Jurisdictional Review after Anisminic

R. D. McInnes*

Jurisdictional review of statutory bodies has long been one of the most confusing areas of the law, particularly in deciding which errors are errors affecting jurisdiction and which are not. Many thought that this question had been resolved once and for all by the decision of the House of Lords in Anisminic *v.* Foreign Compensation Commission *and that since that case all errors would be jurisdictional. In this article the writer examines the way in which* Anisminic *has been applied in the courts and concludes that errors of law within jurisdiction are still possible and that the area of jurisdictional review remains as confusing as ever.*

It is trite to say that if a statutory body acts without jurisdiction its action will be declared a nullity by the courts. Approaching triteness is the comment that the manner in which the limits of that jurisdiction are to be determined is a much disputed and largely unresolved question. Of those involved in the search for answers to that question, perhaps the most experienced campaigner is D. M. Gordon, and even today it is difficult to take issue with his assertion, made nearly fifty years ago in relation to jurisdictional review, that ". . . in no branch of English law is there more confusion and conflict."[1]

One case which many thought went some way towards removing much of the confusion and conflict but which nevertheless caused the learned D. M. Gordon much displeasure was the decision of the House of Lords in *Anisminic* v. *Foreign Compensation Commission.*[2] Few administrative law decisions[3] of recent times have attracted as much attention; a Judge of the Supreme Court of New Zealand has referred to it as a 'landmark',[4] a text book considered it to be 'the final word',[5] and many were of the opinion that it had made the need to distinguish between erroneous decisions within jurisdiction and decisions made without jurisdiction almost a thing of the past. Now, eight years after the decision in *Anisminic,* it is possible to reassess the significance of that case in the light of its fate in the courts. In so doing the writer will seek to establish in particular that some errors of law within jurisdiction are still possible, and

* Junior Lecturer in Law, Victoria University of Wellington.

1. "The Relation of Facts to Jurisdiction" (1929) 45 L.Q.R. 459, 459.
2. [1969] 2 A.C. 147. For Gordon's reaction see "What Did the Anisminic Case Decide?" (1971) 34 M.L.R. 1.
3. Possible exceptions are *Ridge* v. *Baldwin* [1964] A.C. 40, *Conway* v. *Rimmer* [1968] A.C. 910, and *Padfield* v. *Minister of Agriculture* [1968] A.C. 997.
4. Cooke J. in *A.G.* v. *Car Haulaways* (1973) Unreported, Auckland Registry, A.8/73.
5. Benjafield and Whitmore, *Principles of Australian Administrative Law* (4th ed., Sydney, 1971) 181.

that rather than removing the confusion and conflict from the field of jurisdictional review the *Anisminic* decision has in fact added to it.

I. JURISDICTIONAL REVIEW PRIOR TO ANISMINIC

For centuries it has been the practice of Parliament to establish specialist tribunals having authority to determine specified types of cases. Often Parliament would protect the tribunals it established by enacting a privative clause which forbad the courts from hearing appeals from, or controlling by means of the prerogative writs, the decisions of such tribunals. In deference to the wishes of Parliament the courts would not interfere with the decisions of such tribunals, even if erroneous, as Parliament had given those tribunals alone authority to decide. If, however, the tribunal in question had determined a matter it had no authority or jurisdiction to decide the courts would act to set aside that purported determination. Such a determination made without jurisdiction was a nullity, and, therefore, if the decisions of the particular tribunal were protected by a privative clause, there was no valid determination to which the privative clause could apply. Judicial review of the decisions of those tribunals protected by privative clauses was therefore focussed on the question of jurisdiction.

If, however, there was no privative clause protecting the decision of a tribunal, errors within jurisdiction were reviewable by means of a writ of error. The error had, however, to be apparent on the record, and since that record had also to show the facts giving the tribunal jurisdiction, the two grounds of review — lack of jurisdiction, and error of law on the face of the record — became confused. The result was that by the eighteenth century almost all errors of law were treated as going to jurisdiction.

However in the nineteenth century a reaction occurred, probably due to the realisation that to treat all errors of law as going to jurisdiction was to provide the appeal which, in many cases, Parliament had not provided or had indeed forbidden. As a result of this reaction jurisdiction came to mean simply the power to enter on the inquiry in question and was to be judged ". . . on the commencement, not at the conclusion, of the inquiry".[6] The consequences of this approach to jurisdictional review were clearly stated by the Privy Council in *R* v. *Nat Bell Liquors*[7] in the following words

> . . . if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not.

It remained, however, for the courts, and not for the tribunal concerned, to determine whether or not jurisdiction initially existed. If a tribunal had jurisdiction only in a given situation and had erred in finding that that given situation existed, it had erred as to the existence of its jurisdiction, on a matter collateral to the merits, and its purported determination would be set aside by the courts. However the existence of jurisdiction could be conditional on a number of factors — subject-matter, the correct constitution of the tribunal and the correct construction

6. *R.* v. *Bolton* (1841) 1 Q.B. 66, 74 per Lord Denman.
7. [1922] 2 A.C. 128, 151-152 per Lord Sumner.

of the issue to be determined, to name but a few. The problem lay in determining whether or not an error on conditions of that type would affect the existence of jurisdiction, a problem to which the answer was not readily apparent. Over the years the decisions of the courts on jurisdictional matters became increasingly confused and conflicting, in part due to the reluctance of the judiciary to control policy oriented tribunals and their comparatively active role in relation to 'rights determining' tribunals. The truth was, as one American judge put it, that jurisdiction had become "a verbal coat of too many colours."[8]

Jurisdiction was not solely a confused and confusing concept, it was also an important one. In an age in which the number of tribunals was ever-increasing it represented the only means of challenging the determinations of those tribunals protected by privative clauses. Even if there were no privative clause it was no less important in an era in which the scope of the rules of natural justice was heavily shackled and error of law on the face of the record was in a state akin to hibernation.[9]

Whether or not an error perpetrated by a tribunal went to its jurisdiction could thus have serious consequences for a litigant adversely affected by that error, but was largely unpredictable. Some courts would adhere rigidly to the 'jurisdiction is determinable only at the commencement' theory, others would take the collateral principle to varying lengths, and the extent to which either was likely to occur was dependent on judicial perception of the role of the tribunal concerned.

In more recent years the jurisdictional/non-jurisdictional dichotomy had become less important as less demanding grounds for challenge became more accessible. Error of law on the face of the record re-emerged from the depths of administrative law in *R* v. *Northumberland Compensation Appeal Tribunal, ex parte Shaw,*[10] and an active judiciary immediately set about the task of widening its scope; the rules of natural justice were revitalised by *Ridge* v. *Baldwin,*[11] as was the control of administrative discretions by *Padfield* v. *Minister of Agriculture, Fisheries and Food.*[12] Nor were such developments solely the work of the judiciary. The Westminster Parliament had caught the spirit of the period and, in the Tribunals and Inquiries Act of 1958, abolished the vast majority of the then existing privative clauses, in many cases providing instead a right of appeal from tribunal to court, and other legislatures followed suit in varying degrees. Added to this, the declaration, a remedy capable of ignoring the jurisdictional barrier, had become more popular. As a result, the concept of jurisdiction was no longer of such great significance — the judicial superintendence of administrative tribunals could be more easily achieved, either by more accessible common law remedies or by statutory rights of appeal.

With the courts thus having an ever increasing role in the control of administrative tribunals, the House of Lords was, in late 1968, forced to consider the scope of jurisdictional review by one of the few remaining privative clauses

8. *United States* v. *Tucker Truck Lines* 344 U.S. 33, 39 (1952) per Frankfurter J.
9. Its existence was even denied in *Racecourse Betting* v. *Secretary for Air* [1944] 1 Ch. 114.
10. [1952] 1 K.B. 338 (C.A.).
11. [1964] A.C. 40.
12. [1968] A.C. 997.

in Britain.[13] Its consideration of that issue seemed likely to make legal history as, below the surface of the case before it, two strong arguments met head-on. On the one hand was the trend of judicial activism apparent from the previous decade, on the other, the fact that the express exclusion of some privative clauses from the general repeal of such clauses effected by the Tribunals and Inquiries Act 1958 indicated a stronger than ever parliamentary intention to exclude judicial review. In that case, *Anisminic* v. *Foreign Compensation Commission*,[14] the House of Lords chose to continue the trend of judicial activism.

II. ANISMINIC v. FOREIGN COMPENSATION COMMISSION

Anisminic Ltd., a mining and minerals company, had, until the Arab-Israeli conflict of 1956, owned and operated valuable properties in Egypt. During that conflict those properties were first occupied and damaged by the Israeli forces and then sequestrated by the Egyptian Government, which soon afterwards engineered a fictitious sale of those properties by Anisminic to T.E.D.O., an Egyptian organisation, at a loss of some £3,000,000 to Anisminic. Anisminic was not the only British national to have suffered thus, and in 1959 the Egyptian Government agreed by treaty to pay Britain £27,500,000 as compensation, the disposition of that sum to be at the discretion of the British Government. The British Government by Order in Council[15] placed the matter in the hands of the Foreign Compensation Commission, which was to hear claims and quantify the compensation due to particular claimants. The Commission was, by article 4(1) of that Order in Council, to treat a claim as established if a claimant satisfied it that

(i) its claim was in respect of certain property in Egypt,
(ii) the claimant was the owner of that property at the date of sequestration, or the then owner's successor in title, and
(iii) the owner or successor in title was a British national at the date of sequestration and at the date of the 1959 Treaty.

In 1963 Anisminic submitted a claim to the Commission which, construing article 4(1) as requiring it to inquire, when the claimant was the original owner, if the claimant had a successor in title, decided that T.E.D.O. was Anisminic's successor in title and rejected the claim on the ground that T.E.D.O. had never been a British national. Dissatisfied, Anisminic commenced court proceedings, seeking declarations that the Commission had misconstrued article 4(1) and that this misconstruction went to its jurisdiction.

Almost six years later, after the case had twice been to the House of Lords,[16] Anisminic obtained the declarations sought. In the interim Browne J. had upheld its claims on the ground that the Commission had based its decision on matters it had no right to consider,[17] and the Court of Appeal,[18] basing its decision on the jurisdictional fact doctrine, vacated the judgment of Browne J.,

13. Foreign Compensation Act 1950, s. 4(4).
14. [1969] 2 A.C. 147.
15. S.I. 1962 No. 2187.
16. Once on a preliminary issue. Unreported 29/7/64, but referred to in the judgment of Browne J. [1969] 2 A.C. 223, 231.
17. [1969] 2 A.C. 223.
18. [1968] 2 Q.B. 862 (Sellers, Diplock, Russell, L.JJ.).

reasoning that since the Commission had not erred as to the existence of any facts upon which its jurisdiction depended, its subsequent error was an error as to the legal consequences of a fact and therefore an error within jurisdiction.

On appeal to the House of Lords,[19] the decision of the Court of Appeal was reversed and the judgment of Browne J. restored. The majority of the House of Lords[20] held that article 4(1) did not require a claimant who was the original owner to prove anything at all about successors in title and that the Commission had erred as to the meaning of successor in title, which meant something akin to 'successor by survivorship', and further held that the Commission's misconstruction of article 4(1) involved the Commission acting outside its jurisdiction. Accordingly, Anisminic obtained the declarations sought and the decision of the Commission was set aside.

The decision of the House of Lords immediately attracted attention from two areas — Parliament and the legal commentators. The assertion of de Smith[21] that the decision was contrary to parliamentary intent was borne out by the manner in which Parliament speedily amended the Foreign Compensation Act, 1950, giving finality to 'purported determinations' of the Commission and providing a limited right of appeal to the Court of Appeal on questions of law.[22]

The commentators[23] saw *Anisminic* as drastically altering the concept of jurisdiction and the scope of jurisdictional review. Any error of law was now, they claimed, capable of constituting a jurisdictional error. This hypothesis was based on two main factors; first, the fact that the decision in *Anisminic* left the Commission with no margin for error within its jurisdiction, and secondly, the wide ranging examples of excess of jurisdiction given by the majority coupled with the phraseology used in deciding that the Commission had exceeded its jurisdiction.

As to the first of these factors, it did seem to follow that since the Commission's area of competence was almost exclusively defined by article 4(1) and since a misconstruction of one of the matters detailed in that article went to jurisdiction, errors relating to the other matters detailed in that article must also be jurisdictional. The answer to this is that the House of Lords did not decide that the misconstruction of the phrase "successor in title" involved an excess of jurisdiction, but rather that the misconstruction of the wider question as to when the existence of a successor in title was relevant did. This was a misconstruction of the article as a whole rather than a misconstruction of one of the matters detailed in that article. Presumably therefore, the Commission was capable of erring within its jurisdiction by miscontruing one of the matters detailed in the article so long as that error did not affect the wider scheme of

19. [1969] 2 A.C. 147.
20. Lord Reid, Lord Pearce and Lord Wilberforce. Lord Morris of Borth-y-Gest dissented on the jurisdictional issue and Lord Pearson on the construction of article 4(1).
21. "Judicial Review in Administrative Law—The Ever Open Door", [1969] C.L.J. 161, 163.
22. Foreign Compensation Act, 1969, s. 3. For such an appeal see *Benin* v. *Whimpster* [1975] 3 All E.R. 706.
23. de Smith, supra fn. 21; Gordon, supra fn. 2; H. W. R. Wade, "Constitutional and Administrative Aspects of the Anisminic Decision", (1969) 85 L.Q.R. 198; B. C. Gould, "Anisminic and Jurisdictional Review", [1970] Public Law 358; J. A. Smillie, Jurisdictional Review of Abuse of Discretionary Power", (1969) 47 Can. Bar Rev. 623; Lord Diplock, "Judicial Control", (1971) 24 C.L.P. 1, 13.

the article. Even assuming that the decision in *Anisminic* did leave the Commission with no margin of error, it was an apparent non-sequitur to claim that the same would necessarily be true of other tribunals.

The second, and major, foundation for the claims of the commentators was the dicta and terminology used by the majority in *Anisminic*. Perhaps the judgment of Lord Reid is most illustrative of this point. While preferring to use 'jurisdiction' in the narrow sense of power to enter on the inquiry in question, Lord Reid gave six situations in which a tribunal having jurisdiction to enter on the inquiry might subsequently exceed that jurisdiction, these being bad faith, making a decision it had no power to make, non-compliance with the rules of natural justice, misconstruction of the enabling provisions so as to decide a "question which was not remitted to it", non-consideration of relevant factors and consideration of irrelevant factors, and added that "I do not intend this list to be exhaustive."[24]

While most of Lord Reid's examples were admittedly obiter, they were obiter of the highest authority, added to which the terms used by the majority in actually deciding that the Commission had exceeded its jurisdiction were of similar breadth. Lord Reid felt that the Commission had "inquired into and decided a matter it had no right to consider",[25] Lord Pearce spoke in terms of "wrong questions" and "further hurdles"[26] and Lord Wilberforce of the imposition of unwarranted conditions.[27]

As the commentators noted, the examples given and the language used by the majority were capable of covering all errors of law, since, as Wade noted[28]

> Almost any misconstruction of a statute or order can be represented as 'basing their decision on a matter with which they had no right to deal', 'imposing an unwarranted condition' or 'addressing themselves to the wrong question'.

and this argument could be taken beyond misconstructions to errors of law in general. In view of this the commentators contended that the result of *Anisminic* was that any error of law was capable of being classified as an excess of jurisdiction, and a necessary consequence of this was that error of law on the face of the record would become redundant, since lawyers need no longer be concerned with whether or not an error was apparent on the record, and with what the record was. Indeed one of their number, B. C. Gould, went so far as to state positively that this would be the result of *Anisminic* and that it was required by principle.[29]

While the broad dicta in *Anisminic* did indicate that all errors of law were capable of constituting jurisdictional errors, there were suggestions in the majority speeches that errors of law were not of necessity jurisdictional. Indeed one might have thought that Lord Wilberforce had answered in advance the claims

24. [1969] 2 A.C. 147, 171.
25. Ibid., 174.
26. Ibid., 198, 201.
27. Ibid., 214.
28. Op. cit., 211.
29. Op. cit.
30. [1969] 2 A.C. 147, 210.

of the commentators by indicating his dislike of such phrases as "asking the wrong question", which were not, said Lord Wilberforce[30]

> . . . wholly satisfactory, since they do not, in themselves, distinguish between doing something which is not in the tribunal's area and something wrong within that area — a critical distinction which the court has to make.

Not only did Lord Wilberforce thus indicate that the broad dicta were not intended to obliterate the jurisdictional barrier, but he also indicated that in resolving jurisdictional problems the courts were guided by ". . . the form and subject matter of the legislation."[31]

One might have thought the remarks of Lord Wilberforce were worthy of some in-depth consideration, indicating as they did that errors within jurisdiction were still possible, and in which situations they were likely to occur. Yet the commentators were undeterred. Any error of law could be classified as a jurisdictional error, and in support of that proposition could be gathered an impressive array; two administrative law experts — Wade and de Smith, one soon to become a member of the House of Commons — Gould, a Law Lord — Lord Diplock, a lifetime commentator on jurisdictional matters — Gordon, and sundry academics. Such an impressive array could hardly be wrong. Or could they?

III. ANISMINIC IN THE COURTS

This part of this article is, in essence, a review of the manner in which the courts of the Common Law world have treated *Anisminic,* seeking to establish what, if any, changes that case has effected on jurisdictional review, with particular regard to the reactions of the commentators to *Anisminic.* For clarity, and to best indicate judicial trends in the handling of jurisdictional matters, this review will be made by way of national jurisdictions.

A. Canada

The first appearance of *Anisminic* in Canada was in *Metropolitan Life Insurance* v. *International Union of Operating Engineers.*[32] The respondent union had applied to the Ontario Labour Relations Board for certification as a bargaining agent for some of the appellant's employees. The Board was to certify an applicant if it was satisfied that fifty-five percent of the appellant's employees were members of the applicant union.[33] In fact more than fifty-five percent of the appellant's employees had been accepted as members of the union, although under the union's constitution they could not validly be members. The Board decided to treat 'member' as meaning 'member in fact' rather than 'member in law', and accordingly certified the respondent as bargaining agent for the appellant's employees. The appellant claimed that the Board had erred as to the meaning of 'member' as used in the Act and, since the Board's decision was protected by a privative clause, that this error went to the Board's jurisdiction.

31. Ibid., 209.
32. [1970] S.C.R. 425.
33. Labour Relations Act, R.S.O., 1960, c. 202, s. 7.

At first instance and on appeal[34] the case was decided in favour of the respondent union, both cases being prior to the final decision in *Anisminic*. On appeal from the Ontario Court of Appeal, the Supreme Court of Canada allowed the appeal, holding that the Board's error went to its jurisdiction. In so holding the Supreme Court felt it was ". . . sufficient to refer to the recent judgment of the House of Lords in *Anisminic* v. *Foreign Compensation Commission.*"[35]

Despite this brief reference it is apparent from the report that *Anisminic* was closely followed. In delivering the judgment of the Supreme Court Cartwright C.J.C. reasoned in words which closely resemble those of Lord Reid in *Anisminic,* concluding that[36]

> In proceeding in this matter the Board has failed to deal with the question remitted to it (i.e. whether the employees in question were members of the Union at the relevant date) and instead has decided a question which was not remitted to it.

Thus *Anisminic* was followed almost verbatim, and in a manner which suggested that the commentators might well have been correct in asserting that the broad dicta in that case were capable of converting any error of law into a jurisdictional error. The case was, however, a relatively clear one — the Supreme Court could arguably have reached the same result by applying the jurisdictional fact doctrine,[37] yet despite this, *Metropolitan Life* was roundly criticised[38] as being too much of a judicial incursion into the Board's area of competence.

Three years later, *Anisminic* again featured in the Supreme Court, in *Estate of Woodward* v. *Minister of Finance,*[39] and was again accepted as authoritative. However in the face of a strong finality clause having retrospective effect and deeming the determination in question to be "confirmed and binding"[40] it is hardly surprising that the Supreme Court would not intervene. In the interim the reception of *Anisminic* in the provincial courts of Canada had proved to be somewhat less than might have been expected following the decision in *Metropolitan Life.* In one case[41] the New Brunswick Appeals Division chose to ignore not only *Anisminic* but also *Metropolitan Life,* notwithstanding a strong similarity between the latter and the case before it, and in another case the Ontario Court of Appeal sounded a warning as to the width of *Anisminic's* application. In that case, *Re C.S.A.O. and Oakville Trafalgar Memorial Hospital,*[42] Arnup J.A. referred to the 'wrong question' test the Supreme Court in *Metropolitan Life* had culled from *Anisminic* as ". . . by no means a universal one" and noted

34. [1969] 1 O.R. 412.
35. [1970] S.C.R. 425, 435.
36. Idem.
37. Indeed it has been referred to as such a case. See P. W. Hogg, "Judicial Review—How Much Do We Need?", (1974) 20 McGill L.J. 157, 160.
38. By Hogg, op. cit., and by W. H. Angus, "Judicial Review—Do We Need It?", (1974) 20 McGill L.J. 177, 196.
39. [1973] S.C.R. 120.
40. Succession Duty Act, 1960, s. 5(a), as amended by c. 45, 1970 (B.C.).
41. *Re New Brunswick Nursing Association* (1971) 19 D.L.R. (3d) 712.
42. [1972] 2 O.R. 498.

that ". . . it has been sought to be applied in some cases to which it had no real application."[43]

For what would seem to be the first time, there was an indication that *Anisminic* might not go so far as the commentators had expected. That indication was later furthered by the Divisional Court of Ontario which cited *Anisminic* as authority for the proposition that where there was a privative clause, errors of law *per se* were not reviewable by the courts.[44] While this proposition could be supported by reference to dicta in *Anisminic,*[45] it represented the exact opposite of the manner in which the commentators had forseen *Anisminic* being applied. So far as the provincial courts were concerned it seemed that errors of law were not necessarily jurisdictional, but the decision of the Supreme Court in *Metropolitan Life* remained a suggestion to the contrary.

This confused situation was, however, short-lived, for in *Service Employees International Union* v. *Nipawin District Staff Nurses Association*[46] the Supreme Court made a distinct move away from the wider application of *Anisminic.* The facts of *Nipawin Nurses,* another bargaining agent case, were essentially similar to those of *Metropolitan Life,* except the alleged misconstruction was of the phrase "company dominated organisation". An organisation could not be certified as a bargaining agent if it was a "company dominated organisation",[47] and when the respondent association applied for certification the appellant union objected on the grounds that the respondent was such an organisation. To be a "company dominated organisation" the body in question had to be dominated by an employer or employer's agent. The status of the respondent gave the Saskatchewan Labour Relations Board some trouble before it finally decided that since the respondent's members could not properly be classed as employees, they must therefore be employers, and consequently refused certification. The respondent's argument that in thus reasoning the Board had failed to deal with the vital question as to whether or not its members were employers and as a consequence had exceeded its jurisdiction was accepted by the Saskatchewan Court of Appeal,[48] but did not convince the union who appealed to the Supreme Court of Canada.

Given the similarity of the case to *Metropolitan Life,* one might have expected the appeal to be dismissed. Instead it was allowed, with the Supreme Court distinguishing *Metropolitan Life* on the sole ground that "the circumstances are very different."[49] While again *Anisminic* was accepted as authoritative, with Dickson J. repeating verbatim the examples of excess of jurisdiction given by Lord Reid in *Anisminic,* the Supreme Court was prepared to give the Board more latitude under the 'misconstruction' head than it had in *Metropolitan Life,* saying[50]

> . . . if the Board acts in good faith and its decision can be rationally

43. Ibid., 504. Possibly Arnup J.A. is referring to the decision in *Metropolitan Life.*
44. In *Re Convalodge* [1974] 3 O.R. 368.
45. Especially the remarks of Lord Wilberforce, [1969] 2 A.C. 147, 210.
46. [1975] 1 S.C.R. 382.
47. Trade Union Act, 1972, (Sask.) c. 137, s. 2(e).
48. [1973] 4 W.W.R. 616.
49. [1975] 1 S.C.R. 382, 390.
50. Ibid., 389.

supported on a construction which the relevant legislation may reasonably be considered to bear, even the Court will not intervene.

While this importation of reasonableness was by no means a novel judicial approach to the interpretation of statutes by tribunals in Canada,[51] one wonders where it had been in the *Metropolitan Life* case, where the Board's error was, if anything, more rational and reasonable than the error in *Nipawin Nurses,* and where had those criteria been applied the result would surely have been different. The same is true of *Anisminic* itself, where, as Lord Pearson's dissenting judgment shows, the Commission's error could easily have been supported as "rational".

Clearly, the *Nipawin Nurses* case marks a move away from the literal application of *Anisminic,* despite the fact that the "rational and reasonable" test could arguably have been derived from the judgment of Lord Wilberforce as being a situation in which Parliament "is prepared to concede a wide area to the authority it establishes."[52]

While one can only speculate at the reasons for this movement away from the direct application of the *Anisminic* dicta employed by the Supreme Court in *Metropolitan Life,* three factors which may have influenced the Supreme Court in *Nipawin Nurses* are identifiable. First, the doubts of the provincial courts as expressed in cases such as *Re C.S.A.O.,* secondly, the adverse criticism that followed the decision in *Metropolitan Life,* and thirdly, the fact that the decision in *Metropolitan Life* came so soon after the decision in *Anisminic* that the Supreme Court would not have had the opportunity to consider, or even to be aware of, the reactions of the commentators to that case. Whatever the reason may be, one might have expected *Nipawin Nurses* to have forestalled the possibility of *Anisminic* having the effect contended by the commentators. In fact it has not. While in Ontario *Anisminic* is still treated with caution,[53] *Anisminic* has been used as the justification for a more liberal approach to jurisdictional matters. This is particularly true of the Nova Scotia Appeals Division, which, in one case, was prepared to speak in terms of jurisdictional error when the case before it seemed more truly an abuse of discretion and in a situation in which jurisdictional challenge was not essential, there being no privative clause.[54] Equally surprising, if not more so, is the assertion of the Chief Justice of Nova Scotia, McKeigan C.J.N.S. in *Re Stora Kopparbergs Bergslags Aktiebolag*[55] in relation to errors as to the nature of collective bargaining, that "It matters little whether they are labelled excess of jurisdiction, errors of law on the face of the record or failure to exercise jurisdiction", and the apparent equation by Coffin J.A. in the same case of unreasonableness and jurisdictional error. Perhaps the latter approach represents the corollary of the *Nipawin Nurses* approach and indicates that in Canada *Anisminic* may be used as a justification for judicial review of a tribunal's conclusions on the merits.

51. It would seem to be derived from the dissenting judgment of Rand J. in *Beatty* v. *Kozak* (1958) 13 D.L.R. (2d) 1.
52. [1969] 2 A.C. 147, 209-210.
53. *Re Canadian National Railway Co.* (1975) 10 O.R. (2d) 389.
54. *Schwartz* v. *Bread and Cake Workers Union* (1975) 6 A.P.R. 606.
55. (1975) 61 D.L.R. (3d) 97, 108. See also D. J. Mullan, "Recent Developments in Nova Scotian Administrative Law", (1976) 2 Dalhousie L.J. 870.

The Canadian experience of *Anisminic* has thus been that the "confusion and conflict" in the law of jurisdictional review has increased. While errors of law within jurisdiction are clearly still possible, the circumstances in which such an error can be identified remain as unpredictable as ever, possibly more so than before *Anisminic*. In some cases *Anisminic* has been used as the justification for developments akin to those suggested by the commentators, and to this limited extent it would seem the commentators have been proved correct. However given that the Canadian cases have almost all concerned judicial review of one type of tribunal — Labour Relations Boards — one might have expected the situation to be more certain than confused. The fact that it is more confused than certain may be an indication that the extent to which *Anisminic* will be employed is dependent on the manner in which particular judges view their supervisory functions.

B. New Zealand

In New Zealand, as in Canada, the privative clause remains relatively common, despite a trend against its use and towards the provision of rights of appeal to the Administrative Division of the Supreme Court,[56] and thus in some areas judicial review remains focused on the question of jurisdiction. One of those areas, transport licensing, provided in *Attorney-General* v. *Car Haulaways*[57] New Zealand's leading consideration of *Anisminic*.

Car Haulaways, a firm of car transporters, had applied for and been granted extensions to their licences enabling them to add more truck and trailer units to their run. The New Zealand Railways, also heavily committed to car transportation, appealed against this grant to the Transport Licensing Appeal Authority which allowed the appeal on the ground that the Licensing Authority in granting the extensions had been "demonstrably wrong in fact."[58] Car Haulaways then commenced an action alleging that the Appeal Authority had erred in law by failing to consider certain matters that the Transport Act 1962 required to be considered, and that those errors went to jurisdiction.

At first instance Cooke J. upheld the claims of Car Haulaways and quashed the decision of the Appeal Authority.[59] In so doing Cooke J. accepted *Anisminic* as authoritative, referring to it as "a great landmark of Administrative Law." Cooke J. did not take *Anisminic* to the lengths suggested by the commentators, but rather quoted those passages in the majority judgments which indicated that errors of law which were within jurisdiction remained unreviewable. Further to this, Cooke J. was able to identify errors of law within the Appeal Authority's jurisdiction, notably what he considered to be the Appeal Authority's misconception of its appellate function.[60]

While able to identify errors within the jurisdiction, Cooke J. was also of the opinion that the Appeal Authority had committed errors going to its

56. See further the *8th Report of the Public and Administrative Law Reform Committee* (Wellington, 1975).
57. [1974] 2 N.Z.L.R. 331. Noted by Keith, (1976) 7 N.Z.U.L.R. 66.
58. (1973) A.D. 2407; 5 Butterworths Road Transport Licensing Appeals, 588. 596.
59. Unreported, (1973) Auckland Registry, A. 8/73.
60. The Court of Appeal did not agree; [1974] 2 N.Z.L.R. 331, 335.

jurisdiction. The first of these related to section 123(1)(a) of the Transport Act 1962 which required the consideration of the interests of the public generally, including primarily those of persons requiring facilities for transport of goods and secondarily those of persons providing facilities for such transport.

Cooke J. found that the Appeal Authority, who had considered that the preferences of those car dealers who used car transporting facilities "cannot be a matter of great importance" and stated that "I cannot say it has anything to do with the public interest",[61] had refused to consider a matter the Transport Act 1962 required him to consider, and, following Lord Reid in *Anisminic,* that this amounted to a jurisdictional error.

Cooke J. also held that the Appeal Authority had construed section 179 of the Transport Act 1962, which required a balancing of the needs of national production, defence and living standards in such a way as to place an improper onus on the respondent. There was, said Cooke J., ". . . some analogy, though not a perfect one, with the added requirement incorrectly placed on the applicant in the *Anisminic* case."

Finally Cooke J. held that the Appeal Authority had not considered the impact of granting the extensions on the profitability of the New Zealand Railways as section 123 required, and that this too went to jurisdiction.

Thus Cooke J. quashed the decision of the Appeal Authority, relying principally on the last of Lord Reid's examples of excess of jurisdiction. It is, however, of some significance that in order to differentiate between those errors within jurisdiction and those going to jurisdiction Cooke J. felt the need to employ a vague dictum of Lord Denning M.R. in *R* v. *Paddington Valuation Officer, ex parte Peachey Properties,*[62] to the effect that the errors went "to the very root of the determination."

The judgment of Cooke J. clearly illustrated that errors of law within jurisdiction were not only possible but also identifiable. It was, however, reversed by the Court of Appeal.[63] The final decision in *Car Haulaways,* that of the Court of Appeal, indicates very little as to the effects of *Anisminic.* While citing the principle Cooke J. had extracted from *Anisminic,* the Court of Appeal avoided endorsement of that principle, stating only that it was accepted by the parties,[64] and avoided the need to consider the application of *Anisminic* by its conclusion that the Appeal Authority had considered the required matters and had not erred as to the onus resulting from section 179. The decision of the Appeal Authority was therefore upheld.

The decision of the Court of Appeal is, however, illustrative of when *Anisminic* will not be applied. As the decision of the Court of Appeal clearly shows little is required by way of consideration of relevant matters, at least in the area of transport licensing, where it would seem to be sufficient for the Appeal Authority to address himself to the issues at a high level of generality rather than to consider specifics. This point is best illustrated by the issue of profitability and the Railways, on which the Court of Appeal found the Appeal

61. 5 Butterworths Road Transport Licensing Appeals 588, 596.
62. [1966] 1 Q.B. 380, 403.
63. [1974] 2 N.Z.L.R. 331.
64. Ibid., 333. On this point the headnote is incorrect.

Authority had reached a "definite conclusion",[65] that conclusion being that he ". . . should not be surprised if it turned out that the overall operation is profitable"[66] and on which the evidence was such that it was "impossible to say" whether or not the operation was profitable.[67]

Arguably such a level of consideration is all that is required by the Transport Act 1962, its dominant theme being the highly general concept of "the public interest". As the Court of Appeal noted[68] "With the same material before different tribunals, opposite decisions could well be pronounced in the application of such a test to the evidence in a contest of this kind."

In this passage the Court of Appeal would seem to be earmarking transport licensing as an area of the type identified by Lord Wilberforce in *Anisminic,* in which Parliament[69]

> . . . while stating general objectives, is prepared to concede a wide area to the authority it establishes: this will often be the case where the decision involves a degree of policy making . . .

whereas Cooke J., apparently influenced by the detailed provisions of the Transport Act 1962, seemed to consider transport licensing to be within Lord Wilberforce's second proposition, being a situation in which[70]

> . . . it may be apparent that Parliament is itself directly and closely concerned with the definition and delimitation of certain matters of comparative detail and has marked by its language that these shall be closely observed.

The conclusion that *Car Haulaways* forces is that even if *Anisminic* does have as wide an application as that suggested by the commentators, its application is very much dependent on the nature of the jurisdiction in question, and that judicial perceptions of that nature may differ.

The decision in *Car Haulaways* does, however, indicate that not all errors of law will be jurisdictional. Having upheld the Appeal Authority's construction of section 179 the Court of Appeal added[71]

> With respect, we think it may be arguable that an incorrect formulation of a principle of adjective law for his own guidance would fall within the ambit of the authority's jurisdiction.

This indication is not, however, particularly helpful. Presumably "adjective law" includes the rules of natural justice which, according to Lord Reid in *Anisminic,* are jurisdictional matters.

If *Car Haulaways* avoided the application of *Anisminic,* the next New Zealand case in which jurisdictional questions arose did not. *Hydrofoil Services*

65. Ibid., 339.
66. 5 Butterworths Road Transport Licensing Appeals 588, 591.
67. Idem.
68. [1974] 2 N.Z.L.R. 331, 339.
69. [1969] 2 A.C. 147, 209.
70. Idem.
71. [1974] 2 N.Z.L.R. 331, 338.

v. *Shipping Industry Tribunal*[72] resulted from a long-standing manning dispute between the applicant and the Seaman's Union. The Tribunal ordered that the applicant's hydrofoil Manu-wai carry a seaman, although the statutory manning scale did not require one. As Speight J. deciding the case noted, this was a matter it had jurisdiction to order, but in so ordering the Tribunal had stated that it believed regulations would soon be made concerning what it believed to be an inadequate manning scale. This adversion, held Speight J., was a consideration of an irrelevant factor of the type referred to by Lord Reid in *Anisminic,* and therefore the Shipping Industry Tribunal had acted in excess of its jurisdiction. Given that the Tribunal had the power to make the order made and given that it had twice previously done so in the case before it, it is hard to accept that the Tribunal's reference to the possibility of legislative change was an error going to "the very root" of its determination, to use the words adopted by Cooke J. in *Car Haulaways.* It would therefore seem possible that the wide view of jurisdictional error the commentators claimed *Anisminic* might promote had been accepted by Speight J.

A similar indication appeared in the case of *New Zealand Meatworkers Union* v. *Wages Tribunal*[73] in which Ongley J. applied *Anisminic* and held that a misconstruction of the Economic Stabilisation Regulations 1973 went to the Tribunal's jurisdiction, without considering the possibility that it might be an error of law within that jurisdiction. The decision of Ongley J. was probably correct, and does not warrant further consideration, except for the fact that his approach in ignoring the possibility of an error of law within jurisdiction suggests that the commentators might also have been correct in asserting that the jurisdictional barrier was no longer important.

Thus in New Zealand there have been indications both for and against the claims of the commentators, but this confused position has, to a fairly large extent, been removed by a second Court of Appeal decision, *New Zealand Engineering and Associated Trades Union* v. *Court of Arbitration.*[74] In that case the appellant union argued, inter alia, that the Court of Arbitration had failed to consider first the definition of "industry" in the Industrial Conciliation and Arbitration Act 1954, and secondly, certain of the union's submissions. These errors constituted, it claimed, in Lord Reid's terms, a "refusal to take into account something it was required to take into account" and therefore were jurisdictional errors. The manner in which the Court of Appeal dealt with these arguments is strongly reminiscent of the approach it took in the *Car Haulaways* case; rather than comment on the jurisdictional implications of the issues, the Court of Appeal showed that the matters raised by the appellant had in fact been considered by the Court of Arbitration. Unlike *Car Haulaways,* the Court of Appeal did go on to comment on the *Anisminic* decision. First, it was made clear by McCarthy P. and Richmond J. that errors of law might well be possible within jurisdiction. In the words of McCarthy P.[75]

> . . . though recognising the widening field of review which *Anisminic*

72. Unreported, (1974) Auckland Registry, A. 60/74.
73. Unreported, (1976) Wellington Registry, M. 174/75.
74. [1976] 2 N.Z.L.R. 283.
75. Ibid., 285.

> v. *Foreign Compensation Commission* is generally thought to promote, I question whether that case justifies any departure from the interpretation of the privative clause so long and so well established.

Secondly, as indicated in the passage cited above, the Court of Appeal was prepared to accept *Anisminic* as promoting a "widening field of review". Exactly what that widening field of review might be is best indicated by Cooke J. who felt that[76]

> . . . if *Anisminic* v. *Foreign Compensation Commission* has widened the field of jurisdictional review or jurisdictional error, it did so in the sense of preferring one of two long competing lines of authority to the other.

It seems likely that the two lines of authority to which Cooke J. refers are the 'jurisdiction is determinable only at the commencement' school of thought and the 'jurisdiction may be exceeded during the inquiry' school. Clearly *Anisminic* has preferred the second of the two lines, and equally clearly that the majority intended to do so is evidenced by the examples of excess of jurisdiction given in that case.

The third point arising from the *Engineering Union* case is that while McCarthy P. and Richmond J. indicate that errors of law are not always a matter for the courts, Cooke J. appears to disagree, at least so far as errors of construction are concerned. He ends his judgment[77]

> I think the courts of general jurisdiction should be slow to hold that when establishing a court or tribunal of limited jurisdiction Parliament meant it to have authority to determine conclusively for the purposes of any given case the meaning of provisions in the Act by which it is constituted and under which it operates. Questions of fact or discretion are in a different category.

The implication from this passage would seem to be that questions of construction should always be for the courts and therefore should always be jurisdictional. Thus it seems that Cooke J. would go some way towards agreement with the commentators (subject to the reservations apparent from his judgment at first instance in *Car Haulaways*) while the majority of the Court of Appeal would be in agreement with Lord Wilberforce when he stated[78]

> I think we have reached a stage in our administrative law when we can view this question quite objectively, without any necessary predisposition towards one that questions of law, or questions of construction are necessarily for the courts.

The position in New Zealand is therefore confused, although not as much as in Canada. It does seem relatively clear, however, that in the New Zealand

76. Ibid., 301.
77. Idem.
78. [1969] 2 A.C. 147, 209.

context the result of *Anisminic* has not been that errors of law are of necessity jurisdictional errors, although an unreviewable error of law has yet to be positively identified.

C. *Australia*

For a supposed landmark, *Anisminic* has had little effect in Australia. The one case in which it has been considered is, nevertheless, of some importance, being one of the few reported cases in which a court has asserted that errors of law within jurisdiction are still possible and decided that such an unreviewable error of law was in existence. In that case, *R.* v. *The Small Claims Tribunal, ex parte Barwiner Nominees,*[79] one Syme had bought a television set from the applicants. The television set scarcely ever functioned correctly, and a dissatisfied Syme referred the matter to the recently established Small Claims Tribunal, claiming a refund of the purchase price, which the Tribunal ordered, allowing Syme to keep the television set as well. The applicants argued, inter alia, that the Tribunal had exceeded its jurisdiction in making such an order, relying heavily on *Anisminic*. In pursuance of this reliance Gowans J. quoted at length passages from each of the majority judgments in *Anisminic* and stated[80]

> I do not take these observations to justify the proposition that if a tribunal fails to take something into account which is relevant the result is invalidity. It is only when, by doing so, the tribunal steps outside jurisdiction that nullity is the result.

Further to this Gowans J. expressly rejected the argument of Gould that any error of law must go to jurisdiction, preferring to refer to a passage from the more cautious Wade. Having rejected any wider application of *Anisminic,* it is significant that Gowans J. then puts aside *Anisminic* itself, and proceeds to decide the case by reference to earlier Victorian authority, concluding[81]

> If it appeared from the material that the Tribunal had considered that the law was not relevant at all, or if it was, that it did not authorise its order, or that it had not concluded that it did, there would be a case for treating the order as made without fulfilment of the conditions and therefore without jurisdiction. This was the approach of Smith J. in *R.* v. *Chairman of General Sessions at Hamilton, ex parte Atterby.*[82] But there is nothing in the material to show that the Tribunal did not conclude that the law authorised the order made. All that appears is that the Tribunal was itself in error in concluding that the law authorised the order. This is not enough to show a want or excess of jurisdiction.

While the case may be wrongly decided — Gowans J. had earlier indicated that the law had not been adverted to at all[83] — the *Small Claims Tribunal*

79. [1975] V.R. 831.
80. Ibid., 840.
81. [1975] V.R. 831, 841.
82. [1959] V.R. 800.
83. [1975] V.R. 831, 839.

case is significant for two reasons: first, it constitutes express rejection of the wider applications of *Anisminic* and shows that unreviewable errors of law are still identifiable, and secondly, it points to a weakness in *Anisminic* — while giving a wide range of examples which *may* go to jurisdiction, *Anisminic* is singularly unhelpful in determining when they will. Only the two situations given by Lord Wilberforce are of assistance in answering this question, and judges such as Gowans J. and Cooke J. in *Car Haulaways* revert to earlier authority to decide jurisdictional issues.

D. Great Britain

In Britain the cases in which *Anisminic* has been considered or applied are few, no doubt due to the increased rights of appeal from tribunals to the courts and to the fact that the Tribunals and Inquiries Act 1958 made challenge on jurisdictional grounds unnecessary in most cases. Nevertheless *Anisminic* has had possibly more of an impact in Britain than elsewhere.

Anisminic has featured in only three reported British cases, and in the first of these, *Aldridge* v. *Simpson-Bell,*[84] the jurisdictional issues were evaded by Lord Fraser, employing a technique somewhat similar to that used by the New Zealand Court of Appeal in the *Car Haulaways* case. The second case, *R.* v. *Southampton Justices, ex parte Green,*[85] has resulted in changes of some significance. In that case the applicant, Mrs Green, had entered a surety of £500 for her husband, who had been charged with importing cannabis. Despite his wife's efforts to ensure his attendance, Mr Green decamped, and, as a result, the Justices, who had a discretion as to whether or not the surety should be forfeited, ordered the forfeiture of Mrs Green's surety. In so ordering the Justices erred in failing to consider whether or not Mrs Green had made any efforts to ensure her husband's attendance, and considered the value of her husband's boat as relevant to her means. The Court of Appeal was unanimous in deciding that affidavit evidence of those errors was sufficient to warrant certiorari for error of law on the face of the record, but Lord Denning M.R. went further, saying[86] "This case comes within the category of 'want of jurisdiction'. The scope of this category is very wide, as is shown by *Anisminic* v. *Foreign Compensation Commission* . . ." He then cited a passage from the judgment of Lord Pearce in *Anisminic* and continued[87]

> Applying these words, it seems to me that, if the Justices fail to take into account matters which they should take into account, or vice versa, they step outside their jurisdiction.

Lord Denning was thus prepared to give *Anisminic* a wide application, equating abuse of discretion with excess of jurisdiction, but Browne L.J. whose judgment at first instance in *Anisminic* was ultimately upheld by the House of

84. (1971) S.C. 87. Note also the similar decision of Wilson J., anticipating the House of Lords in *Anisminic,* in *Rural Co-Operative Society* v. *Thomson* [1969] N.Z.L.R. 300.
85. [1976] Q.B. 11.
86. Ibid., 21.
87. Idem.

Lords, was more cautious, saying[88] "On reflection, I feel very doubtful whether the exercise of a discretion on wrong principles can really be said to be a case of 'lack' or 'excess' of jurisdiction."

The third member of the Court of Appeal, Brightman J., somehow managed to agree with both views, before Lord Denning made the additional comment[89] "I would like to say that I agree with the alternative way in which Browne L.J. puts it."

Other than being a classic example of the confusion *Anisminic* has brought to jurisdictional matters, it is hard to know exactly what the *Green* case decided on the jurisdictional issue. The closing remarks of Lord Denning would, despite the views expressed in his judgment, tend to indicate that the opinion of the Court of Appeal is that stated by Browne L.J., and that therefore while the Justices had exercised their discretion erroneously, they had not exceeded their jurisdiction.

That this is the correct interpretation of the *Green* case is confirmed by the similar case of *R.* v. *Southampton Justices, ex parte Corker,*[90] in which the Divisional Court, presided over by Lord Widgery C.J., after considering the *Green* case stressed that certiorari would not go to quash the erroneous exercise of such a discretion unless the errors were apparent on the face of the record, from which it would seem to follow that the errors in question were not jurisdictional. Lord Widgery's interpretation of the *Green* case in *Corker* is, however, hard to reconcile with his later views in *R.* v. *Horseferry Road S.M., ex parte Pearson,*[91] another case involving the forfeiture of a surety on wrong principles. There Lord Widgery stated that the *Green* case "entirely rightly" shows that it is not necessary to show an error of law on the face of the record since the forfeiture of a surety on wrong principles involves an excess of jurisdiction.[92]

Two interpretations of the above three cases are possible: first, that all errors of law are jurisdictional errors, and second, that an abuse of discretion may be equated with an excess of jurisdiction. The first interpretation is, it is submitted, untenable in the particular circumstances of the above cases as the *Corker* case would seem to decide otherwise, and untenable as a general proposition as recent British cases such as *R.* v. *Preston Supplementary Benefits Appeal Tribunal, ex parte Moore,*[93] show not only that errors of law within jurisdiction are possible, but also that the British courts may not be prepared to review some errors of law unless they are unreasonable — an interesting parallel with the attitude of the Supreme Court of Canada in the *Nipawin Nurses* case considered earlier.

The second interpretation gains some support from the conclusions of Smillie[94] and from the fact that the well known words of Lord Greene M.R. in

88. [1976] Q.B. 11, 22.
89. Idem.
90. (1976) *The Times,* 12/2/76.
91. [1976] 1 W.L.R. 511.
92. Ibid., 513.
93. [1975] 1 W.L.R. 624 (C.A.). See also *R.* v. *Barnsley Supplementary Benefits Appeal Tribunal, ex parte Atkinson,* [1976] 1 W.L.R. 1047 (D.C.); noted by J. McBride, "Supplementary Benefits and Judicial Review", [1976] C.L.J. 196.
94. Op. cit.

Associated Provincial Picture Houses v. *Wednesbury Corporation*[95] concerning abuse of discretion

> . . . whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account matters which they ought to take into account.

— closely resemble the remarks of Lord Reid in *Anisminic* concerning excess of jurisdiction[96]

> It may have refused to take into account something which it was required to take into account. Or it may have based its decision some matter which . . . it had no right to take into account.

This interpretation would, however, run contrary to the words of Browne L.J. in the *Green* case and, although some support for it may be found in Canada,[97] would seem not to be accepted in New Zealand.[98] The increasing use of 'reasonableness' in relation to errors of law in Canada and in Britain may, however, indicate that the two heads of review are again drawing together.[99]

The British situation is therefore confused. The answer to this confusion may lie in the context within which the above cases have arisen. Since there is, in Britain, no right of appeal against the forfeiture of a surety,[1] the courts may be more inclined to exercise stringent supervisory functions over the jurisdiction of Justices. Yet even within this context the *Southampton Justices* and *Horseferry S.M.* cases appear irreconcilable.

If the *Southampton Justices* line of cases indicates that the length to which jurisdictional review will be taken is dependent on the context of the exercise of jurisdiction, that indication is taken further by the third British case in which *Anisminic* has been considered, *R.* v. *Secretary of State for the Environment, ex parte Ostler.*[2] In that case the applicant sought to quash a compulsory purchase order made one and a half years previously on the grounds that it was made in bad faith and contrary to the rules of natural justice. The order was protected by a privative clause which provided that the order could only be challenged within six weeks of its being made. Twenty years earlier a similar case, *Smith* v. *East Elloe R.D.C.*,[3] had been before the House of Lords which then decided that such a clause excluded *all* judicial review outside the six week period. In *Anisminic* the majority of the House of Lords had all cast doubts on

95. [1948] 1 K.B. 223, 233-234.
96. [1969] 2 A.C. 147, 171.
97. In *Schwartz* v. *Bread and Cake Workers Union* (1975) 6 A.P.R. 606.
98. In this respect compare *Commercial Broadcasting* v. *N.Z.B.A.* [1972] N.Z.L.R. 550, and *N.Z.B.C.* v. *Stewart* [1972] N.Z.L.R. 556, both noted by D. J. Mullan, "Abuse of Discretion: Jurisdictional Error?" (1973) 5 N.Z.U.L.R. 280. See also the remarks of Cooke J. in the *Engineering Union* case.
99. The two grounds of review would seem to have a common origin in cases such as *Rooke's Case* (1598) 5 Co. Rep. 99b.
1. In New Zealand there is. See Summary Proceedings Act, 1958, s. 115.
2. [1977] 1 Q.B. 122. Noted by A. G. Keesing, "Administrative Law—Another Retreat?", [1976] N.Z.L.J. 467, and by H. W. R. Wade, "Anisminic v. East Elloe", (1977) 93 L.Q.R. 8.
3. [1956] A.C. 736.

the *East Elloe* case, in particular Lord Reid[4] "I cannot regard it as being a very satisfactory case."[5] In the *Ostler* case the question arose as to whether or not *East Elloe* was still good law after *Anisminic*. The Court of Appeal held it was.

Lord Denning, with whom Shaw L.J. agreed, felt *Anisminic* was distinguishable on three grounds.[6] The first was that the privative clause in *East Elloe* (and in the *Ostler* case) was not a complete ouster clause and allowed some judicial review whereas the clause in *Anisminic* was. While one could argue the significance of this distinction on the grounds that if the order was made in excess of jurisdiction there would be nothing for the clause to protect, it does have some limited validity, it being possible to view the *East Elloe* type clause as being akin to a statutory period of limitation and an express indication by Parliament that it does not want the usual rules of interpretation of privative clauses to apply.[7] Significantly, Goff L.J. could not agree with this distinction.[8]

The second point of distinction, on which the Court of Appeal were unanimous, was that the decision in *Anisminic* had been 'judicial', whereas the decision in *East Elloe* and in *Ostler* was 'administrative'. This again is a distinction of doubtful validity, given that the judicial-administrative dichotomy would seem to have died with the decision in *Ridge* v. *Baldwin*.[9]

The validity of the first two distinguishing factors given by the Court of Appeal is, however, of little significance in view of the third distinction given by the Court of Appeal, which is that the decision in *Anisminic* was made in excess of jurisdiction whereas the order in the *Ostler* case was within jurisdiction. Lord Denning preferred to refer to this distinction as being a distinction between the actual decision and the process by which it was made,[10] but the point is perhaps made most clearly by Shaw L.J. who noted that in *Anisminic* the decision could never have been validly made, whereas in *Ostler* it could have been.[11] In reality the Court of Appeal is intimating that there is a distinction between the excess of powers and the abuse of powers. In so intimating Lord Denning and Shaw L.J. ignored that in *Anisminic* Lord Reid by asserting that bad faith or failure to comply with the rules of natural justice would go to jurisdiction[12] had denied that such a distinction existed, a point noted by Goff L.J. who was nevertheless unconvinced.[13] Given the Court of Appeal's decision on this third point, it was unnecessary for it to have dealt with the first two points. Indeed it would have been preferable for it not to have done so. If the clause ousted all judicial review, why was the issue of jurisdiction relevant,

4. Who had dissented in the *East Elloe* case.
5. [1969] 2 A.C. 147, 170.
6. [1977] 1 Q.B. 122, 135.
7. See Wade, op. cit., 209.
8. [1977] 1 Q.B. 122, 138.
9. [1964] A.C. 40. See also the virtual denial of the distinction in *R.* v. *London Borough of Hillingdon, ex parte Royco,* [1974] Q.B. 720, and by Lord Denning himself since the *Ostler* case in *R.* v. *Barnsley M.B.C., ex parte Hook,* [1976] 1 W.L.R. 1052, 1057. (D.C.).
10. [1977] 1 Q.B. 122, 135.
11. Ibid., 99.
12. [1969] 2 A.C. 147, 171.
13. [1977] 1 Q.B. 122, 137.

and if the decision was 'administrative' rather than 'judicial', why was the Court of Appeal speaking in terms of jurisdiction rather than *vires*?

Despite the fact that the *Ostler* case must be seen as largely unsatisfactory, it is illustrative of two important points. First, it has again been made clear that errors of law within jurisdiction remain possible, although on this point *Ostler* must be treated as doubtful authority, and secondly, the occasion for jurisdictional review is dependent on the circumstances of the case and the nature of the jurisdiction exercised. As Lord Denning put it in the *Ostler* case[14]

> But in an administrative decision (such as a compulsory purchase order) the public interest plays an important part. The question is, to what extent are private interests to be subordinated to the public interest?

Viewed in the light of this statement many of the decisions canvassed in this article become clearer. For example, the reluctance of the New Zealand Court of Appeal to intervene in *Car Haulaways,* where the Transport Act 1962 made it clear that the overriding concern was the public interest. Similarly the broad view of jurisdictional questions taken in the British surety cases becomes readily explicable, as does the distinction between *Anisminic,* in which an individual's right to compensation was in issue, and the *Ostler* case, in which questions of compensation were not in issue, but rather the question of the public interest in upholding planning matters thought valid for nearly two years and on which the public had presumably relied.

IV. CONCLUSIONS

It will have become apparent from the cases canvassed above that the field of jurisdictional review remains as confused as ever. A wide variety of errors of law have been held to go to jurisdiction, yet the courts have affirmed that unreviewable errors of law within jurisdiction still exist. On some types of error opinions differ. Thus in New Zealand judicial opinion would seem to indicate that questions of construction should be a matter for the courts, while in Canada and in Britain the courts are prepared to give tribunals more latitude on questions of construction. Similarly, in New Zealand matters of discretion would seem to be within jurisdiction while in Canada and in Britain they appear to be treated as being capable of going to jurisdiction. If anything, there may be more confusion on jurisdictional questions in the post-*Anisminic* era than before that case.

In this state of confusion one thing seems relatively certain, that is that while it may have been a reasonable assumption in view of the then prevailing circumstances to have treated *Anisminic* as representing the intersection of error of law and jurisdictional error, errors of law are not necessarily jurisdictional. Thus the one commentator who asserted that they must be, B. C. Gould, has been conclusively proved wrong. Those commentators who claimed that the

14. Ibid., 95. Lord Denning's opinion on this question would seem to have changed since he delivered his judgment in *Bradbury* v. *Enfield R.D.C.* [1967] 1 W.L.R. 1311, in which he felt the "Rule of Law" required the closure of an almost complete school built ultra vires.

result of *Anisminic* would be that almost any error of law might constitute a jurisdictional error have been proved right up to a point — *Anisminic* has provided the courts with a tool which enables them to treat any error of law as jurisdictional. The extent to which the courts will be prepared to use that tool depends largely on the nature of the jurisdiction in question and the context within which it is exercised.

Whether the majority Law Lords in *Anisminic* intended to provide such a tool is doubtful. If the majority of the House of Lords were attempting anything other than the resolution of a difficult case, it seems likely, as Cooke J. implied in the *Engineering Union* case,[15] that they were attempting to establish affirmatively that jurisdiction could be exceeded after the commencement of the inquiry, thereby finally banishing the already ailing 'jurisdiction is determinable only at the commencement' theory. That no judge since *Anisminic* has adopted that theory evidences that they may well have succeeded in doing so. However in so doing they have clearly provided a means of converting almost any error of law into a jurisdictional error. The operation of this conversion is, however, dependent on largely the same factors as were influential prior to *Anisminic*. As Lord Denning put it "The question is, to what extent are private interests to be subordinated to the public interest."[16]

Judicial answers to Lord Denning's question are, it is submitted, likely to be guided by "the form and subject matter of the legislation"[17] as made clear by Lord Wilberforce in *Anisminic*. Judicial perceptions of those matters are, as *Car Haulaways* shows, likely to differ, and so the practical effect of *Anisminic* is that it gives the judiciary more room in which to move. Thus decisions on jurisdictional questions are likely to remain as confusing as ever.

15. [1976] 2 N.Z.L.R. 283, 301.
16. [1977] 1 Q.B. 122, 135.
17. [1969] 2 A.C. 147, 209.