonable delay;

46. *See* D.P. Jones, "Discretionary Refusal of Judicial Review in Administrative Law" (1981) 19 *Alta. L. Rev.* 483.

(ii) lack of clean hands or other undesirable conduct by the Applicant; (iii) futility in granting the remedy; (iv) the availability of an alternative remedy; (v) the fact that the delegate's decision is not patently unreasonable even though it may disclose a possible error of the law which is not jurisdictional in nature; and (vi) where the Applicant has waived or acquiesced in the proceedings of the delegate.

On the one hand, many of the cases on waiver and acquiescence are irrelevant to the topic being discussed here because they relate to procedural defects occurring *after* the delegate has undoubtely acquired jurisdiction, or relate to the non-statutory delegates whose jurisdiction can be extended by agreement between the parties. This is illustrated by the decision of the Ontario Court of Appeal in *Hunter Rose Co.* v. *Graphic Arts Int. Union, Loc. 28B*, where Dubin J.A. said:[47]

> Unlike a tribunal of limited jurisdiction, the parties [to a collective agreement], by their conduct, can confer jurisdiction upon a board of arbitration. Having responded to the grievance, appointed its nominee to the board of arbitration, and having failed to object to the jurisdiction of the board, the company, along with the union, thereby agreed to recognize the jurisdiction of the board to inquire into and determine the grievance.

On the other hand, it is possible to find a number of cases where waiver has been applied by the courts in contexts which at least arguably relate to a preliminary defect in the acquisition of jurisdiction of a statutory delegate. Take, for example, the decision of the Saskatchewan Court of Queen's Bench in *Potash Corporation of Saskatchewan Mining Limited and United Steelworkers of Americal, Local 7689*[48] which dealt with an application to quash an arbitrator's award on the basis (inter alia) that he did not have jurisdiction to deal with the grievance. The Court declined to do so because

> . . . if he did not have jurisdiction initially[,] the parties by their conduct waived any jurisdictional objection, *and by so doing gave him jurisdiction.*

Although Osborn J. specifically relied on the passage quoted above by Dubin J.A. in *Hunter Rose*, it is not possible to rationalize this decision on the basis that the arbitration board was not a statutory tribunal (so that the application of waiver would not conflict with the constitutional principle that the courts should uphold the limited jurisdiction of inferior tribunals). In fact, His Lordship acknowledged that the decision of the Supreme Court of Canada in *Shalansky* v. *Regina Pasqua Hospital*[49] effectively gives all labour arbitration a statutory foundation. This means that it is no longer possible to treat at least some labour arbitrators differently from statutory delegates — with the result that any application of waiver to a defect in the acquisition of a statutory arbitrator's jurisdiction must conflict squarely with the constitutional principle demonstrated by *Scivitarro*.

Another clear example of the use of judicial discretion to refuse a remedy against undoubtedly unlawful governmental action occurred in *R. V. Paddington Valuation Officer; ex parte Peachey Property Corp.* [50] The

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47. (1979) 99 D.L.R. (3d) 566 (Ont. C.A.).

48. [1985] 6 W.W.R. 190 (Sask. Q.B.). *See also Sturgeon Creek School Division 24 Board of Trustees* v. *Alberta Teachers' Association* (1985) 40 Alta. L.R. (2d) 111 (Alta. C.A.) concerning "procedural waiver" as distinguished from quasi-contractual waiver or estoppel.

49. [1983] 1 S.C.R. 303.

50. [1964] 3 All E.R. 200; *affd.* [1965] 2 All E.R. 836 (C.A.).

English Court of Appeal held that the municipality's property tax rolls were unlawful, but declined to grant a remedy to the objecting taxpayer for a period of six months in order to permit the municipality to bring itself within the law. It is very hard to rationalize this type of decision in terms of the unflexible concept of constitutionality demonstrated in *Scivitarro*.

Finally, the recent decision in the *Manitoba Language Rights* case provides a very strong example of a circumstance in which the Supreme Court of Canada itself has rejected the proposition that technical constitutionality must be blindly upheld without any regard to the consequences to good government of a broader view of what the rule of law requires. How else can one justify the Courts' refusal to strike down all of the unilingual laws which Manitoba has enacted unconstitutionally since 1890?

## VII. CONCLUSION

It is submitted, therefore, that there are at least some circumstances in administrative law in which the need to uphold the constitution is not so great that it swamps all other claims to justice. Indeed, *Scivitarro* itself might be one of these cases. After all, the governmental department *had* agreed to the technically illegal procedure used to determine the dispute with Mrs. Scivitarro. Why *should* it be allowed after the fact to attack the validity of this procedure? While the court may well feel obliged to note and declare that the governmental department had no statutory authority to agree to the procedure used, why does this observation compel the court to exercise its discretion to issue a remedy to quash the decision (in effect imposing an unfair burden on the citizen who in good faith accepted the government's agreed procedure)? What serious harm would have been done to the constitution if the court had made its observation about the illegality, but had exercised its discretion to refuse a remedy to the government department?

Accordingly, it is suggested that waiver — even of a defect in the acquisition of jurisdiction — is a proper consideration for a court to exercise its discretion to refuse a remedy for illegal governmental action.