NOVA SCOTIA COURT OF APPEAL
Citation: *Heighton v. Kingsbury*, 2003 NSCA 80

Date: 20030729
Docket: CA 191516
Registry: Halifax

Between:

Ambrose Heighton, The Town of Stellarton and
The Board of Police Commissioners for the Town of Stellarton

Appellants

v.

David Kingsbury

Respondent

Judges: Glube, C.J.N.S.; Chipman and Oland, JJ.A.

Appeal Heard: June 9, 2003, in Halifax, Nova Scotia

Held: **Appeal and cross-appeal dismissed per reasons for judgment of Chipman, J.A.; Glube, C.J.N.S. and Oland, J.A. concurring.**

Counsel: Jane E. O'Neill and Roseanne M. Skoke, for the appellants
David W. Fisher, for the respondent

Reasons for judgment:

[1] This is an appeal from a decision of a Supreme Court judge in Chambers quashing the respondent's demotion as a police officer and his dismissal from a police force, and prohibiting the appellants from taking any further action against him respecting the matters raised in the decision of the court. There is a cross-appeal by the respondent respecting an award of costs against him with respect to the dismissal of proceedings against another party.

[2] The respondent was employed as a police officer in the Town of Stellarton, N.S. since 1983.

[3] The appellants are the Town of Stellarton, the Board of Police Commissioners for the Town, constituted under the **Police Act**, R.S.N.S. 1989, c. 348, and Ambrose Heighton, Chief Officer of the Stellarton Police Services.

[4] In February 2000 the respondent entered a competition held for promotion to the rank of corporal and was successful. He received a letter from Chief Heighton simply stating that he had been promoted to that rank effective June 7th, 2000. A notice to the same effect was published on the bulletin board in the police station. In his affidavit filed with the materials before the Chambers judge, Chief Heighton stated that he personally told the respondent on June 7th, 2000, that his appointment to corporal was probationary and was subject to review. Article 27.06 of the **Collective Agreement** (dated November 1, 1997) in effect at the time among the Town, the Board and the Stellarton Police Association provides that the Board has the right to place a successful applicant to a position on a trial period not exceeding six months. Conditional on satisfactory service such trial promotion then becomes permanent. The respondent, in his affidavit and in oral testimony before the Chambers judge, denied that he was advised that his appointment was probationary.

[5] After the respondent's promotion, Chief Heighton had concerns about his behaviour. In the early morning hours of October 12, 2000, the respondent left the Town of Stellarton while on duty, leaving it without police protection for over an hour while he visited a home on Green Street, New Glasgow. At the time he was in police uniform and driving a marked police vehicle. Unknown to the respondent, Chief Heighton had followed him and witnessed these goings-on. Chief Heighton filed a complaint on Form 8 (Notice of Allegation) in the

Regulations to the **Police Act** on November 23, 2000, alleging a disciplinary default on the respondent's part with respect to this incident.

[6] On the 4th of December, 2000, the appellant Board held a meeting. The Board advised the respondent by letter dated the following day that Chief Heighton's Notice of Allegation was drawn to its attention and the matter was discussed at its meeting. The Board agreed that the respondent's actions were unsatisfactory in the probationary position of corporal, and that effective December 4th he was to be returned to his former rank of constable with salary to be adjusted accordingly, effective the same date.

[7] The incident of October 12th involving the respondent's departure from duty without authority was also followed up by proceedings under the **Police Act** and Regulations. Two additional Form 8 complaints relating to other matters were filed, and Chief Heighton suspended the respondent on January 16th, 2001, pursuant to Regulation 27(1). Inspector Stephen Sykes of the Halifax Regional Police Services was appointed to investigate the complaints. Associate Chief Dave Wilson of the Cape Breton Regional Police Services was appointed to act as authority to decide whether a disciplinary default may have been committed. On January 21st, 2001, the respondent met with Inspector Sykes and acknowledged his involvement in the disciplinary defaults alleged against him. Inspector Sykes recommended minor penalties. Associate Chief Wilson then met with the respondent and gave him an opportunity to be heard by him. Associate Chief Wilson's decision was that the respondent forfeit two days vacation on each of the charges, undergo a fitness for duty assessment and be reinstated in the rank of corporal, as he considered the Board's "punishment" was in excess of what was required for the offences.

[8] Chief Heighton lifted the suspension and arranged a psychological assessment. On May 17, 2001, the psychologist forwarded a report to Chief Heighton in which he opined that the respondent was ready to return to active duty. The Board, however, refused to reinstate the respondent to his rank of corporal as it considered the demotion was of a probationary rank pursuant to the **Collective Agreement**, and not a disciplinary matter. In the Board's view the matter of reinstatement was beyond the jurisdiction of Associate Chief Wilson.

[9] The respondent filed an appeal from this decision to the Police Review Board pursuant to the **Police Act** and Regulations. However, it was never pursued.

[10] On May 30, 2001, the respondent caused an originating notice (application *inter parties*) to be issued against the appellants seeking an order in the nature of *certiorari* to quash his demotion.

[11] On September 5, 2001, eleven additional complaints under the **Police Act** and Regulations were filed against the respondent including discreditable conduct, insubordination, neglect of duties, deceit, improperly disclosing information, abuse of authority, sexual harassment and uttering death threats. The respondent also filed a number of complaints against Chief Heighton. Considerable publicity ensued including items in the local newspaper. The respondent was arrested on Chief Heighton's orders, and criminal Informations were sworn. However, the Crown later withdrew the charges as it was felt there was insufficient evidence to obtain a conviction. On September 5, 2001, the respondent was again suspended from duty following the filing of these complaints, pursuant to Regulation 27(5).

[12] Staff Sergeant Frank Chambers of the Halifax Regional Police Service was appointed as investigating officer to look into the eleven disciplinary defaults alleged against the respondent. He reported on January 10, 2002, to Chief Heighton. His conclusion was that the investigation did not sustain any of the allegations made against the respondent.

[13] Chief Heighton then appointed Chief K.C. MacLean of the Truro Police Service to review the investigation of Staff Sergeant Chambers and make a recommendation respecting the disciplinary complaints. By his letter of January 23, 2002, to Chief Heighton, MacLean found the respondent guilty of three allegations respecting threats against Chief Heighton and Sergeant McGrath (also of the Stellarton Police Services). By way of penalty, he recommended that the respondent attend a psychologist, take whatever treatment was recommended, and upon producing a favourable recommendation he should be reinstated in the Stellarton Police Services as a constable, to be followed by one year of "close supervision".

[14] The response of Chief Heighton to the investigation of Staff Sergeant Chambers and the recommendation of Chief MacLean was to find the respondent guilty of all eleven allegations. He recommended to the Board that he be dismissed.

[15] The matter was referred to the Board, and the respondent, represented by counsel, was heard at a hearing on March 26, 2002. Chief Heighton was not present at this meeting. At a meeting held on April 4, 2002, the Board found the respondent guilty of all eleven charges and determined that he should be dismissed from the Stellarton Police Services.

[16] On May 9th, 2002, the respondent caused an originating notice (application *inter parties*) to be issued against the appellants and Chief Kenneth MacLean seeking an order in the nature of *certiorari* to quash his dismissal, and an order in the nature of prohibition to prohibit further disciplinary action being taken against him, and for a declaration that the respondent was still a police officer with the Stellarton Police Services holding the rank of corporal.

[17] The originating notices issued in both matters were supported by affidavits of the respondent. Affidavits were in due course filed on behalf of the defendants. The hearing of the matters was held in Chambers on September 26th, 2002. An oral judgment was rendered that day quashing the demotion and dismissal of the respondent and ordering that reinstatement be made with whatever adjustments were necessary to place him in the same position he would be had he not been demoted or dismissed. The Chambers judge also found that the appellants should be prohibited from taking any further disciplinary action against the respondent in the matters raised in the decision. An order giving effect to the decision was made on December 6th, 2002.

[18] At the commencement of his decision, the Chambers judge noted that two preliminary matters were considered by him. The first dealt with Chief Kenneth MacLean. As Chief MacLean had made no decision to terminate the respondent and, in fact, indicated in his affidavit that he felt that termination was not appropriate, and as he was not, on the evidence, "the chief officer" as contemplated by the **Police Act**, the proceedings as against him should be dismissed with costs. These were fixed at $1,500.00.

[19] The second preliminary matter related to extensive arguments by both sides in the briefs presented relating to the relevance of the grievance procedure under the **Collective Agreement,** and the review provisions of the **Police Act** respecting disciplinary adjudications.

[20] The Chambers judge continued:

> [3] ... Having read all the submissions, but without argument on the point, I indicated that the law was clear, that where "an applicant claims to be aggrieved by a decision made without jurisdiction or in breach of the rules of natural justice, the fact that he has not taken a statutory right of appeal should normally be regarded as irrelevant." (deSmith, Judicial Review of Administrative Action, 4th Ed. at p. 425). This position has been maintained in *Martin v. Jackson, Board of Police Commissioners (Halifax) and Halifax* (1985), 70 N.S.R. (2d) 91; *Re Burgenham and Gilbertson* 133 C.C.C. 265; and a recent Nova Scotia case *Reid v. Rushton* (2002), N.S.J. No. 92. The same approach applies to the grievance procedure under the Collective Agreement. An applicant alleging lack of jurisdiction and/or denial of natural justice, when dealing with a statutory body, can always appeal to the courts and have the matter determined regardless of the existence of other appeal procedures.

[21] In his reasons, the Chambers judge first addressed the demotion. He came to the conclusion that, as there was nothing in the documentary evidence to indicate that the promotion was on a trial basis, and particularly having regard to the respondent's *viva voce* evidence that there was no qualification to his promotion, the promotion was not on a trial or probationary basis. Were there to be any qualifications respecting the promotion, fairness demanded that they be made known to the respondent. He did not accept that Chief Heighton told him that the appointment was a probationary one. He was satisfied that the remedy of *certiorari* should be granted quashing the demotion decision, together with an order prohibiting further action on the matter. For "clarity purposes" he stated that the demotion was "void from the beginning".

[22] The Chambers judge further found that were he wrong respecting this finding, he was satisfied that the Board lacked jurisdiction to make the demotion decision. While it may have believed it was exercising a management right to review a probationary employee, the Board was limited to its powers as set forth in the **Police Act**. Section 34 of that **Act** provided that no member of a municipal force is subject to reduction in rank except after proceedings taken in accordance with the **Act** and the Regulations. No such proceedings were taken that led to the meeting of December 4th and the decision to demote. Simply put, the Board demoted the respondent without any power to do so. Demotion is a disciplinary matter for the chief officer on whose recommendation only the Board could act.

[23] On this alternative approach, the Chambers judge stated that the decision to demote was made without jurisdiction and was therefore a nullity.

[24] With respect to the dismissal, the Chambers judge made reference to the eleven complaints made against the respondent. Chief MacLean did not recommend dismissal. In his affidavit he stated that because of his limited role he did not require the respondent to appear before him to answer the allegations. Nevertheless, Chief Heighton recommended dismissal which the Board ordered.

[25] The proceedings were purportedly taken under the **Police Act**. The Chambers judge observed that s. 21(8) of the Regulations provides that where the chief officer decides that the evidence in an investigation discloses that a disciplinary default may have been committed, such officer shall forthwith send a notice of meeting to, and meet privately with, the member who may have counsel, a union representative or a member of the police force present, and give the member an opportunity to hear the results of the investigation and admit or deny the allegation.

[26] No such meeting occurred. Chief Heighton had neglected to give the respondent this opportunity either forthwith or at all. This was a mandatory provision in the disciplinary process. The omission of such a mandatory step had the effect of depriving the Board of jurisdiction to dismiss the respondent as it purported to do. The dismissal based on the Chief's recommendation, absent this mandatory step, was also a denial of natural justice which rendered the whole process "void from the beginning".

[27] The Chambers judge also opined that, while it was unnecessary to deal with the allegation of apprehension of bias and actual bias, the evidence clearly showed that the relationship between the respondent and Chief Heighton was so bad that a reasonable apprehension of bias "in the circumstances was obvious."

[28] The appellants appeal to this Court on a number of grounds, and the respondent cross-appeals respecting the award of costs to Chief MacLean against him. The issues raised may be stated as follows:

1. whether the Chambers judge erred in law in concluding that alternative remedies of the grievance procedure with respect to the demotion

and the statutory appeal with respect to the dismissal were irrelevant;

2. whether the Chambers judge otherwise erred in allowing the applications for *certiorari* and prohibition;
3. if the answer to Question 1 is in the affirmative, and to Question 2 is in the negative, whether the alternative remedies available were adequate with respect to either the demotion or the dismissal;
4. whether, in any event, the Chambers judge erred by granting prohibition respecting further disciplinary action arising out of the matters raised in the applications or any of them;
5. whether the Chambers judge erred in his disposition respecting the costs of Chief Kenneth MacLean.

ISSUE 1 - Relevancy of Alternate Remedies:

[29] At the outset, the Chambers judge stated that where an applicant for *certiorari* claims to be aggrieved by a decision made without jurisdiction or in breach of the rules of natural justice, the fact that he has not taken a statutory right of appeal or a grievance procedure under a collective agreement should normally be regarded as irrelevant, and was, in fact, irrelevant in the two applications before him. He, therefore, gave no consideration to the availability of these remedies or their adequacy.

[30] The appellants submit that the Chambers judge made a fundamental error in law in this respect.

[31] While counsel for the respondent, on the argument before us, did not dispute that as a general rule the availability of an adequate alternative remedy must be explored by the court before granting prerogative remedies, that rule did not apply here because both the demotion and the dismissal were imposed by the Board in the absence of any statutory authority to do so. Their decisions were void *ab initio.* Being nullities they could not be the subject of proceedings by way of the grievance procedure under the **Collective Agreement** in the case of the demotion, or by way of statutory appeal in the case of dismissal.

[32] Before the Supreme Court of Canada decision in **Re: Harelkin v. University of Regina**, [1979] 2 S.C.R. 561; 96 D.L.R. (3d) 14, many authorities supported the principle that where a decision-maker had no jurisdiction to make the impugned decision, a party need not exhaust alternative remedies before applying for judicial review. See, for example, **Orchard v. Tunney**, [1957] S.C.R. 436 *per* Locke, J. and authorities mentioned by Dickson, J. (dissenting) in **Re: Harelkin, supra** commencing at p. 607. Included in these authorities is the passage from Professor S.A. de Smith, *Judicial Review of Administration Action*, 3rd ed. (1973) quoted by the Chambers judge in para. 20 ante.

[33] In **Re: Harelkin**, **supra**, the applicant was a student at the University of Regina who was advised that he was required to discontinue his studies. He requested a hearing by a committee of council pursuant to the **University of Regina Act**, 1974, 1973-74 (Sask) which was held, without allowing him to appear at the hearing. The committee affirmed the decision to require Harelkin to withdraw. Harelkin sought judicial review of the decision without availing himself of a right of appeal to a committee of the university's senate. His application for *certiorari* was granted by a judge in Chambers, but an appeal to the Saskatchewan Court of Appeal was allowed. An appeal to the Supreme Court of Canada was dismissed, Beetz, J., giving the reasons for the majority.

[34] It is clear that in **Harelkin**, the committee's decision was one that it had authority under the statute to reach, but that the error made by it consisted of a failure to observe the rules of natural justice.

[35] At pp. 575 - 576 Beetz, J. recognizes a distinction between excess or abuse of jurisdiction by a tribunal and a complete lack of jurisdiction. He said:

> ... In some cases, particularly those involving lack of jurisdiction, Courts have gone as far as to say that *certiorari* should issue *ex debito justitiae*. And, on the more than dubious assumption that cases involving a denial of natural justice could be equated with those involving a lack of jurisdiction, it has also been said that *certiorari* should issue *ex debito justitiae* where there was a denial of natural justice.
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> The use of the expression *ex debito justitiae* in conjunction with the discretionary remedies of *certiorari* and *mandamus* is unfortunate. It is based on a contradiction and imports a great deal of confusion into the law.

> *Ex debito justitiae* literally means "as of right", in opposition to "as of grace" (P.G. Osborne, *A Concise Law Dictionary*, 5th ed.; *Black's Law Dictionary*, 4th ed.). A writ cannot at once be a writ of grace and a writ of right. To say in a case that the writ should issue *ex debito justitiae* simply means that the circumstances militate strongly in favour of the issuance of the writ rather than for refusal. But the expression, albeit Latin, has no magic virtue and cannot change a writ of grace into a writ of right nor destroy the discretion even in cases involving lack of jurisdiction.
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> *A fortiori* does the discretion remain in cases not of lack of jurisdiction, but of excess or abuse of jurisdiction such as those involving a breach of natural justice. The following cases are authority to that effect. I refer to them without expressing any view as to whether in each one I would necessarily have exercised the discretion in the same manner.
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> ...

[36] In dealing with a submission that the committee's decision was a nullity from which there could be no appeal to the senate in any event, Beetz, J. observed (p. 580) that the proposition that failure to comply with natural justice renders a decision absolutely null rather than voidable is an old and much mooted one of a somewhat theoretical nature, but with far-reaching practical consequences. The matter was raised, but left unanswered in **White et al. v. Kuzych**, [1951] A.C. 585 at p. 598.

[37] At p. 581 Beetz, J. preferred the view of Lord Devlin in **Ridge v. Baldwin**, [1964] A.C. 40 at 138-139 that to make a decision *void ab initio* there must be some condition precedent to the conferment of authority on the tribunal which had not been fulfilled. He observed that in the case at hand, the committee of council had statutory authority to hear and decide upon the applicant's application. The failure to hear him was a failure to observe the rules of natural justice. This rendered the decision of the committee voidable at the instance of the aggrieved party and the decision remained appealable until quashed by the court or set aside on appeal. Moreover, Beetz, J. considered even if it could be said that the decision was a nullity, it was still appealable to the senate committee for the simple reason that the senate committee was given power by statute to hear and decide upon appeals from decisions of council whether or not they were null.

[38] Beetz, J. then embarked upon an inquiry whether the appellant's right to appeal to the senate committee constituted an adequate alternative remedy. Having examined the nature of the appeal to the senate in the form of a trial *de novo*, he concluded that the alternative remedy was adequate, and more convenient for the student as well as for the university in terms of costs and expeditiousness. *Certiorari* did not lie. At p. 588 Beetz, J. said:

> In order to evaluate whether appellant's right of appeal to the senate committee constituted an adequate alternative remedy and even a better remedy than a recourse to the courts by way of prerogative writs, several factors should have been taken into consideration among which the procedure on the appeal, the composition of the senate committee, its powers and the manner in which they were probably to be exercised by a body which was not a professional court of appeal and was not bound to act exactly as one nor likely to do so. Other relevant factors include the burden of a previous finding, expeditiousness and costs.

[39] Since Beetz, J. took pains to find that the committee's decision was not a nullity, one might take **Harelkin** as not being authority for the principle that adequate alternative remedies need to be pursued when the impugned decision is a nullity. Some courts took this approach: see **Reiman v. Penkala** (1985), 45 Sask. R. 89 (Q.B.), **Goertz v. College of Physicians and Surgeons (Saskatchewan)** (1989), 76 Sask. R. 64 (C.A.); **Perfection Foods Ltd. v. Prince Edward Island (Labour Relations Board)** (1985), P.E.I.J. No. 50 (Q.L.)(C.A.).

[40] In **Canadian Pacific Ltd. v. Matsqui Indian Band**, [1995] 1 S.C.R. 3, the Supreme Court of Canada settled the question whether there was any doubt that the adequate alternative remedy principle applied to cases of lack of jurisdiction. The Court considered whether a judge of the Federal Court, Trial Division, had properly exercised his jurisdiction when he refused to grant judicial review of a decision of a band council making a tax assessment. The impugned decision involved a determination by the council of the extent of its own jurisdiction, a determination that, if incorrect, would place the entire matter outside of the council's jurisdiction. A majority of the judges agreed with Lamer, C.J.C. respecting the principle laid down by **Harelkin, supra**, although there was disagreement among the judges of the court on other issues.

[41] At paras. 32-33 and 37 Lamer, C.J.C. commented upon the decision in **Harelkin, supra** in the following terms:

> [32] In exercising his discretion, Joyal J. relied on the adequate alternative remedy principle. He found that the statutory appeal procedures were an adequate forum in which the respondents could pursue their jurisdictional challenge and obtain a remedy, and he therefore decided not to undertake judicial review.
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> [33] The adequate alternative remedy principle was fully discussed in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 586, where Beetz J., for the majority, held at p. 576 that "even in cases involving lack of jurisdiction", the prerogative writs maintain their discretionary nature. Dickson J. (as he then was, dissenting), took a narrower view of discretion in the case of jurisdictional error (pp. 608-9). He nevertheless concluded, at p. 610, that where a jurisdictional error "derives from a misinterpretation of a statute, a statutory right of appeal may well be adequate".
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> ...
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> [37] On the basis of the above, I conclude that a variety of factors should be considered by courts in determining whether they should enter into judicial review, or alternatively should require an applicant to proceed through a statutory appeal procedure. These factors include: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). I do not believe that the category of factors should be closed, as it is for courts in particular circumstances to isolate and balance the factors which are relevant.

[42] In **Delmas v. Vancouver Stock Exchange** (1995), 130 D.L.R. (4th) 461; B.C.J. No. 2449 (Q.L.), the British Columbia Court of Appeal dismissed an appeal from a judge of the Supreme Court dismissing an application for judicial review of a decision of a hearing panel of the Vancouver Stock Exchange. The appellant was a registered representative within the meaning of the rules of the Exchange. In December 1993 the Exchange issued a citation against him for alleged infractions of a by-law. A hearing panel was appointed and the appellant argued that the Exchange lacked jurisdiction to conduct the hearing. The panel dismissed the appellant's objections and set a date for the continuation of the hearing. The Supreme Court judge found that matters within the jurisdiction of the exchange were to be dealt with by that body and then could be appealed to the Securities Commission. In dismissing the appeal, the British Columbia Court of Appeal *per* Prowse, J.A., speaking for the Court, said of **Matsqui, supra**, at paras. 28 - 29:

> [28] What is significant about the majority decision in *Matsqui*, however, is that even though the majority treated the issues before it as "jurisdictional", in the sense just described, they concluded that there was, none the less, a discretion in the reviewing court as to whether judicial review would lie. In other words, the classification of an issue as jurisdictional or non-jurisdictional was not determinative of the question of whether judicial review would lie.
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> [29] The conclusion of the majority in *Matsqui* that there is a discretion to refuse judicial review, even in cases of jurisdictional error, is consistent with that of Beetz J., speaking for the majority in *Harelkin*.

[43] At para. 36, Prowse, J.A. said:

> [36] In summary, it is clear from the majority decisions in both *Harelkin* and *Matsqui* that the classification of an issue as jurisdictional or non-jurisdictional is but one factor to consider in determining whether a trial judge has erred in the exercise of his or her discretion in deciding whether to grant judicial review. The *Matsqui* decision affirms the discretionary nature of the decision whether to grant judicial review, and focuses the analysis on the question of whether the statutory appeal provisions constitute an adequate alternative remedy to judicial review. ...
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> (Emphasis added)

[44] In **Turnbull v. Canadian Institute of Actuaries**, [1995] 129 D.L.R. (4th) 42 (Man. C.A.), Scott, C.J. speaking for the Court said regarding **Masqui, supra** at p. 49:

> ... In a nutshell it can be said that a clear majority of the court, consisting of at least six judges, adopted the reasons of Lamer C.J.C. with respect to the principle that an adequate alternative remedy can exist even if the issue before the alternative administrative tribunal is one going to jurisdiction.

[45] In **Walker v. Board of Registration of Embalmers and Funeral Directors (N.S.)** (1995), 143 N.S.R. (2d) 49; N.S.J. No. 303 (Q.L.)(C.A.), this Court reversed the granting of *certiorari* by a Chambers judge quashing a decision of the appellant Board suspending a funeral director from practice. The Chambers judge held that

the applicant had been denied natural justice in two respects; first, that the Board failed to strictly follow the relevant legislation and regulations with respect to notice to board members, and second, that the Board failed to give the applicant an opportunity to be heard on the question of penalty. The legislation governing funeral directors provided for an appeal from the Board's decision, but the applicant did not avail himself of this procedure before seeking judicial review.

[46] Flinn, J.A., speaking for this Court in reversing the Chambers judge, first addressed the issue whether the Board's decision was a nullity such that it could not be appealed pursuant to the provisions under the **Act**. Flinn, J.A. referred to the discussion of this issue by Beetz, J. in **Harelkin, supra** and concluded at para. 31:

> [31] Firstly, in my opinion, the decision of the Board dated December 20th, 1993, was not a nullity in the legal sense. The decision was made by a body (the Board) with the statutory authority to make such decisions. If in the course of making such a decision the Board erred in failing to observe the rules of natural justice (as the Chambers judge determined) those errors would make the decision of the Board voidable at the instance of Mr. Walker. The Board's decision is not a nullity and "remains appealable" (see **Harelkin**) pursuant to the provisions of s. 23(2) of the **Act**.
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> (Emphasis added)

[47] Flinn, J.A. then examined the right of appeal to the Supreme Court available within three months of the date of suspension. The appeal was not limited to questions of law or jurisdiction. In the opinion of Flinn, J.A. the appeal provided the applicant with an adequate alternative remedy, and since the applicant had chosen not to take advantage of it, he could not expect the courts to now intervene with the discretionary remedy of *certiorari*. There were no special circumstances which might provide an exception to the general rule respecting an adequate alternative remedy.

[48] In **Brown and Evans**, *Judicial Review of Administrative Action in Canada*, Vol. 1 (Looseleaf Updates, Canvasback: Toronto, 1998), the authors summed up the effect of **Matsqui, supra** at pp. 3-31 to 3-32:

> In some cases, an allegation that an administrative decision was not within the jurisdiction of a decision-maker has led the court to grant relief in judicial review proceedings, even though the applicant had not exhausted its statutory

> administrative remedies. Indeed, some courts have reached a similar conclusion where the question was simply one "of law". And while many of these cases pre-date the Supreme Court of Canada's decision in *Harelkin*, in others *Harelkin* has been distinguished on the ground that it does not apply where there is a complete lack of jurisdiction, as opposed to a breach of the duty of fairness. As a result of *Matsqui*, however, it is now clear that the courts' discretion to refuse relief where there is an adequate alternative remedy extends in principle to the cases where the applicant challenges the decision-makers' jurisdiction on either procedural or substantive grounds.

[49] On the basis of this law, I am satisfied that the general rule is that because judicial review is discretionary, prerogative remedies should not ordinarily issue when the applicant has an adequate alternative remedy such as a statutory appeal or a grievance procedure under a collective agreement. As a result of **Matsqui, supra** it is abundantly clear that the adequate alternative remedy principle extends to cases where the applicant has challenged the decision-maker's jurisdiction on either procedural or substantive grounds. In all applications for judicial review in which prerogative remedies are sought, the court must make an inquiry whether the applicant has exhausted all adequate alternative remedies. An application for judicial review of a decision alleged to have been made without jurisdiction *ab initio* is no more or less subject to the alternative remedy principle than a review of a decision allegedly reached by an abuse or excess of jurisdiction. A distinction between a decision that is a nullity and one which is merely voidable may have relevance when it comes to deciding if the alternative remedy is adequate, as we shall see later.

[50] I am therefore satisfied that the Chambers judge erred in his general conclusion as to the lack of relevancy of any available alternate remedies. He was bound to inquire whether there were remedies available to the respondent that were adequate alternatives to the prerogative remedies of *certiorari* and prohibition before granting them. It is now necessary for this Court - if we find the Chambers judge otherwise did not err in granting these remedies - to undertake this inquiry. It will be necessary to consider, in so doing, the respondent's submission that an absence of jurisdiction is a factor in assessing whether the available remedies are, in fact, adequate.

ISSUE 2: Whether the Chambers judge otherwise erred in allowing the applications for *Certiorari* and Prohibition:

[51] I will deal with *certiorari* only at this stage, as the question of prohibition is raised separately and can be addressed more conveniently later. For reasons that will become apparent, it is necessary to determine, not only if the Board made an error subject to judicial review, but whether such error was merely an excess or an abuse of jurisdiction, or whether it was acting in the absence of jurisdiction to do so.

(a) The demotion:

[52] The appellants submit that the Chambers judge erred in quashing the Board's decision respecting the demotion. They submit that the Chambers judge wrongly approached this decision as one which was disciplinary, and in so doing wrongly held that the Board did not have jurisdiction to make a decision. Moreover, it is submitted the Chambers judge erred in finding that the respondent was not promoted on a trial basis, as this finding was contrary to the evidence before him.

[53] The position of the appellants is that the respondent's appointment as corporal was probationary, as he had been so informed by Chief Heighton at the time of his appointment. The Board was simply exercising its power under Articles 27.06 and 27.07 of the **Collective Agreement** to return him to his former rank. The incident giving rise to the disciplinary proceeding was but an indication that he was not satisfactory in the probationary period. Chief Heighton's affidavit, as well as that of the Board's chairman, refers to the minutes of the Board meeting of September 7th, 2000, before the October 12th incident, which showed that Chief Heighton then advised that the respondent's appointment was probationary for six months, to be reviewed in January, 2001. Minutes of the meeting of the Board on December 4th, 2000, show that Chief Heighton advised that the respondent had been placed in the position as corporal on a six months probationary period in June, and an assessment of his performance was required prior to the six months period expiring. The minutes show that he gave a report regarding the probationary period and referred not only to the October 12th incident but to other, albeit minor, incidents involving the respondent. Chief Heighton referred to the

Collective Agreement sections regarding promotions. He recommended that the corporal's stripes be removed.

[54] The appellants point out that the letter of December 5th from the Board makes it clear that the respondent was "returned" to the former rank, an expression derived from Article 27.07 of the **Collective Agreement**. The appellants submit that the Board had every right to act pursuant to that Article as a management right quite independently of discipline proceedings which arose out of the same events.

[55] The respondent submitted that in the case of the demotion, the Board's error was more than simply the commission of a jurisdictional error by way of breach of the rules of natural justice or otherwise, but was a case of the Board embarking upon an inquiry and making an adjudication which it was simply not authorized to do. Unlike the council members in **Harelkin, supra**, there was no power given by the Collective Agreement or statute to the Board to enter upon the inquiry or to perform the function of disciplining a police officer. The respondent says that the demotion was a reduction in rank which can only be accomplished in a disciplinary exercise carried out by the chief officer in accordance with the provisions of the **Police Act** and Regulations.

[56] The respondent emphasizes that under the **Collective Agreement**, demotion can result only when the Board places an applicant to a position for a trial period and the applicant proves unsatisfactory. Articles 27.06 and 27.07 provide:

> 27.06 The Board shall have the right to place the successful applicant to the position on a trial period not exceeding six (6) months. Conditional on satisfactory service, such trial promotion shall become permanent after the period of six (6) months.
>
> 27.07 In the event the successful applicant proves unsatisfactory in the position during the aforementioned trial period, or if the employee finds himself unable to perform the duties of the new position, he shall be returned to his former position without loss of seniority.

[57] The respondent says that on an examination of the record it is clear that the Board demoted the respondent as a disciplinary measure, largely if not entirely, on the basis of the October 12th incident. He refers to the letter of December 5th from the Board to the respondent reading, in part:

> The Board of Police Commissioners have been advised by Chief of Police, of the Notice of Allegation and the Form 8 that had been served on you, and of the information as to why this Notice of Allegation and Form had been served on you.
>
> The Stellarton Board of Police Commissioners had discussed this matter, and have agreed that your actions have proven to be unsatisfactory in the probationary position as Corporal, and that effective the 4th of December, 2000, you will be returned to your former rank as Constable with the Stellarton Police Services. ....

[58] The respondent refers to notes taken by him at the time he was advised of the demotion in which he states that Chief Heighton and Sergeant McGrath delivered the letter advising of the demotion. Chief Heighton stated that it was a police commission decision at the local level and not his decision. The respondent asked the reason he received the letter - whether it was because of the Form 8 or because of his work. The notes state that Chief Heighton replied "oh because of the incident, your work is excellent. Sergeant McGrath added "There was never any problem with your work."

[59] Finally, the respondent refers to a statement given by the Chair of the Board to a police investigator confirming that the Board was responsible for the demotion, reciting the fact that during the probationary period of the respondent in the rank of corporal, Chief Heighton made him aware of an incident. As a consequence a meeting of the Board was held in camera at which the Chief attended and informed the Board of the details of the incident. The statement continued:

> A motion was made to demote Corporal Kingsbury back to Constable based on the incident as described by Chief Heighton. The motion was carried and he was demoted.

[60] The respondent refers to the following sections of the **Police Act**:

> **34** No member of a municipal police force is subject to reduction in rank, to dismissal or to any other penalty for breach of the code of discipline except after proceedings have been taken in accordance with this Act and the regulations.
>
> **14 (3)** Members, special constables, by-law enforcement officers and civilian employees of a municipal police force, other than the chief officer, shall be appointed, promoted, suspended, dismissed or reinstated by the board on the

> recommendation of the chief officer, or by the chief officer in accordance with a by-law made by the municipality for that purpose.
>
> . . .
>
> **14(7)** Except when inconsistent with the provisions of this Act, the actual day to day direction of the police force with respect to the enforcement of law and the maintenance of discipline within the force shall rest with the chief officer or person acting for him.
>
> ...
>
> **20 (2)** Notwithstanding the right of a municipality to direct its own police operations, the function of any board shall primarily relate to the administrative direction, organization and policy required to maintain an efficient and adequate police force but shall not exercise jurisdiction relating to complaints, discipline or personnel conduct except in respect of the chief officer of the municipal police force.

[61] The respondent submits that these provisions make it clear that the Board cannot be involved in matters of discipline except as provided in s. 14(3), on the recommendation of the chief officer, or as otherwise provided in the **Police Act** and Regulations. Specifically the disciplinary power to <u>demote</u> falls to the chief officer under s. 14(7) and Regulation 5(3). We were also referred to Article 2.01 and 2.02 of the **Collective Agreement**:

> 2.01 The Union recognizes and acknowledges that it is the exclusive function of the Town, subject to the terms and conditions of this Agreement to: hire, discharge, direct, classify, transfer, promote, demote, and suspend, or discipline employees, provided that a claim that an employee has been discharged for non-disciplinary reasons without reasonable cause may be the subject of a grievance and dealt with in accordance with the grievance procedure herein set forth.
>
> 2.02 All disciplinary matters shall be dealt with by the Town in strict accordance with the procedural and substantive requirements for discipline matters in the *Police Act*, RSNS 1989, Chapter 348, and Regulations thereunder and the final disposition of disciplinary matters under these procedures shall be final and binding on the parties and not arbitrable under this Agreement.

[62] The respondent refers to the decision of the Supreme Court of Canada in **Proctor v. Sarnia (City) Police Commissioners**, [1980] 2 S.C.R. 727. In that case the appellant was engaged by the respondent as a probationary constable and under Article 9 of the relevant Collective Agreement was subject to dismissal "without notice and without reference to the Police Code of Discipline and without a trial or hearing before the Board at any time during the ... period. ..." (p. 729) The appellant had testified at a hearing respecting another constable with whom the appellant was drinking in a tavern. He was dismissed by the Chief of Police. The reason given was "unsatisfactory probation - not what we expected." (p. 730) The Chief of Police had not attended the hearing where the appellant testified. He had been advised that the appellant should be dismissed because he had lied under oath. Both under the relevant **Collective Agreement** and the **Police Act**, the power to dismiss rested with the Board. The Board was later advised of the dismissal, and despite the fact that no decision had been made at a hearing, confirmed the dismissal without passing a resolution, taking minutes, calling the respondent before it or notifying him that he stood dismissed.

[63] An appeal to the Supreme Court of Canada was allowed on the basis that the power to effect the dismissal was vested exclusively in the Board and could not be delegated. Laskin, C.J.C., delivering the judgment of the Court, noted that the opportunity allegedly given to the respondent to respond was no opportunity when it was to a person without power to dismiss, i.e., the Chief. The respondent Board did not even advise the appellant that his case was being considered by it. It did not fulfill its statutory function. There was no effective discharge in law. The power of dismissal was vested exclusively in the Board, and a constable was not to be so lightly deprived of his status as was done here, and by an unauthorized act. Laskin, C.J.C. continued at p. 733:

> ... Madam Justice Wilson is on unassailable ground in her position that the Board could not fulfil its statutory function in respect of a dismissal when it did not even let Proctor know that his case was going to be considered. There was, in short, no effective discharge under the law.

[64] The respondent also refers to **Kearney v. Ottawa (City) Commissioners of Police** (1988), 63 O.R. (2d) 652 (Div. Ct.) and **Regina Police Assoc. Inc. v. Regina (City) Board of Police Commissioners**, [2000] 1 S.C.R. 360 as authority for the proposition that a dismissal of a police officer must be carried out by the body authorized to do so, and that there is no discretion to select another legal

mechanism such as arbitration to proceed against a police officer in respect of a disciplinary matter.

[65] The respondent's position is that the essential character of this dispute was discipline. The Board proceeded to discipline the respondent under the **Police Act** following receipt of the recommendation of Associate Chief Wilson. Here it wishes to discipline him again under the **Collective Agreement**.

[66] It is very clear that both under the **Police Act** and the **Collective Agreement** the Board's authority under the latter is confined to management issues of a non-disciplinary nature. In matters of discipline, the provisions of the **Police Act** and Regulations govern.

[67] Was the Board acting under the **Collective Agreement** or purporting to exercise a disciplinary role? Irrespective of the language used we must look to the essential character of the dispute. In **Regina Police Assoc. Inc.**, **supra**, a police officer resigned rather than face a disciplinary action. He later withdrew his resignation but the chief of police refused to accept the withdrawal. The officer's union filed a grievance under the collective agreement and eventually requested arbitration. The arbitrator held that she did not have jurisdiction to decide the dispute since matters of police discipline and dismissal were governed by the Saskatchewan **Police Act** and Regulations, and were matters within the jurisdiction of the adjudicative bodies set up thereunder. The Court of Queen's Bench dismissed the union's application to quash the decision but this was overruled by a majority of the Court of Appeal.

[68] The Supreme Court of Canada allowed an appeal from the decision of the Saskatchewan Court of Appeal. The Court said that when deciding which of two competing regimes should govern a dispute two things must be addressed; (a) the essential character of the dispute must be determined, and (b) the **Collective Agreement** must be examined to determine whether the dispute falls within the ambit of its terms. Bastarache, J. said at paras. 29 and 30:

> 29 ... To determine the essential character of the dispute, we must examine the factual context in which it arose, not its legal characterization. I agree with Vancise J.A. that, in light of the agreed statement of facts, this dispute clearly centres on discipline. The dispute began when Sgt. Shotton was advised that he would be charged with discreditable conduct pursuant to the Regulations. He was

> also told that the Chief of Police intended to initiate disciplinary proceedings with a view to dismissal. Some time later, Sgt. Shotton was informed by the Chief of Police that discipline orders would be signed if notices of formal discipline proceedings were successful. It was in this factual context that Sgt. Shotton was given the option of resigning rather than being disciplined. I agree with Vancise J.A. that the informal resolution of this disciplinary matter did not change its essential character.
>
> 30 I turn now to the collective agreement to determine whether the dispute falls within the ambit of its provisions. In determining whether the dispute falls within the ambit of the collective agreement, we must bear in mind that the legislature intended that the members of the Regina Police Force be governed by two separate schemes, the collective agreement and *The Police Act* and Regulations. In determining whether the dispute is arbitrable, we cannot interpret the collective agreement in a manner that would offend the legislative scheme set out in *The Police Act* and Regulations. The provisions of the collective agreement, therefore, must be interpreted in light of the scheme set out in *The Police Act* and Regulations. ...

[69] The factual context here was that on October 12, 2000, the respondent left his duties for over an hour. Chief Heighton followed him and as a result, on November 23rd laid a complaint in Form 8. On December 4th the Board purported to review the trial appointment. The Chambers judge characterized this exercise as a disciplinary one. The appellants say that it really has two characteristics - disciplinary, which Chief Heighton, in fact, pursued separately by the appointment of Inspector Sykes as investigator - and managerial, in the review by the Board of the trial appointment at the end of the six month period.

[70] This apparent dilemma presents a difficult situation - perhaps more difficult than that which confronted the Supreme Court of Canada in **Regina Police Assoc. Inc., supra.**

[71] This dispute, principally centered on the October 12th incident, had two aspects; disciplinary which was pursued separately, and managerial, if the respondent was promoted for a trial period because in such a case, independent of discipline, the Board was entitled to evaluate his performance. In so doing it would ordinarily rely on Chief Heighton's opinion respecting the respondent's performance.

[72] Looking at the ambit of the **Collective Agreement**, disciplinary matters are clearly excluded: Article 2.02. They are dealt with in the sections of the **Police Act** to which I have referred. Viewed as the appellants view it, the dispute is not disciplinary and can be said to fall within the ambit of the provisions of the **Collective Agreement**.

[73] In my opinion, the resolution of this issue turns on the correctness of the finding by the Chambers judge that the promotion was not on a trial or probationary basis. The Chambers judge accepted the respondent's evidence - both by affidavit and *viva voce* - that the promotion was not on trial. He referred to the fact that none of the documentary evidence at the time of the appointment revealed any qualification put upon the promotion.

[74] Of particular significance is the fact that while under the **Collective Agreement** the promotion committee (of which Chief Heighton was a member) makes the appointment (Article 27.04), it is the Board that has the right to place the applicant to the position on a trial period. There is no evidence anywhere in the minutes of the Board meetings or elsewhere showing that the Board so qualified the promotion. The Board appears to have accepted Chief Heighton's advice given in September and December, 2000, after the fact, that the promotion was probationary. In reality the Board should have known that it, in fact, did not make such a determination.

[75] I am satisfied that the Chambers judge's essential finding of fact that the promotion was not on a trial basis was correct. It was based on a finding of credibility coupled with all of the documentary evidence.

[76] It follows from this that the Board had no power to demote under Article 27.07 of the **Collective Agreement**.

[77] The Board had no power to demote under the **Police Act**, because the power to do that rests only with the chief officer under Regulation 5(3) thereto.

[78] I conclude that the Chambers judge was correct when he found that the decision to demote was made without jurisdiction. The demotion truly was, as the Chambers judge said, "void from the beginning". The Chambers judge did not err in concluding that it was quashable on *certiorari*.

(b) the dismissal:

[79] I will review the requirements and procedures in the **Police Act** and Regulations for internal disciplinary proceedings against a police officer as they relate to this case.

[80] I have referred to s. 34 of the **Police Act** which I will repeat for convenience of reference:

> **34** No member of a municipal police force is subject to reduction in rank, to dismissal or to any other penalty for breach of the code of discipline except after proceedings have been taken in accordance with this Act and the regulations.

[81] Regulation 4(3) of the Regulations to the **Police Act** provides:

> **4(3)** No member of a police force is subject to any penalty for the commission of a disciplinary default including reduction in rank or dismissal, until after proceedings have been taken pursuant to the Act and these regulations, except that
>
> ...
>
> (Here follow exceptions not material to this inquiry)

[82] Regulations 19 - 21 deal with internal discipline. The disciplinary authority is the chief officer of a police force or an officer not below the rank of inspector delegated by the chief officer. A member of a police force may allege a disciplinary default against another member by filing a written allegation with the chief officer. Proceedings are commenced when a notice of allegation in Form 8 is served on that member. No proceedings may be commenced more than six months after the occurrence of the alleged disciplinary default.

[83] The chief officer then appoints an investigating officer who shall complete the investigation expeditiously, in any case within 60 days of the date the written allegation is filed, except where the chair of the Police Review Board extends the time. After completing the investigation, the investigator reports forthwith to the chief officer whether, in the investigator's opinion, the member has committed a disciplinary default, and may recommend a penalty. Within 14 days of receiving

the report, the chief officer shall decide whether the evidence discloses a disciplinary default.

[84] Regulation 21(8) is important. It provides:

> **21(8)** Where the chief officer decides that the evidence gathered in the investigation discloses that a disciplinary default may have been committed, the chief officer shall forthwith send a notice of meeting in From 10 of the Schedule and meet privately with the member who may be represented by counsel, a union representative or a member of the police force and who shall be given an opportunity to
>
> (a) hear the results of the investigation; and
>
> (b) admit or deny the allegation.

[85] Where it is decided that a disciplinary deficiency has been committed, the chief officer may impose a penalty. The penalty options are set out in Regulation 5(3). They include a recommendation to the board of police commissioners that the member be dismissed, and a reduction in rank which is imposed by the chief officer. The chief officer shall then forward a written copy of the decision and reasons therefor in Form 12 to the member involved, the member who made the allegation, and to the Nova Scotia Police Commission.

[86] To summarize, the steps to be taken respecting internal disciplinary proceedings as they relate to this case are:

Step 1	Written allegation against a police officer filed with the chief officer (Reg. 20(1));
Step 2	Notice of allegation in Form 8 given to the member (Reg. 20(4));
Step 3	The appointment of an investigating officer (Reg. 21(1)(2););
Step 4	An investigation of the allegation (Reg. 21(3));
Step 5	Report to the chief officer with recommendation (Reg. 21(4));

Step 6	A decision by the chief officer whether the evidence discloses that a disciplinary default may have occurred (Reg. 21(6));
Step 7	Notice of meeting to be given forthwith, followed by a meeting with the chief officer with right to counsel, union representative or a member of the force present, and opportunity to hear the results of the investigation and to admit or deny allegations (Reg. 21(8));
Step 8	Decision that there was a disciplinary default and imposition of penalty (Reg. 21(9), Reg. 5(3));
Step 9	Forwarding written copy of decision and reasons as provided in Regulation 21(10).

[87] The respondent refers to Regulation 21(8) of the Regulations and to the finding of the Chambers judge that no such meeting, as required by Regulation 21(8), occurred, that Chief Heighton neglected to give the respondent this opportunity either forthwith or at all to meet, and be given an opportunity to be heard. Step 7 was simply omitted. As the Chambers judge said, this provision is mandatory and not merely a technical matter. It is a procedural requirement which must be met, an integral step to be taken prior to a recommendation of dismissal made to the Board. The respondent says that the result of omitting the mandatory step was to deprive the Board of any jurisdiction to enter upon the matter, as the Chambers judge found. This means, the respondent says, that the Board simply had no jurisdiction under the **Police Act** to act at all.

[88] The respondent has drawn our attention to the following cases dealing with disciplinary proceedings under the **Police Act** or its predecessors or similar legislation in other provinces: **Ans v. Paul** (1980), 41 N.S.R. (2d) 256 (S.C.); **Bergenham and Gilbertson** (1962), 133 C.C.C. 265 (B.C.S.C.); **Gage v. Ontario (Attorney-General)** (1992), 90 D.L.R. (4th) 537 (Div. Ct.); **Griffin v. Summerside (City) Director of Police Services** (1998), 159 D.L.R. (4th) 698 (P.E.I. S.C.); **Perrott v. Storm, et al.** (1984), 14 D.L.R. (4th) 251 (N.S.S.C.); affirmed (1985), 18 D.L.R. (4th) 473 (N.S.S.C. A.D.); **Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners**, **supra**; **Storm v. Halifax (City)**

Board of Police Commissioners (1987), 78 N.S.R. (2d) 365; N.S.J. No. 158 (Q.L.)(C.A.); and **Woolridge v. Halifax (Regional Municipality) Police Service** (1999), 178 N.S.R. (2d) 367; N.S.J. No. 268 (S.C.).

[89] It is only necessary to refer to a few of these cases.

[90] In **Ans v. Paul, supra**, an order in the nature of prohibition was made to prohibit a police inspector from presiding at the hearing of an alleged disciplinary default pursuant to the **Police Act**, S.N.S. 1974, c. 9 and Regulations. Among the requirements in the Regulations was that contained in Regulation 13(2) providing that the chief officer or his delegate shall serve notice in Form 3 upon the accused member not less than 14 days before the hearing. Only 11 days notice of the hearing was given to the member. Morrison, J. said at paras. 31 - 33:

> **[31]** Finally, I am satisfied that regulation 13(2) laid down a procedural rule that Form 3 must be served upon the accused member not less than fourteen days before the first date of hearing. In my opinion, this procedural rule must be considered as being mandatory (subject to the effect of waiver under regulation 41) and not directory only.
>
> **[32]** Regulation 13(2) is a regulation authorized by statute and sets down a specific time limit in which notice must be given. The powers conferred by these regulations are conferred upon the administration of the Halifax Police Department and they affect, because they are disciplinary in nature, the fundamental rights of the police officer affected. In such circumstances all material requirements as to notice must be closely observed.
>
> **[33]** S.A. DeSmith in his *Judicial Review of Administrative Action* (3rd Edition), says as follows at page 199:
>
> > If procedural rules have been laid down (e.g., for the hearing of disciplinary charges against police officers), those rules will be treated as mandatory except in so far as they are of minor importance; and upon them there will be engrafted the implied requirements of natural justice.

[91] Morrison, J. concluded at para. 37 that as the mandatory 14 days notice had not been given or waived, there was a lack of jurisdiction and that an order in the nature of prohibition should issue.

[92] In **Gage v. Ontario (Attorney General), supra,** the Ontario Divisional Court said, with respect to the legislation in Ontario similar to that in Nova Scotia, at pp. 540 - 541:

> The Act treats time seriously. It discriminates carefully between various time lines depending on their significance in the overall scheme of the Act. For less important matters, it prescribes no time-limits, and in proportion to the time sensitivity of each particular provision, the time standards become more and more demanding until they reach the most time-sensitive actions which attract the "forthwith" standard.
>
> ...
>
> The legislature applied, to the most time-sensitive steps in the statute, the "forthwith" standard. In a statute so entirely dependent on timing, which distinguishes so carefully among a wide range of time standards, the selection of the most rigorous standard must be taken as an express legislative requirement that it be followed and not ignored.

[93] In **Perrott v. Storm, supra**, as a result of an incident, the chief of police appointed a review board pursuant to the Regulations under the **Police Act**, 1974, c. 9 to investigate and make recommendations whether disciplinary action should be taken against members of the police force. Regulation 32 prescribed a three month limitation period after discovery by the chief officer that an alleged disciplinary default occurred for bringing proceedings. Proceedings were not brought until at least three days after the three month period had expired. Rogers, J. granted an order for prohibition to bar further disciplinary proceedings. At p. 254 he said:

> In my opinion, the limitation period for bringing a disciplinary proceeding in s. 32 of the regulations is mandatory. I apply the same reasoning to s. 32, as Mr. Justice Morrison did to s. 13(2) of the regulations in the case of *Anns v. Paul* ...

[94] An appeal to this Court was dismissed.. MacKeigan, C.J.N.S. said at 18 D.L.R. (4th) 476:

> I agree with Mr. Justice Rogers in his interpretation of s. 32, and his application of it to the facts of this case. I also agree with him in holding that s. 32 is

> mandatory and in applying to s. 32 the reasoning applied by Mr. Justice Morrison to s. 13 of the regulations in *Anns v. Paul* ...

[95] In **Woolridge v. Halifax, supra**, a disciplinary proceeding was commenced against a police officer outside the 60 day limit from the date the written allegation was filed as provided for in Regulation 21(3) of the **Police Act**. Goodfellow, J. interpreted this provision as mandatory requiring that the internal investigation be completed as expeditiously as possible and in any event not later than 60 days unless an extension was granted. Goodfellow, J. said at p. 374:

> **[20]** Turning to 21(3), first of all, the terminology used in there is "shall" which is mandatory but does not always have to be interpreted as being mandatory. In reading that section, I am taking into account the purpose and intent of the **Act** itself. But, when you read that section, it seems to me unequivocally it is intended to be mandatory and the time frame is of significance because it not only says it is mandatory "shall" but it sets a time limit. ...

[96] In my opinion, these cases support the proposition that whenever in the **Police Act** or Regulations the word "shall" is used in connection with a material step in the procedure such step is mandatory, not directory. The omission of such step has the effect of depriving the board or the chief officer, as the case may be, of jurisdiction in the matter. I do not accept the submission of the appellants that the omission of this step was corrected by the fact that the Board subsequently gave the respondent an opportunity to be heard by it before dismissing him. The Board's only mandate was, upon receipt of Chief Heighton's recommendation for a dismissal, to act upon it or to decline to do so. See s. 14(3) of the **Police Act** and Regulations 21(9) and 5(5). An alternative procedure is not sanctioned in the **Police Act**. Police officers are not employees, but the holders of public office carrying out the duties set out in the **Police Act** and administered by the board of police commissioners. These provisions are disciplinary in nature affecting the fundamental rights of the police officer respecting his or her professional career. All material requirements must be complied with. The case law demonstrates that there is a clear statutory intent that a police officer is not to be disciplined except pursuant to the procedures set out in the **Police Act** and the Regulations.

[97] I agree with the Chambers judge that the omission of the step in the disciplinary proceedings required by Regulation 21(8) had the effect of depriving the Board of jurisdiction to dismiss the respondent. I do not accept his characterization of the whole process as void from the beginning, but I accept that

the proceedings after Chief Heighton received the investigation report from Staff Sergeant Chambers are void from then on. The Board lacked the statutory authority to enter into the inquiry. The proceedings were a nullity "in the legal sense" to use the words of Flinn, J.A. in **Walker, supra**.

[98] In view of my conclusion, for the reasons given, that the Board lacked jurisdiction to dismiss the respondent it is not necessary to address other grounds on which the Board may have lost or lacked jurisdiction.

[99] I am satisfied that with respect to the dismissal the Chambers judge did not err in concluding that the decision was quashable on *certiorari.*

ISSUE 3 - Whether the Alternative Remedies were Adequate:

[100] In **Harelkin, supra**, Beetz, J. said at p. 588 which I shall repeat for convenience of reference:

> In order to evaluate whether appellant's right of appeal to the senate committee constituted an adequate alternative remedy and even a better remedy than a recourse to the courts by way of prerogative writs, several factors should have been taken into consideration among which the procedure on the appeal, the composition of the senate committee, its powers and the manner in which they were probably to be exercised by a body which was not a professional court of appeal and was not bound to act exactly as one or likely to do so. Other relevant factors include the burden of a previous finding, expeditiousness and costs.
>
> (Emphasis added)

[101] In **Matsqui, supra**, Lamer, C.J.C. addressed the adequate alternative remedy principle in paras. 33 - 37 concluding at para. 37 which I shall repeat for convenience of reference:

> [37] On the basis of the above, I conclude that a variety of factors should be considered by courts in determining whether they should enter into judicial review, or alternatively should require an applicant to proceed through a statutory appeal procedure. These factors include: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). I do not believe that the category of factors should be closed, as it is for courts in particular circumstances to isolate and balance the factors which are relevant.

(Emphasis added)

[102] I conclude from the case law that the burden of persuasion is on the party who seeks the prerogative remedies - discretionary remedies of last resort - to satisfy the court that there is no adequate alternative remedy.

[103] I will address the issue of the adequate alternative remedies by reference to the demotion and the dismissal.

(a) Demotion:

[104] In assessing the alternative remedies available to him, the respondent and his advisors would have to consider the difficult question whether the demotion was a disciplinary matter which should be pursued by way of the appeal provisions in the **Police Act** or whether it was a violation of the provisions of the **Collective Agreement** to be pursued pursuant to the grievance procedure set out therein. While it is true that Chief Heighton had made an allegation in Form 8 served upon the respondent — the commencement of a disciplinary proceeding — and while it is true that this was referred to in the letter from the Board demoting the respondent, the Board also stated that his promotion was on a probationary basis and that - influenced by the complaint - his performance was unsatisfactory.

[105] In these circumstances, if obliged to first exhaust alternative remedies, the respondent and his legal advisors would be faced with a dilemma. Should they go to arbitration or should they appeal to the Police Review Board? The very fact that there is this uncertainty is in this case a factor militating against requiring the respondent to resort to remedies other than judicial review.

[106] The respondent did succeed in getting the union to file a grievance, but apparently thought better of pursuing it. Where would it have gotten him? The arbitrator, faced with the decision in **Regina Police Assoc., supra**, might decline jurisdiction on the ground that the central character of the dispute was disciplinary and fell under the **Police Act**. The arbitrator might, on the same authority, judge that the ambit of the **Collective Agreement** did not embrace this dispute, citing Article 2.02 thereof. The record somewhat, but not conclusively, supports the view that this was not a management issue but a disciplinary one.

[107] An appeal to the Police Review Board could be rejected on the ground that the Board's decision was not within the contemplation of the **Police Act** and the Regulations and that there was nothing from which to appeal. Even if the Police Review Board did enter into an inquiry, for the reasons I will discuss in connection with the dismissal, I do not consider this avenue is an adequate alternative remedy. Moreover, should the pursuit of these alternate remedies prove fruitless, by the time that became known, the six month limitation period for seeking *certiorari* prescribed by **Civil Procedure Rule** 56.06 would have expired. This prospect makes the alternative remedy option very much less attractive than seeking *certiorari* in the first place.

[108] I am satisfied that what the respondent had to seek was an adjudication whether the Board had any statutory authority to demote him. The only remedy that comes to mind is prerogative relief by way of judicial review.

(b) the Dismissal:

[109] Section 35 of the **Police Act** provides that after a disciplinary decision has been made in accordance with the **Act** and the Regulations, a police officer who is the subject of the decision may initiate a review by filing a notice with the Registrar of the Police Review Board within the time determined by the Regulations. The provisions in the **Police Act** dealing with the constitution and powers of the Review Board include:

> **28 (1)** There shall be a Police Review Board composed of three members appointed by the Governor in Council.
>
> ...
>
> (5) All members of the Review Board shall be appointed for such term as the Governor in Council determines and may be re-appointed.
>
> ...
>
> **29** The Review Board may conduct hearings into
>
> ...

(b) matters of internal discipline referred to it in accordance with the regulations; and

...

32 A hearing by the Review Board shall be a hearing *de novo* and the parties to the proceeding may

(a) appear and be heard and be represented by counsel; and

(b) call witnesses and examine or cross-examine all witnesses.

33 (1) At a hearing under this Act, the Review Board may

(a) make findings of fact;

(b) dismiss the matter;

(c) find that the matter under review has validity and recommend to the body responsible for the member of the municipal police force what should be done in the circumstances;

(d) vary any penalty imposed including, notwithstanding any contract or collective agreement to the contrary, the dismissal of the member of the municipal police force or the suspension of the member with or without pay;

(e) affirm the penalty imposed;

(f) substitute a finding that in its opinion should have been reached;

(g) award or fix costs where appropriate; and

(h) supersede a disciplinary procedure or provision in a contract or collective agreement.

(2) The decision of the Review Board shall be in writing and provide reasons therefor, and shall be forwarded to persons entitled to be parties to the proceeding.

(3) The decision of the Review Board shall be final.

...

[110] Regulation 23(1) provides that a member in respect of whom a decision has been made may within fourteen days after receiving the decision, initiate a review thereof by the Review Board by filing a notice of review in Form 13 of the Schedule. Under Regulation 23(4), an application may be made to the Review Board to extend the time for filing the notice and under Regulation 23(5) the Review Board is empowered to extend the time if satisfied that there are reasonable grounds for so doing and that the extension will not unduly prejudice a party.

[111] Part IV of the Regulations deals with Review Board hearings respecting a complaint by a member of a police force who is the subject of disciplinary proceedings. Relevant provisions set out the procedure before the Review Board and its powers in terms substantially the same as set out in ss. 32 and 33 of the **Police Act**.

[112] These provisions in the **Police Act** and Regulations are wide-reaching, and by providing for a trial *de novo*, the process leaves the aggrieved party with no burden of a previous finding, and in a position where the party who alleged the disciplinary fault must prove the case all over again. In making an order, the Review Board has wide latitude. As the remedy relates to the merits of the dispute, I am satisfied that it is most adequate. Thus, if the substance of the aggrieved party's complaint is that he or she was not fairly tried by the decision-maker of first instance, or that the result is unreasonable or unjust, this regime meets the test of an adequate alternative remedy.

[113] However, a reviewing court, in determining the adequateness of a right of appeal is also bound to question whether the appellate body is able or willing to consider jurisdictional questions, especially when that question goes to the lack of authority to enter into the inquiry and to make a decision. The result of a statutory appeal tribunal lacking the power or declining to consider such questions could be that the initial decision-maker would be shielded from any form of review.

[114] The question, when considering adequateness of the alternative remedy, should be not only whether or not the reviewing body is capable of curing the alleged harm but also whether it is willing to do so.

[115] The Ontario Divisional Court considered the jurisdictional aspect of a right of appeal in **Aylward v. McMaster University** (1991), 47 Admin. L.R. 198. On an application to prohibit a university tribunal from continuing a hearing on academic dishonesty, Flinn, J., writing for the majority, found that the process was not a nullity when first convened, but that the tribunal lacked jurisdiction to continue the hearing after the complaint was withdrawn. He said at p. 205:

> In this case once the complaint was withdrawn the foundation for the tribunal to continue was gone. Observations made in nullity cases are appropriate in going further and considering whether or not the action or decision to proceed is patently unreasonable.

[116] Flinn, J. examined whether the right of appeal to the senate board was an adequate alternative remedy. At p. 206 he said:

> Having come to the conclusion that the essential function of the tribunal was quasi-judicial in deciding questions of academic dishonesty and that the decision to continue was patently unreasonable, can appropriate relief be achieved within the parameters of the rules of procedure established by the Senate? In our view the answer is no. ...
>
> The internal appeal process by trial de novo does not provide an adequate remedy because, before this tribunal, the student is in no direct peril of suspension or expulsion. At a trial de novo on appeal, those penalties may be imposed and at that stage the student bears the burden of a previous finding of academic dishonesty.

[117] It is interesting to note that Flinn, J. found that even an appeal in the form of a trial *de novo* was not adequate when the initial decision-maker had no jurisdiction to make the decision.

[118] A reviewing court must ensure that tribunals exercise their statutory powers within the limits of their jurisdiction, and that the decision-maker actually possesses the statutory authority to make the decision. A party who genuinely impugnes a decision on the ground that it was made without jurisdiction is entitled to a determination at some level whether or not that is so. The court, in determining whether an alternate remedy is adequate, must ask whether the appellate body is able and willing to consider jurisdictional questions. If the appellate body refuses to consider such questions, the initial decision-maker

would, if prerogative relief is not given, be shielded from any form of review. If the court were to find the appellate body an adequate remedy in such circumstances, the initial decision-maker would be immune from questions as to its jurisdiction and beyond the reach of supervision.

[119] The distinction between a loss of jurisdiction and a complete lack of jurisdiction is valid in determining the adequateness of an alternative remedy. That is not to say that the alternative remedy must be in the form of prerogative relief. That relief is available only in the superior courts. An example of a like remedy can be found in **R. v. Brighton Justices, Ex. P. Robinson**, [1973] 1 W.L.R. 69, referred to in **Re Harelkin, supra** by Dickson, J. at p. 610 and by Beetz, J. at p. 579. In the case of lack of jurisdiction of an initial decision-maker, the administrative appeal procedure ought at the least to be capable of addressing and curing, if necessary, that lack of jurisdiction. While most breaches of natural justice and, indeed, even cases of bias could be cured by a trial *de novo*, a lack of initial jurisdiction may not be adequately addressed in this way.

[120] Care must be taken in each case to examine the real nature of the aggrieved party's complaint. If it is in substance that the decision is simply wrong, a procedure such as trial *de novo* is adequate. If the real nature of the complaint is that the decision-maker was without jurisdiction, it may well not be enough. Little would be accomplished, the respondent says, by relitigating at great length and cost, the eleven disciplinary complaints against him, when a simple decision as to the decision-maker's jurisdiction could bring the matter to an end. In each case, the reviewing court must be careful not to classify as jurisdictional an error which is not, so as to permit the aggrieved party to avoid seeking an alternative remedy.

[121] The respondent argued that there was a reasonable apprehension of bias or actual bias on the part of Chief Heighton and the Board. If that were all, it is likely that a hearing *de novo* would give the respondent full redress by way of the opportunity to present and argue his case before an unbiased body with original jurisdiction. So too, breach of natural justice could be corrected in this way, as indeed Beetz, J. considered the case to be in **Harelkin, supra**.

[122] However, the fact that the Board had no jurisdiction to enter into the inquiry raises a different concern. As I have pointed out, police officers are not employees but public office holders, and this is recognized by the complex and precise requirements of the disciplinary scheme set out in the **Police Act** and Regulations.

Cases falling within this scheme are clearly beyond the scope of collective agreements, as we have seen. Wherever the word "shall" is used respecting any material step in the disciplinary process, that word is considered to be mandatory, as appears from the cases I have reviewed. The protection in the **Police Act** against improper discipline procedures requires that failure to meet procedural requirements and resulting lack of jurisdiction must be subject to some form of review as opposed to an appeal.

[123] In order for the alternative remedy to be adequate, that remedy must therefore provide the respondent with the opportunity not just to present evidence and be heard on the merits of the case but to argue, as he could before the Chambers judge, that discipline was imposed without jurisdiction.

[124] We must examine the nature of the tribunal, its powers and its willingness to undertake the task.

[125] The Review Board's powers have been set out and are arguably wide enough to enable it to consider matters of jurisdiction. The purpose of the legislation is to provide a mandatory set of procedures to be followed in the recognition that police officers as holders of public office are entitled to protection against arbitrary discipline. The body that the legislature has provided to which disciplined officers can appeal should be able to review and correct breaches of those procedures.

[126] Counsel for the respondent has pointed out, however, that on two occasions the Police Review Board has declined to exercise the power of setting aside a decision for lack of jurisdiction. In **Wilms v. Halifax** (1999), NSPRB 95-0178 at p. 12 counsel for a dismissed officer:

> ... argued that because of certain procedural errors in the handling of the matter at the department level, the dismissal was in essence a nullity, and the Board therefore had no jurisdiction to conduct a hearing.

[127] The Review Board made a finding based on uncontradicted facts that the procedure followed did not, in fact, render the decision a nullity. It did, however, make a blanket statement rejecting its own jurisdiction to find that the challenged decision was a nullity. At p. 17 the Board said:

> We also point out of course, that we do not in any event have the power to declare the decision of the Department a nullity; that is a power that can only be exercised by a justice of the Supreme Court; our finding is restricted to a determination that "the matter under review has validity", as contemplated by the Regulations.

[128] In **Young v. Kentville**, 2002 NSPRB 99-0038, the Review Board declined jurisdiction to hear an appeal from a discipline decision made in contravention of mandatory time limits. It said at pp. 5-6:

> ... It is the interpretation of this Board that the Chief had lost jurisdiction by relying on an investigation and rendering a decision on a matter of discipline which was completed outside of the mandatory 60 day investigation period. It is true this resulted from an interpretation of the Regulations shared by the Board's Registrar. However, this is of no assistance to the Kentville Chief. He had no jurisdiction to issue the Form 10 Notice of Meeting, or to recommend dismissal. ...
>
> ...
>
> Evidently, if the Board is correct in its conclusion that Deputy Chief Mander had no jurisdiction to discipline Constable Young in relation to the March 8th, 1999 complaint, that portion of these proceedings before the Board are a nullity. If the Board has no jurisdiction, it cannot issue an order in relation to Constable Young. The Board can only recommend that the Town of Kentville and Constable Young reach an accommodation or place the matter before a Nova Scotia Supreme Court judge for a decision on the issue of jurisdiction. ...

[129] The approach taken in each of these decisions is slightly different but the bottom line is the same. In **Wilms, supra**, the Review Board stated that it was without authority to declare a lower decision a nullity. In **Young, supra**, the Review Board said that the lower decision was a nullity, but declined authority on its part to cure the jurisdictional error. It is apparent from these decisions that whatever interpretation one puts on the provisions in the **Police Act** conferring jurisdiction on the Review Board, that Board has been unwilling to exercise jurisdiction to grant relief akin to judicial review. The only recourse that is probably open to the respondent under the alternate remedy is to get a hearing *de novo* which would, of course, open up the merits but would give him no opportunity to challenge the Board's jurisdiction. If we were to exercise our discretion and refuse judicial review in these circumstances, there would be a risk that in many cases the strict procedural requirements set out in the **Police Act**

would go unenforced. There would be no reviewing body able and willing to ensure that discipline is administered in accordance with the **Act** in the manner done in the cases that I reviewed earlier. An accused police officer could, in spite of the most flagrant breaches of the procedural requirements, be subject to a lengthy hearing before the Review Board into alleged disciplinary infractions where a simple inquiry into jurisdiction would suffice. I am satisfied that the lack of jurisdiction here can only be cured through application to the courts. The respondent has made a good point that the hearing of the eleven charges would result in the unnecessary expenditure of much time and money when a simple inquiry into the Board's jurisdiction in the first place was all that was necessary.

[130] I am satisfied that the respondent was genuinely in search of something better than a trial of the many time consuming issues arising out of the eleven charges. The risk that he would be driven to this rather than seek the comparatively simple machinery of challenging jurisdiction in the courts is sufficiently great that it would be unsafe, in my view, for the court not to grant *certiorari*.

[131] The respondent has satisfied me that the alternate remedies available to him under the **Police Act** are not adequate in the circumstances existing in this case.

ISSUE 4 - Whether in any event the Chambers judge erred in granting prohibition respecting further Disciplinary Action:

[132] The appellants contend that the Chambers judge erred in making orders prohibiting further dealings with the promotion issue and further disciplinary proceedings. The effect of the Chambers judge's orders, they say, is that the internal matter of whether or not the respondent has satisfied his probationary period and the allegations of severe disciplinary infractions will never properly be examined on their merits. The Chambers judge, they say, should only have granted *certiorari* in any event. They refer to the decision of this Court in **Re Labour Relations Board (Nova Scotia) and Little Narrows Gypsum Co. Ltd. et al.** (1977), 82 D.L.R. (3d) 693 (N.S.S.C. A.D.) where MacKeigan, C.J.N.S. said at pp. 694 - 595:

> ... Prohibition lies only to prevent a tribunal from embarking on or continuing with a matter over which it has no jurisdiction. It does not lie to block an inquiry

> or proceeding which it has jurisdiction to conduct but which a Court may think is unnecessary, unwise or fruitless. Prohibition can stop a tribunal from doing what it has no power to do; it cannot be used to stop the performance of an act within a tribunal's jurisdiction, ...

[133] The Chambers judge's decision, the appellants say, has the effect of prohibiting further dealings with these decisions involving the respondent akin to a stay of proceedings in a criminal matter.

[134] Prohibition is a drastic remedy, and because it has the effect of precluding further hearing and adjudication by the tribunal of a matter it is granted only when the tribunal lacks jurisdiction to proceed further in that matter. See *Blake, Administrative Law in Canada*, 3rd ed., (Butterworths: Markham: Ontario, 2001) at p. 200.

[135] In the passage quoted from **Little Narrows, supra**, this Court recognizes the limits applicable to the granting of prohibition. It cannot be used to prohibit acts within a tribunal's jurisdiction.

[136] As to the demotion issue, while prohibition was not sought in the original matter, we were advised that it was agreed by the parties that this was properly before the Chambers judge. The Chambers judge found that the respondent was not on a trial position in the rank of corporal. This finding precludes any further consideration by the appellants of this issue under the **Collective Agreement**. It is *res judicata*. The Board does not have jurisdiction to consider it again. Nor does the Board have jurisdiction to discipline the respondent by way of demotion. As this Court said in **Little Narrows, supra**, prohibition can "stop a tribunal from doing what it has no power to do."

[137] Chief Heighton originally had jurisdiction under the **Police Act** and the Regulations to discipline the respondent respecting the three Form 8 complaints laid in November 2000 and January 2001. He exercised it, and I would not interfere with the order of the Chambers judge prohibiting further action by him or the Town.

[138] As to the dismissal, the Board had no jurisdiction to dismiss because a necessary step in the disciplinary process was omitted. I have already referred to the nature of the disciplinary process under the **Police Act** and the emphasis placed

by the language therein and by the case law upon strict compliance with its procedural provisions. An appropriate example in this context is the decision of this Court in **Storm v. Halifax (City) Board of Police Commissioners**, **supra**. There the Chambers judge had found, in disciplinary proceedings, that there had not been compliance with the notice requirements of Regulation 54(3) and (4) of the **Police Act** then in force. Nevertheless, the Chambers judge did not order prohibition because notice was effectively given during the course of the proceedings. The Chambers judge said:

> I feel that the irregularities that did occur were important actions to be taken by the administrative tribunal and I do not waive their requirements except that I would feel it appropriate in view of what has developed in this case that the requirement of the Chief of Police under subsection 54(3) to give notice to the municipal constable is not now truly necessary as clear and full notice has been provided in the course of these proceedings.
>
> ...
>
> I deny the order of prohibition and I direct the administrative tribunal to comply with the notice requirement in s. 54(4) and to set up an inquiry as provided in the regulation. ...

[139] This Court, in allowing an appeal from this decision of the Chambers judge said at (1987), 78 N.S.R. at p. 371:

> **[28]** With the greatest respect for the opinion of the Chambers judge, I do not agree there is compliance with Regulation 54(3) and (4) by the appellant receiving notice during the course of the proceedings, particularly when the proceedings arose from an application for an order in the nature of prohibition on the ground, among others, that the administrative tribunal lacked jurisdiction to hear the appeal because the appellant received no notice. Similarly, I do not agree that the mandatory procedural requirement of Regulation 54(3) and (4) can be met by the administrative tribunal giving notice subsequently as directed by the learned Chambers judge.

[140] This further reflects the concern for strict compliance with the procedural requirements of the disciplinary scheme established under the **Police Act**.

[141] The omitted step in this case was to have been taken “forthwith”. It is now far too late for that to happen and the necessary step cannot be taken. Any attempt

to now do so would be without jurisdiction. Accordingly, I am of the opinion that prohibition is appropriate here to stop the appellants or any of them from further action in this respect.

ISSUE 5 - Costs:

[142] The respondent says that the costs of the unsuccessful venture against Chief MacLean should have been awarded against the appellants.

[143] In awarding the costs of Chief MacLean against the respondent, the Chambers judge made two points; (i) Chief MacLean made no decision to terminate the respondent; (ii) Chief MacLean was not a "chief officer" as contemplated by the **Police Act**. In fact, the Chambers judge noted in his decisions that the matter "went off the rails" with the involvement of Chief MacLean.

[144] Costs are in the discretion of the trial judge. This Court has repeatedly stated that it will not interfere with a trial judge's exercise of discretion unless wrong principles of law have been applied or the decision is so clearly wrong so as to amount to a manifest injustice.

[145] This principle as it relates to costs was most recently addressed by this Court in **Claussen Walters & Associates Ltd. v. Murphy** (2002), 201 N.S.R. (2d) 58; N.S.J. No. 44 (Q.L.), where Saunders, J.A. said at para. 5:

> **[5]** A trial judge's decision whether or not to award costs is clearly discretionary and will only be disturbed where wrong principles of law have been applied or the decision is so clearly wrong as to amount to a manifest injustice. See, for example, **Exco Corp. v. Nova Scotia Savings & Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331 (C.A.); **Conrad v. Snair et al.** (1996), 150 N.S.R. (2d) 214; 436 A.P.R. 214 (C.A.).

[146] The respondent is asking this Court to substitute its discretion for that of the Chambers judge and grant what is commonly known as a Bullock order. Such an order was discussed by Grant, J. in **Eastern Canadian Cleaners Ltd. v. Kernaghan (S.J.) Adjusters Ltd. and General Accident Assurance Company of Canada** (1984), 64 N.S.R. (2d) 330; N.S.J. No. 81 (Q.L.) (S.C.T.D.) at paras. 10 and 11:

> **[10]** Our court has generally accepted the test of reasonableness in joining parties. Was it reasonable for the plaintiff to join the defendant Kernaghan? Needless to say, the reasonableness is determined by the individual facts and circumstances of each case.
>
> **[11]** In **Finance America Realty Ltd. v. Block, et al.** (1979), 37 N.S.R. (2d) 185; 67 A.P.R. 185, Cowan, C.J.T.D., dealt with the test of reasonableness. In **Kelly v. Wawanesa Mut. Ins. Co. et al.** (1979), 30 N.S.R. (2d) 294; 49 A.P.R. 294, the Appeal Division of this court dealt extensively with that question with Macdonald, J.A., writing for the majority and Hart, J.A., dissenting on some issues.

[147] The respondent's application was one for *certiorari* and prohibition. He sought to quash the Board's decision to dismiss him. There is no confusion respecting who actually made the decision to dismiss - it was the Board. Chief MacLean did not even recommend dismissal. The Chambers judge did not err in concluding that it was neither reasonable nor necessary to name him as a respondent to the originating notice.

[148] I would dismiss the cross-appeal.

Disposition:

[149] In the result, I would dismiss the appeal with costs in the amount of $3,000 inclusive of disbursements. I would dismiss the cross-appeal with costs in the amount of $750.00 inclusive of disbursements, such amounts to be set off.

Chipman, J.A.
Concurred in:
Glube, C.J.N.S.
Oland, J.A.