JUDICIAL REVIEW — 'NO EVIDENCE'

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I. Introduction

One possible common law ground for judicial review of a judicial or quasi-judicial administrative decision is the allegation that the decision-maker acted without evidence. The nature of this so-called 'no evidence' ground is surrounded by confusion. In fact, the status of 'no evidence' as a legitimate independent ground of review in Manitoba is uncertain. In other jurisdictions such uncertainty has resulted in legislation which provides that lack of evidence or insufficiency of evidence is a ground for judicial review.[1] In Manitoba, the ground of 'no evidence' is derived from a variety of common law and statutory sources.

II. 'No Evidence' and the Common Law

Most of the confusion regarding 'no evidence' flows from the 1922 Privy Council decision of *R.* v. *Nat Bell Liquors Ltd.*[2] Nat Bell Liquors was convicted under Alberta liquor legislation of unlawfully keeping a quantity of liquor for sale. The conviction was based almost totally on the evidence of one witness who testified that an employee of Nat Bell Liquors had sold him twelve bottles of whiskey. However, the witness had previously been convicted of stealing beer and his credibility was impeached on cross-examination when he denied this fact. The Alberta Court of Appeal held that there had been no evidence before the magistrate to support the conviction and quashed it on certiorari.[3] The Privy Council reversed this decision holding that the absence of evidence does not affect the jurisdiction of a magistrate to try a charge. In a frequently quoted passage, Lord Sumner stated that:

> To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all.[4]

Since this decision, courts have struggled with Lord Sumner's reasoning in attempts to avoid the concept that once initial jurisdiction is established it cannot be lost. Today, the initial jurisdiction theory is generally accepted as erroneous.[5] A hearing properly begun may be nullified by a variety of events, such as a breach of the rules of natural justice or consideration of irrelevant matters.[6]

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1. *Federal Court Act*, S.C. 1970-71-72, c. 1, s. 28(1); *Judicial Review Procedure Act*, R.S.O. 1980, c. 224, s. 2(3); Australia, *Administrative Decisions (Judicial Review) Act 1977*, No. 59 of 1977; United States, *Administrative Procedure Act*, 5 U.S.C.A., § 706 (2) (E).
2. [1922] 2 A.C. 128 (P.C.).
3. (1920-21), 16 A.L.R. 149 (Alta. C.A.).
4. *Supra* n. 2, at 152.
5. *Toronto Newspaper Guild* v. *Globe Printing Company*, [1951] 3 D.L.R. 162 (Ont. H.C.); *R.* v. *White* (1962), 39 W.W.R. 425 (Alta. S.C.); *Anisminic Ltd.* v. *Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.).
6. H. Whitmore and M. Aronson, *Review of Administrative Action* (1978) 277.

Despite acceptance of the fact that Lord Sumner's theory of initial jurisdiction is wrong, there remains the proposition in the *Nat Bell Liquors* case that absence of evidence is not a ground for judicial review. It is accepted that the administrative tribunal itself is the best judge of factual material. The tribunal has the advantage of hearing and seeing the witnesses. Further, the review of evidence is an appellate function and the right to appeal can only be derived from statute. Nevertheless, courts have demonstrated great ingenuity in either sidestepping *Nat Bell Liquors* or ignoring it altogether to formulate a 'no evidence' ground of review.[7] Such covert judicial efforts, combined with the willingness of some courts to apply *Nat Bell Liquors*,[8] has led to confusion.

Today it can be stated with certainty that 'no evidence' exists in Canada as a common law ground for judicial review.[9] As well, it is established that for a decision-maker to find facts without evidence is to err in law.[10] Only the nature and scope of 'no evidence' remains uncertain.

III. Existence of Evidence v. Weighing of Evidence

The standard of proof required by administrative tribunals is relevant to a discussion of 'no evidence'. However, it is difficult to make an authoritative statement regarding standard of proof because of the diversity of subject matter and procedure with which administrative tribunals are involved. It is often said that administrative tribunals are not bound by the strict rules of evidence which apply to civil proceedings.[11] But, as Adamson C.J.M. pointed out in the 1961 case of *Young* v. *Johnson*, "That is quite a different thing to saying that the committee does not require proof or evidence of any kind".[12] (It should be noted that *The Manitoba Evidence Act* applies to most administrative hearings.[13]) The standard of proof regarding administrative tribunals is the normal standard in civil proceedings. This standard is proof on the balance of probabilities.[14] However, a more flexible standard of proof for administrative tribunals was discussed in the 1977 case of *Re Bernstein and College of Physicians and Surgeons of Ontario*,[15] in which O'Leary J. stated that

> before reaching a conclusion of fact, the tribunal must be reasonably satisfied that the fact occurred, and whether the tribunal is so satisfied will depend on the totality of the circumstances including the nature and consequences of the fact or facts to be proved, the seriousness of the allegation made, and the gravity of the consequences that will flow from a particular finding.[16]

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7. D.J. Mullan, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform?" (1973), 23 U. of T. L.J. 14 at 39.
8. *R.* v. *Peterborough Police Commissioners, Ex Parte Lewis*, [1965] 2 O.R. 577 (C.A.).
9. *R.* v. *Ontario Racing Commission, Ex Parte Taylor*, [1971] 1 O.R. 400 (C.A.).
10. *R.* v. *Kyling* (1970), 15 D.L.R. (3d) 351 (S.C.C.); *Westburne Industrial Enterprises Ltd.* v. *Labour Relations Board*, [1973] 6 W.W.R. 451 (B.C.S.C.); aff'd [1974] 1 W.W.R. 572 (B.C.C.A.).
11. *R.* v. *Deputy Industrial Injuries Commissioner, Ex Parte Moore*, [1965] 1 Q.B. 456 (C.A.).
12. *Young* v. *Johnson* (1961), 34 W.W.R. 385 at 391 (Man. C.A.).
13. C.C.S.M., c. E150, (s. 2(a) includes in the term "action" any civil proceeding, inquiry, or arbitration. s. 2(d) includes in the term "court" a judge, arbitrator, commissioner, or person before whom a legal proceeding is held. And, s. 2(f) defines "legal proceeding" as including any civil proceeding, inquiry or arbitration).
14. J.A. Kavanagh, *A Guide to Judicial Review* (1978) 58.
15. (1977), 15 O.R. (2d) 447 (Div. Ct.).
16. *Ibid.*, at 470.

Regardless of what the standard of proof might be, there must be something more than the mere existence of evidence in order to justify a tribunal making a particular finding. Thus the question arises as to whether the 'no evidence' ground of review may be extended to include the review of sufficiency of evidence. Where does the determination of the existence of evidence stop and the weighing of evidence begin?

It has been suggested that *Nat Bell Liquors* did not deny the existence of 'no evidence' as a possible ground of review, but rather denied the courts' power to review the weight or sufficiency of evidence.[17] In *Nat Bell Liquors* there was some evidence. It is frequently asserted by courts that the weighing of evidence is an appellate function.[18] But, because the distinction between the existence of evidence and the sufficiency of evidence is blurred, courts will often weigh evidence to decide if in fact it is evidence.

In the 1952 English case of *Lee* v. *Showmen's Guild of Great Britain* Lord Denning stated that 'no evidence' extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding.[19] Lord Denning repeated this test in 1965 in *Re Stalybridge; Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government.*[20] This case was discussed in the recent British Columbia case of *Re McInnes and Simon Fraser University.*[21] McLachlin J. noted the illusory nature of the distinction between the determination of the existence of evidence and the weighing of evidence:

> The requirements which must be met if a court is to set aside the decision of an inferior tribunal for 'no evidence' are clearly established. If the decision is to be upheld, there must be some evidence logically capable of supporting the conclusion to which the tribunal has come. Such evidence is sometimes referred to as evidence which "reasonably" supports the conclusion, leading to statements such as that found in *Re Stalybridge, supra,* to the effect that the conclusion must be one to which the tribunal could reasonably have come on the evidence. Such language does not, in my view, authorize the court to embark on the exercise of weighing and evaluating evidence which was properly received by the committee and which possesses some probative value. The court of review remains confined to the initial question of whether there is some evidence capable of supporting the committee's conclusion.[22]

The concept of "some evidence logically capable of supporting the conclusion" certainly goes beyond determining the mere existence of evidence. Although the process may not involve a full review of evidence, there will, by necessity, be an element of weighing of evidence.

As one writer has suggested, even within a strict "existence of evidence" determination it may be possible to embark on a sweeping review of evidence; by regarding lesser issues in a decision as subsidiary decisions each would require "some" evidence.[23] As well, it has been held that evidence

17. D.W. Elliott, "'No Evidence': A Ground of Judicial Review in Canadian Administrative Law?" (1972), 37 Sask. Law Rev. 48 at 58.

18. *City of Vancouver* v. *Brandram-Henderson of B.C. Ltd.* (1960), 23 D.L.R. (2d) 161 (S.C.C.); *Minister of Transport* v. *Tudor Estates Ltd.* (1980), 19 L.C.R. 325 (B.C.S.C.).

19. [1952] 1 All E.R. 1175 (C.A.); *Secretary of State for Education and Science* v. *Metropolitan Borough of Tameside,* [1976] 3 All E.R. 665 (C.A.).

20. [1965] 1 W.L.R. 1320 at 1326 (C.A.).

21. (1982), 140 D.L.R. (3d) 694 (B.C.S.C.); aff'd on other grounds (1984), 3 D.L.R. (4th) 708 (B.C.C.A.).

22. *Ibid.*, at 698.

23. *Supra* n. 17, at 76.

must have some probative value to be admissible before an administrative tribunal.[24] The question of probative value requires the weighing of evidence.

Although most cases deny that sufficiency of evidence is a ground for review there is some authority to the contrary. In the 1952 Supreme Court of Canada decision in *Labour Relations Board (B.C.)* v. *Canada Safeway Ltd.*, obiter dicta statements of Taschereau J., Rand J. and Cartwright J. indicate that the sufficiency of the evidence before the board was relevant to their decision to uphold the board's decision.[25] In particular, Rand J. indicated that a finding of fact by the board was unimpeachable "so long as its judgment can be said to be consonant with a rational appreciation of the situation presented".[26]

It appears that while courts may disclaim the power to review the weight or sufficiency of evidence, the extent of review does go beyond the strict "existence of evidence" basis of the 'no evidence' ground of review. The courts seem to be encroaching on an appellate jurisdiction. It is questionable whether this is a desirable state of affairs. Professor Mullan asks "Where should the balance be struck between the need for efficient, specialist tribunals and the expectation of the public to receive protection from unwarranted arbitrary action on the part of these same tribunals?"[27]

IV. Jurisdictional Error v. Error on the Face of the Record

At common law, on the review of administrative decisions certiorari is only available if there is an error of law which appears on the face of the record, or if there is any error which deprives the tribunal of its jurisdiction. In the latter case, the error need not appear on the face of the record. The finding of facts on no evidence is an error of law.[28] However, the question remains as to within which of the two categories of error 'no evidence' falls. The weight of authority favours the proposition that 'no evidence' is an error going to jurisdiction.[29] However, there is authority which states that 'no evidence' is an error of law on the face of the record.[30]

Woodward Stores (Westmount) Ltd. v. *Alberta Assessment Appeal Board* held that reaching a conclusion with no evidence was not a jurisdictional defect.[31] The court stated that if the record of the proceedings before an inferior tribunal discloses that the tribunal made a finding of fact wholly unsupported by the evidence, the lack of evidence would be an error of law appearing on the record and the court could intervene. The earlier Supreme

24. *Re Sisters of the Charity, Providence Hospital and Labour Relations Bd.*, [1951] 3 D.L.R. 735 (Sask. C.A.).

25. [1953] 2 S.C.R. 46.

26. *Ibid.*, at 54-55.

27. *Supra* n. 7, at 41.

28. *Supra* n. 10.

29. *R.* v. *White, supra* n. 5; *R.* v. *Council of Pharmaceutical Association (B.C.), Ex Parte Windt* (1967), 65 D.L.R. (2d) 132 (B.C.S.C.); *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government*, [1965] 1 W.L.R. 1320 (Eng. C.A.); *R.* v. *Ontario Racing Commission, Ex Parte Taylor, supra* n. 9; *Westbourne Industrial Enterprises Ltd.* v. *Labour Relations Board, supra* n. 10; *Re McInnes and Simon Fraser University* (1982) 140 D.L.R. (3d) 694 (B.C.S.C.).

30. *City of Vancouver* v. *Brandram-Henderson of B.C. Ltd. supra* n. 18; *Re New Brunswick Registered Nursing Assistants*, [1971] 3 N.B.R. (2d) 532 (N.B.C.A.); *Woodward Stores (Westmount) Ltd.* v. *Alberta Assessment Board Div. No. 1 and City of Edmonton* [1976] 5 W.W.R. 496 (Alta. S.C.).

31. *Supra* n. 30.

Court of Canada decision in *City of Vancouver* v. *Brandram-Henderson of B.C. Ltd.* stated that finding error on the face of the award means finding in the award some erroneous legal proposition which is the basis of the award.[32] However, the finding of error on the face of the record is restricted by the rule that the error must be found on the record itself and not in outside material.[33] This limitation restricts the usefulness of error on the face of the record as a basis for review on the ground of 'no evidence'. The record rarely shows the evidence upon which findings of fact are based.[34] But, what is meant by the term "record"?

Obviously, the scope of review for error on the face of the record depends upon the definition of the "record". In most decisions of inferior tribunals, the record is simply the decision of the tribunal. However, in *Province of Nova Scotia* v. *Seaport Contractors* it was held, following *City of Vancouver* v. *Brandram-Henderson of B.C. Ltd.*, that an arbitrator's "award" included documents incorporated in the award, such as a note appended to the award by the arbitrator giving his reasons for judgment.[35] In a recent criminal case before the Manitoba Court of Appeal, Mr. Justice Matas stated that a magistrate committing an accused for trial at a preliminary inquiry is not obliged to give reasons for committal, but if he does, they form part of the record for the purpose of judicial review.[36] Nevertheless, in most cases it will be difficult to determine from the record whether the tribunal made a decision in the absence of evidence.

The problem of what constitutes the record of proceedings has been dealt with by statute in some jurisdictions. For example, in Ontario the *Statutory Powers Procedure Act* provides:

> 20. A tribunal shall compile a record of any proceedings in which a hearing has been held which shall include,
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> . . .
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> (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceedings;
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> (e) the transcript, if any, of the oral evidence given at the hearing; and
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> (f) the decision of the tribunal and the reasons therefor, where reasons have been given.[37]

However, as will be discussed below, Ontario has also provided statutorily for judicial review on the ground of lack of evidence.

Such is not the case in Alberta where the *Administrative Procedures Act* provides:

> 7. When an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out
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> (a) the findings of fact on which it based its decision, and

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32. *Supra* n. 30.
33. *Woodward Stores (Westmount) Ltd.* v. *Alberta Assessment Appeal Board, supra* n. 30.
34. H.W.R. Wade, *Administrative Law* (4th ed.) 275.
35. (1979), 37 N.S.R. (2d) 57 (N.S.S.C.).
36. *R.* v. *Dubois*, [1983] 1 W.W.R. 97 (Man. C.A.).
37. R.S.O. 1980, c. 484, s. 20.

(b) the reasons for the decision.[38]

This provision could be interpreted as including the evidence supporting the findings of fact.

Aside from general statutory provisions, it is also possible that the statute creating a specific tribunal will require that a record of proceedings be maintained. An obvious example is found in the provincial jurisdiction to enact penal sanctions for enforcing provincial law. *The Summary Convictions Act* deals with the judicial proceedings regarding such offences. Section 18(1) provides:

> 18(1) Notwithstanding any statute or law to the contrary, the evidence taken in connection with any conviction or order shall be treated as part of the conviction or order in any motion, application, or proceedings, other than an appeal to the County Court to quash the conviction or order, whether by certiorari or otherwise.[39]

Because of this section, absence of evidence would be an error of law apparent on the face of the record. Such provisions facilitate judicial review for error on the face of the record. However, in Manitoba there is no uniformity as to what will constitute the "record" of an administrative tribunal as there is in Ontario and, to a lesser extent, in Alberta.

Judicial review for an error which goes to jurisdiction is not limited to an error which appears on the face of the record. Thus the jurisdictional error approach to 'no evidence' is more flexible than error on the face of the record. Courts have frequently held that a tribunal which finds facts on no evidence will lose jurisdiction.[40] Confusion lies in determining whether 'no evidence' is an independent ground for alleging loss of jurisdiction or a variation of one of the other grounds of loss of jurisdiction.

It is often stated by courts that finding facts on no evidence is a denial of natural justice which leads to loss of jurisdiction.[41] The principle of natural justice most resembling 'no evidence' is that of *audi alteram partem.*[42] The person affected must be given a fair chance to put his case before the tribunal. However, it is possible that, despite being given a fair opportunity to be heard, a 'no evidence' decision might result. There may be a lack of evidence on one issue essential to the decision. 'No evidence' is a logical extension and refinement of the *audi alteram partem* principle.

However, there is also authority for the proposition that 'no evidence' is an independent principle of natural justice distinct from *audi alteram partem.*[43] It has been suggested that the common law in Canada will follow this natural justice direction to full recognition of a 'no evidence' principle.[44]

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38. R.S.A. 1980, c. A-2, s. 7.
39. C.C.S.M. c. S230, s. 18(1).
40. *Supra* n. 29.
41. *R.* v. *McMicken* (1923), 41 C.C.C. 156 (Alta. C.A.); *R.* v. *Deputy Industrial Injuries Commissioner, Ex Parte Moore, supra* n. 11; *R.* v. *White, supra* n. 5; *R.* v. *Council of Pharmaceutical Association (B.C.), Ex Parte Windt, supra* n. 29.
42. *Supra* n. 17, at 96.
43. *R.* v. *Deputy Industrial Injuries Commissioner, Ex Parte Moore, supra* n. 11; *R.* v. *White, supra* n. 5.
44. *Supra* n. 17, at 98.

'No evidence' is also similar to the jurisdictional grounds of 'declining of jurisdiction' or 'failure to consider a relevant question'.[45] A tribunal which wrongfully refuses to hear evidence because it does not believe itself to have jurisdiction is guilty of declining jurisdiction.[46] However, unlike 'declining of jurisdiction', 'no evidence' need neither be deliberate nor an error on a collateral matter.[47] It appears that all 'no evidence' cases would readily fall within the 'failure to consider a relevant question' ground of review. But, there is an important distinction between the two principles. 'No evidence' is concerned with the objective procedural requirement that there be relevant material before the tribunal while 'failure to consider a relevant question' is largely concerned with the subjective reasoning process of the tribunal.[48]

A jurisdictional error may also arise as a matter of statutory interpretation. It was stated in *Westburne Industrial Enterprises Ltd.* v. *Labour Relations Board (B.C.)* that in granting jurisdiction to a tribunal the legislature must be taken to have stopped short of granting a power to decide without evidence.[49] Thus a decision with no evidence to support it could be set aside as made in excess of jurisdiction. More specifically, certain statutes creating individual tribunals contain provisions which may be interpreted as precluding decisions based on 'no evidence'. For example, s. 22(2) of *The Arbitration Act* states that where an arbitrator has "misconducted" himself the court may set the award aside.[50] The making of an award without any evidence to support it was "misconduct" under similar British Columbia legislation.[51] More directly, *The Labour Relations Act* provides that an arbitration board "shall hear evidence submitted by or on behalf of the parties to the arbitration".[52] Failure to observe such a provision would lead to loss of jurisdiction. Other statutes governing specific administrative tribunals also have provisions regarding the conduct of hearings which may be used as a jurisdictional basis for the 'no evidence' principle. This is particularly true with respect to criminal matters, as will be discussed below.

There are advantages associated with jurisdictional review which make it preferable to non-jurisdictional review based on error on the face of the record. Most obviously, a jurisdictional error may be established by material not on the face of the record while an error on the face of the record cannot be so established. Another important distinction is that a statutory privative provision will exclude non-jurisdictional review but will generally be ineffective to exclude jurisdictional review.[53] As well, non-jurisdictional errors

45. *Ibid.*, at 94.

46. *Toronto Newspaper Guild* v. *Globe Printing Company*, [1953] 3 D.L.R. 561 (S.C.C.).

47. *Supra* n. 17, at 95.

48. *Ibid.*, at 96.

49. *Supra* n. 10, at 456.

50. C.C.S.M. c. A120, s. 22(2).

51. *City of Vancouver* v. *Brandram-Henderson of B.C. Ltd.*, *supra* n. 18; *Jupiter Estates Ltd.* v. *Board of School Trustees* (1965), 54 W.W.R. 655 (B.C.C.A.).

52. S.M. 1972, c. 75, s. 92.

53. *Labour Relations Bd. (B.C.)* v. *Canada Safeway Ltd.*, [1953] 2 S.C.R. 46; *Re New Brunswick Registered Nursing Assistants*, *supra* n. 30.

must generally be errors of law while jurisdictional errors may be errors of law or fact.[54] As stated above, 'no evidence' is an error of law.[55]

It is logical that given the difficulties associated with non-jurisdictional review, a judicial preference would arise for jurisdictional review. Such appears to be the case as the decisions discussed above reveal a judicial tendency to hold that 'no evidence' is a ground for jurisdictional review. D.W. Elliott suggests that this tendency may be attributed to the *Nat Bell Liquors* case. He reasons that, because *Nat Bell Liquors* reasserted and strengthened the difficulties associated with non-jurisdictional review, it had the effect of contributing to the rise of 'no evidence' as a jurisdictional defect.[56]

V. Criminal Law and 'No Evidence'

Although criminal law falls within the jurisdiction of Parliament, it is an area of law which deserves discussion regarding 'no evidence'. In the context of criminal law, judicial review frequently arises with respect to the conduct of a preliminary inquiry under Part XV of the *Criminal Code*.[57] Section 475 is particularly relevant to the ground of 'no evidence':

> 475(1) When all the evidence has been taken by the justice he shall,
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> (a) if in his opinion the evidence is sufficient to put the accused on trial,
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> (i) commit the accused for trial, or
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> (ii) order the accused, where it is a corporation, to stand trial in the court having criminal jurisdiction; or
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> (b) discharge the accused, if in his opinion upon the whole of the evidence no sufficient case is made out to put the accused on trial.[58]

In 1970 the Supreme Court of Canada dealt with the question of the review of a magistrate's decision on a preliminary inquiry in *Patterson* v. *The Queen*.[59] Judson J. stated emphatically that "if it is sought to review a committal for trial, there is only one ground for action by the reviewing Court and that is lack of jurisdiction".[60] More recently, in the 1980 case of *Forsythe* v. *The Queen*, the Supreme Court repeated this principle.[61] Laskin C.J.C. added that a magistrate will lose jurisdiction if there is a failure to observe a mandatory provision of the *Criminal Code*, or if there is a denial of natural justice.[62] Thus, in the case of an alleged lack of evidence for committal, it might be argued that there was a failure to observe s. 475(1) of the *Criminal Code* or that there was a denial of natural justice. The first of these arguments was discussed in the case of *Re Martin, Simard and*

54. *R.* v. *Northumberland Compensation Appeal Tribunal, Ex Parte Shaw*, [1952] 1 K.B. 338.
55. *Supra* n. 10.
56. *Supra* n. 17, at 89.
57. R.S.C. 1970, c. C-34.
58. R.S.C. 1970, c. C-34, s. 475(1).
59. (1970), 9 D.L.R. (3d) 398 (S.C.C.).
60. *Ibid.*, at 400.
61. (1980), 112 D.L.R. (3d) 385 (S.C.C.).
62. *Ibid.*, at 389.

Desjardins and The Queen.[63] The case involved an application for certiorari to quash committal for trial on the ground of insufficiency of evidence. Estey, C.J.O., relying on *Nat Bell Liquors* and s. 475 of the *Criminal Code,* stated that the committal was not subject to review unless there was a complete absence of evidence. He said:

> Where there is any evidence at all upon a charge or issue arising thereunder, the Provincial Court Judge is called upon by s. 475 of the *Code* to hear it and determine "if in his opinion the evidence is sufficient to put the accused on trial . . ."; and his decision is not subject to review.[64]

Both the British Columbia Court of Appeal and the Ontario Court of Appeal have recently repeated that a magistrate acts within jurisdiction unless he commits without any evidence at all.[65] Thus, in the criminal law, the 'no evidence' ground of review is limited to an "existence of evidence" test and is a jurisdictional defect.[66]

In *Westburne Industrial Enterprises Ltd.* v. *Labour Relations Board (B.C.)* Berger J. of the British Columbia Supreme Court discussed the potentially more limited availability of certiorari in criminal cases than in statutory tribunal cases.[67] In criminal cases there is generally a right of appeal which is usually not available from the decisions of statutory tribunals. Certiorari may be the only means of challenging the decision of a statutory tribunal. As well, in the criminal law, certiorari most often arises to challenge the decision of a magistrate at a preliminary inquiry. The preliminary inquiry is an early stage of the investigative process which will lead to a full review of evidence at trial. In an administrative law context, certiorari arises to challenge the decision of an administrative tribunal, which is the final step in the process.

VI. Statutory Provisions Regarding 'No Evidence' in Other Jurisdictions

A number of jurisdictions have enacted legislation to govern administrative procedure. Some of these jurisdictions have included in the legislation provisions regarding sufficiency of evidence as a ground for judicial review. In Canada s. 28(1) of the *Federal Court Act*[68] and s. 2(3) of Ontario's

63. (1978), 87 D.L.R. (3d) 634 (Ont. C.A.); aff'd (1978), 87 D.L.R. (3d) 704 (S.C.C.).

64. *Ibid.*, at 666.

65. *Re Robertson and The Queen (No. 2)* (1982), 69 C.C.C. (2d) 481 (B.C.C.A.); *Stillo* v. *The Queen* (1981), 60 C.C.C. (2d) 243 (Ont. C.A.).

66. Regarding the judicial review of a magistrate's decision at a preliminary inquiry, it is interesting to note the recent Manitoba Court of Appeal decision in *R.* v. *Dubois,* [1983] 1 W.W.R. 97. In that case the accused was discharged at a preliminary inquiry because Norton P.C.J. held that he was not satisfied beyond a reasonable doubt that there was evidence of the accused's guilt. However, the standard of proof for committal is much lower. The Crown applied for certiorari to quash the discharge, but Wright J. held that as other remedies were available to the Crown he would not grant certiorari. The Court of Appeal reversed this decision and granted certiorari. Monnin J.A. said that it would take clearer words than those of Judson J. in *Patterson* v. *The Queen* (*supra* n. 59) to convince him that *Nat Bell Liquors* was no longer good law. But, he held that Norton P.C.J. had misdirected himself and as the error was apparent on the face of the record the discharge was quashed. Matas J.A. accepted Judson J.'s statement that certiorari was only available for loss of jurisdiction at a preliminary inquiry. However, he held that an error as to the onus borne by the Crown was an error of law which resulted in an excess of jurisdiction. Thus he too granted certiorari although for different reasons. O'Sullivan J.A. held in a dissenting opinion that Norton P.C.J.'s error was an error in law which did not go to jurisdiction. Thus following *Patterson* he would not have granted certiorari. This case, with three entirely different opinions, illustrates the uncertainty surrounding the *Nat Bell Liquors* case and the concept of jurisdictional error.

67. *Supra* n. 10.

68. S.C. 1970-71-72, c. 1, s. 28(1).

Judicial Review Procedure Act[69] are examples of such provisions. Examples in other jurisdictions include s. 5(1)(h) of Australia's *Administrative Decisions (Judicial Review) Act 1977*[70] and s. 706(2)(E) of the American *Administrative Procedure Act.*[71] Although judicial review procedure legislation in British Columbia and New Zealand is based on the Ontario legislation, neither statute has a provision regarding sufficiency of evidence.

A. Canada

In 1971 the Exchequer Court of Canada was transformed into the Federal Court of Canada by the *Federal Court Act.*[72] This transformation endowed the new court with a general judicial review jurisdiction not previously enjoyed by the Exchequer Court. Section 28(1) of the Act is particularly relevant to the 'no evidence' ground of review:

> 28(1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal
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> (a) failed to observe a principle of nature justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.[73]

First, this section maintains the common law dichotomy between administrative decisions and judicial, or quasi-judicial, decisions. The grounds of review listed do not apply to administrative decisions. Although s. 28(1)(c) deals expressly with 'no evidence' it might be possible to fit 'no evidence' into s. 28(1)(a) or s. 28(1)(b) either as a denial of natural justice or as an error of law. However, it appears that s. 28(1)(c) would provide for a much broader review of evidence.

Thurlow J. discussed the limitations on the broad scope of review under s. 28(1) in *Re Commonwealth of Puerto Rico and Hernandez (No. 2):*

> The grounds upon which an application under s. 28 of the *Federal Court Act* may be made, as set out in that section, are defined broadly enough to include any question of law or jurisdiction. The nature of the proceeding, however, is not that of a rehearing of the matter but is a review of the legality of what has transpired and this Court, while authorized to set the decision or order aside and to return the matter to the tribunal with directions, is not empowered, as is usual under appeal provisions, to give the decision or order that, in its opinion, the tribunal ought to have given. Nor is the Court authorized to reweigh the evidence and substitute its own view of the facts for that reached by the tribunal. In this area the jurisdiction is merely to set aside a decision based on a finding of fact that is not sustainable in law and thus falls within the meaning of s. 28(1)(c).[74]

69. R.S.O. 1980, c. 224, s. 2(3).
70. No. 59 of 1977.
71. 5 U.S.C.A. § 706(2) (E).
72. S.C. 1970-71-72, c. 1, s. 28(1).
73. S.C. 1970-71-72, c. 1, s. 28(1).
74. (1973) 42 D.L.R. (3d) 541 at 542 (Fed. C.A.).

Despite Thurlow J.'s statement that the Court has no power to weigh evidence under s. 28(1)(c), the contrary might be argued. It is possible that a finding of fact with some evidence to support it was made in a "perverse or capricious manner or without regard for the material before it".[75] However, Heald J. of the Federal Court of Appeal recently stated that the Court will not interfere unless there is a complete absence of evidence.[76] He reasoned that the tribunal had the legal authority and expertise necessary to evaluate the evidence. Thus, s. 28(1)(c) has been given a more limited scope than its wording might indicate.

In the light of s. 28(1)(b), dealing with error of law, and the cases referred to above, it is doubtful whether s. 28(1)(c) has any independent meaning. It seems that s. 28(1)(c) is regarded as merely a more specific example of error of law under s. 28(1)(b).[77] Furthermore, s. 28(1)(b) removes the common law requirement that the error appear on the face of the record.

B. Ontario

Ontario's *Judicial Review Procedure Act* contains a provision regarding judicial review on the grounds of 'no evidence' which is more restricted than that in the *Federal Court Act*. Section 2(3) reads:

> 2(3) Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review.[78]

This section forecloses the possibility of a reviewing court weighing evidence. As well, review on the basis of lack of evidence is thereby restricted to those tribunals which are required by statute or by law to base findings of fact on evidence admissible before them. The situation is similar to that discussed above in which 'no evidence' was found to be a jurisdictional defect arising from interpretation of the statute creating the tribunal. In fact, in the one reported case considering s. 2(3) the Ontario Court of Appeal characterized absence of evidence under the section as a jurisdictional error.[79]

C. Australia

The Australian *Administrative Decisions (Judicial Review) Act 1977* also has a provision regarding 'no evidence'. Section 5(1)(h) reads:

> 5(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Court for an order of review in respect of the decision on any one or more of the following grounds:
>
> . . .
>
> (h) that there was no evidence or other material to justify the making of the decision.[80]

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75. *Supra* n. 14 at 55.
76. *Sarco Canada Ltd.* v. *Anti-dumping Tribunal*, [1979] 1 F.C. 247 at 254 (Fed.C.A.).
77. *Supra* n. 7, at 55.
78. R.S.O. 1980, c. 224, s. 2(3).
79. *Re Keeprite Workers' Independent Union* (1980), 29 O.R. (2d) 513 (Ont. C.A.).
80. No. 59 of 1977, s. 5(1)(h).

However, this provision is qualified by s. 5(3):

> 5(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless —
>
> (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he was entitled to take notice) from which he could reasonably be satisfied that the matter was established; or
>
> (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.[81]

Section 5(3)(a) limits review to situations where the decision-maker was required by law to reach a decision only if a particular matter was established. This restriction is similar to that contained in Ontario's legislation. But, s. 5(3)(b) appears to provide for review of the existence of all findings of fact upon which a decision is based, whether jurisdictional or apparent on the face of the record. Griffiths has suggested that unless this provision is read down it will effectively create an appellate jurisdiction from administrative findings of fact in Australia.[82]

In addition to s. 5(1)(h), s. 5(1)(f) of the *Administrative Decisions (Judicial Review) Act* provides that an error of law, whether or not the error is apparent on the record, is a ground for judicial review. This section could be applied to a case which falls outside s. 5(1)(h). The situation is similar to that discussed with respect to s. 28 of the *Federal Court Act*.

D. United States

The intent of the statutory provisions discussed above is, generally, to restrict judicial review of the evidence before administrative tribunals to the existence of the evidence. Even where the wording of a provision suggests an interpretation which might lead to a weighing of evidence, Canadian courts have disclaimed such jurisdiction.[83]

In the United States the weighing of evidence is an accepted part of judicial review. The *Administrative Procedure Act* provides:

> 706 To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —
>
> . . .
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be —
>
> . . .
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.[84]

This provision establishes a standard of proof necessary for the decisions of administrative tribunals. It also establishes a jurisdiction in the reviewing court to weigh the evidence before the tribunal. The provision is discussed

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81. No. 59 of 1977, s. 5(3).

82. J. Griffiths, "Legislative Reform of Judicial Review of Commonwealth Administrative Action", (1978) 9 Fed. Law Rev. 42 at 60.

83. *Supra* n. 74.

84. 5 U.S.C.A. § 706 (2) (E).

in the United States Supreme Court decision of *Universal Camera Corporation* v. *National Labor Relations Board*.[85] In that case Frankfurter J. stated that "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".[86] Such a standard of review approaches an appellate jurisdiction much more closely than Canadian courts appear to feel desirable. The American administrative process is said to be highly judicialized.[87] The process of review of findings of fact in the United States is facilitated by the fact that comprehensive records of agency proceedings including evidence are compiled. It is arguable that these qualities in the American system greatly decrease the intended efficacy and expediency of administrative law.

VII. Conclusions

It may be concluded that 'no evidence' does exist as a ground for judicial review of the judicial or quasi-judicial decisions of administrative tribunals. The scope of review is limited to a determination of the existence of evidence before the tribunal. However, it appears that this determination will often involve the weighing of evidence. The weighing of evidence is frequently disclaimed as an appellate function which has no place in judicial review. Yet, without the 'no evidence' ground of judicial review, a person aggrieved by the decision of a tribunal would often be without a remedy.

It seems clear that a tribunal which finds facts with a lack of evidence commits a jurisdictional error. This conclusion is most readily reached on the basis of natural justice or statutory interpretation. But it remains arguable that 'no evidence' is an error of law on the face of the record and thus subject to the restrictions of that basis of review.

The judicial review of the decisions of magistrates at preliminary inquiries conducted under the *Criminal Code* provides the least ambiguous authority regarding 'no evidence'. This clarity is likely the result of the mandatory nature of *Criminal Code* provisions and the numerous authoritive decisions handed down on the subject by the Supreme Court of Canada. In the criminal law, it is clear that a committal for trial based upon a total lack of evidence is a jurisdictional defect.

The *Federal Court Act* and Ontario's *Judicial Review Procedure Act* present two opposite statutory approaches to 'no evidence'. Ontario has restricted 'no evidence' to findings of fact by tribunals required by law to base their decisions on admissible evidence. As well, the ground of review is jurisdictional and limited to the existence of evidence. Conversely, the *Federal Court Act* appears to allow for a broad scope of review on 'no evidence' as an error of law which might even extend to the sufficiency of evidence. But the Federal Court of Appeal has been unwilling to give the Act an interpretation which would confer on it a near appellate jurisdiction

85. 340 U.S. 474 (1951).

86. *Ibid.*, at 477.

87. J.M. Evans et al., *Administrative Law: Cases, Text, and Materials*, (1980) 500.

similar to that in the American *Administrative Procedure Act*. Canadian courts are generally of the opinion that reviewing the weight of evidence is an appellate jurisdiction which must be expressly provided for by statute.