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JUDICIAL REVIEW OF FEDERAL
ADMINISTRATIVE AGENCIES: THE FIRST
TWO YEARS UNDER THE FEDERAL
COURT OF CANADA

by

Norman Fera B.A., B.A. (Hons).

A thesis submitted to the Faculty of
Graduate Studies in partial fulfilment
of the requirements for the degree of
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JUDICIAL REVIEW OF FEDERAL ADMINISTRATIVE AGENCIES:
THE FIRST TWO YEARS UNDER THE FEDERAL COURT OF CANADA

submitted by Norman Fera, Hons. B.A.
in partial fulfilment of the requirement for
the degree of Master of Arts.

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i

ABSTRACT

Prior to judicial construction in the litigation process, the new statutory review provisions in the Federal Court Act were seen quite differently by groups and individuals normally concerned with or involved in the administrative process. For example, the Canadian Labour Congress perceived certain provisions in Section 28 as creating such broad powers of 'review' that it feared the Federal Court of Appeal would be "substituted for the relevant board or tribunal as the final decision-making body". Some other critics of the new statute pointed to features which seemed designed to curtail the supervisory review traditionally available under the 'common-law' writs. But in general, the view persisted that judicial control under the Federal Court Act was broader than previously available. It will be seen from this paper, however, that the control exercised so far by the Federal Court of Canada does not indicate a broadening of the review process.

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CHAPTER ONE

INTRODUCTION

Among those who have a comprehensive knowledge of administrative law,¹ there is little disagreement about the significant degree of 'confusion'² that exists in this branch of jurisprudence. It is also generally agreed that a good deal of this confusion arises from the insistence of the courts on maintaining some rather difficult distinc-

¹Louis L. Jaffe has said: "The subject matter of administrative law is the body of rules controlling the exercise of executive power and, more particularly, those aspects of executive power which is loosely denominated 'administrative'". In "Review of Books," University of Toronto Law Journal, (1973), Vol. XXII, No. 2, p.274.

²As it relates to the Canadian scene, this is well documented in R.F. Reid, Administrative Law and Practice (Toronto: Butterworths, 1971). A few have criticized Reid for his emphasis on the confusion of the law, but other Canadian scholars have reiterated it. See, for example, review of that book by P.W. Hogg (Professor of Law, Osgoode Hall Law School of York University) in the Osgoode Hall Law Journal, (1971), Vol. 9, No. 3, pp.663-667 or Professor Hogg's article "The Supreme Court of Canada and Administrative Law, 1949-1971", also in the Osgoode Hall Law Journal, (1973), Vol. 11, No. 2, esp. pp.221-223. Indeed, case law in any field bears some degree of confusion. In a rather euphemistic metaphor Professor S.A. de Smith compares administrative law with other branches: "In the tapestry of law, the juridical norm and the creative discretion of the judge are closely interwoven strands. Nowhere is the pattern more intricate, or more fascinating, than in the law relating to

tions.¹ For example, in exercising their supervisory role,² the courts have generally insisted that the more popular remedies³ will issue only against 'improper' decisions that are judicial or quasi-judicial⁴ in nature. The

judicial review of administrative action". See S.A. de Smith, Judicial Review of Administrative Action (London: Stevens and Sons Ltd., 1959), p.51.

¹Hoping the new Trial Court would give a broader meaning to the writs, G.F. Henderson (Q.C.) has commented: "An opportunity exists to avoid the uncertainties relating to the inconsistent decisions distinguishing between ministerial decisions of administrative tribunals and quasi-judicial decisions of such bodies". (Italics added.) In "Federal Administrative Tribunals in Relation to the New Federal Court of Canada", Special Lectures of Law Society of Upper Canada, 1971, pp.68-69.

²Discussed below under "Supervisory Review".

³In Canada these are certiorari and prohibition. Discussed below in Chapter 3.

⁴That is, 'judicial or quasi-judicial as opposed to "purely administrative" or "purely discretionary" - the latter two normally are unreviewable. While it is true that courts use terms imprecisely, they usually "refuse to supervise the decisional element in the exercise of an absolute discretion, which for the purpose, [they] will likely call 'administrative' or 'ministerial' but [they] will supervise the exercise of a limited discretion, which, for the purpose, [they] will likely call 'judicial' or 'quasi-judicial'." In Reid, p.152. (Italics added.)

problem is, however, that the distinction between judicial and non-judicial decisions is, at best, difficult to determine and equally difficult to explain. Professor G.V.V. Nicholls would go further. He says:

It is misleading to hold out hope of ever being able to evolve a simple test, easy of application, of the difference between judicial and administrative functions.¹

Faced with a most difficult task, the courts have attempted to devise various tests to guide their rulings.² But in the end it is impossible to organize the impossible, and so we find in the reams of reported judgments similar functions of apparently similar tribunals classified quite differently.³ And so it is frequently alleged that the "classification of a function as judicial or administrative is often nothing more than a rationalization of a decision prompted by considerations of public policy".⁴

But the confusion does not rest on the basis of that 'dichotomy' alone. Judicial judgments also show a

¹In Committee on Justice and Legal Affairs, Minutes, May 12, 1970, p.24. See also G.V.V. Nicholls, "Federal Proposals for Review of Tribunal Decisions", Chitty's Law Journal, Oct., 1970, p.259.

²Discussed below in Chapter 3 in more detail.

³The 'licencing function' is an excellent example of this. Discussed below in more detail.

⁴de Smith, Judicial Review of Administrative Action, p.51.

lack of consistency as to what is the 'record', what are collateral matters and what are the features of natural justice. For example, failure to allow cross-examination of witnesses before a tribunal has sometimes been held to be a denial of natural justice;¹ at other times, it has been accepted without reference to that concept² and in some other cases, it has not been recognized as a right at all. Indeed, the rules of natural justice

...vary according to the context and in some recent cases they appear to have been endowed with a kaleidoscopic unpredictability.³

Unfortunately, the inconsistency in judicial pronouncements has not been strictly limited to classifying functions or discerning the features of natural justice - it is more general and widespread. Indeed, considered as a whole, administrative law "bears a look that is subjective, ad hoc, contradictory and disarrayed".⁴ R.F. Reid (Q.C.) attempts a

¹See, for example, the Globe case [1953], S.C.R. 18. At a hearing before the Ontario Labour Relations Board, counsel for the respondent was refused permission to cross-examine the union secretary to show that since the filing of the application a number of the employees had resigned.

²See Brethour, [1951] 2 D.L.R. 138. In that case, Brethour, a barrister and solicitor of many years, was not permitted to cross-examine his accuser on certain matters.

³S.A. de Smith, Constitutional and Administrative Law (Baltimore, Maryland: Penguin Books Ltd., 1971), p.557.

⁴Reid, p.2.

somewhat comprehensive explanation of that condition. He writes:

Administrative law is a young subject. Our adherence to the traditional process of allowing the courts to clarify law by their own means, whatever its virtue, requires a great deal of time, and comparatively little has passed.

It has been suggested, however, that carefully drafted legislation could do much to accelerate the process of clarification and make more consistent and understandable the grounds of judicial control. Indeed, this may have been one of the considerations which prompted the draftsmen to create a new federal court with statutory jurisdiction to review the decisions of federal administrative agencies.² Under the terms of the Federal Court Act,³ which came into force on June 1, 1970, both the Trial Division and the Appeal Division of the Federal Court acquired original jurisdiction to control administrative action. More precisely, under section 18, the Trial Division gained exclusive, original jurisdiction to issue an injunction, writ of certiorari, prohibition, mandamus or quo warranto,

¹Reid, p.2.

²There are a great number of federal administrative agencies; that is, boards, tribunals or commissions which have statutory power to perform some judicial-like function or other administrative function. The C.R.T.C., the Canadian Transport Commission and the Tax Appeal Board are examples of such agencies.

³Canadian Statutes, 19 Elizabeth II (1970).

or grant declaratory relief against any federal tribunal. There is nothing in section 18 or in any other part of the statute which expressly requires the Trial Division "to give those terms a meaning given by the courts in any other jurisdiction".¹ Unfettered, therefore, by any statutory provision or by its own previous practice in defining the scope of the terms, the Trial Division has been given

The opportunity...to give each of these writs...[a meaning wider than previously given] to ensure a realistic protection of the subject against the bureaucratic action of the state.²

Under section 28 of the Federal Court Act, the Appeal Division is given original jurisdiction to review and set aside certain administrative decisions.³ More precisely, it

...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...a federal board...upon the ground that the board...

(a) failed to observe a principle of nat-

¹Henderson, Special Lectures of Law Society of Upper Canada, 1971; p.68.

²Ibid.

³The term is used in a general sense and refers to any decision rendered by a board, tribunal or commission. Sometimes, however, we speak of a decision that is "purely administrative" in nature. That term applied to decisions which are neither judicial nor quasi-judicial in nature.

ural justice or otherwise acted beyond or refused to exercise its jurisdiction,
 (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.

Without reference to judicial construction in the litigation process, those provisions have been seen quite differently by groups and individuals normally concerned with or involved in the administrative process. By some they have been seen as an attempt to expand judicial control. For example, the Canadian Labour Congress has perceived section 28, particularly section 28(1)(c), as creating much broader grounds of review than were previously available.¹ Mr. Jean Beaudry, Executive Vice-President of the C.L.C. has said:

We are...concerned about [28](1)(c)... because of its wide implications and the very real possibility that the Court of Appeal may be substituted for the relevant board...as the final decision-making body. (Italics added)²

....

[That section]...is an open invitation

¹Reported and discussed in an article I have written: "Review of Administrative Decisions Under the Federal Court Act (1970)", Canadian Public Administration, (1971), Vol. 14, No. 4, pp.588-589.

²Committee on Justice and Legal Affairs, Minutes, May 26, 1970, p.13.

to litigation.¹

Mr. A. Andras, Director of Government Employees and Legislation for the C.L.C. has added:

It is one thing to go to the courts on a principle of natural justice or on a question of error in law; it is another to go before the courts and say that the board acted capriciously or that it did not read the facts as they ought to have read them. [28(1)(c)]...makes it very simple indeed for somebody who is unhappy with a decision to make that statement and having made it, it sets machinery in motion which will take a long time.²

Other parts of section 28 have been seen as an attempt to limit judicial control. For example, Professor Nicholls of the Faculty of Law at Dalhousie University made serious representations during the committee stage concerning the restrictions placed on judicial review especially by the following words in that section: "other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". He said:

Any suggestion that at common law a finding that a decision is an administrative act is enough, in itself to preclude review... is demonstrably wrong. If the intention of Bill C-192 is that an aggrieved citizen, in the absence of a right of appeal... is to have no recourse... to the courts from a decision of an administrative nature, which

¹ Ibid., p.15.

² Ibid., p.19.

seems to be the effect of subsections (1) and (3) of section 28...then the existing law is being changed and members of Parliament and the public should realize it.¹

The impression, however, has persisted that judicial review under the Federal Court is generally broader than previously available under the 'common-law' writs. It will be seen, however, that since its inception none of the judgments of the Court has yet indicated a broadening of the review process. Indeed, it will be shown that both the Trial Division and the Appeal Court have generally maintained the status quo. That is,

- (a) the Trial Division has issued the prerogative writs along well established precedents;²
- (b) the Appeal Division's right of review has been exercised along lines traditionally associated with the writs; and,
- (c) while intervention in administrative decisions has not been completely curtailed, as feared by Professor Nicholls and others, it is certainly not greater than previously exercised by the courts.

It is the purpose of this paper to substantiate those assertions by using the following framework:

¹Committee on Justice and Legal Affairs, Minutes, May 12, 1970, p.21. See also Nicholls' article, "Federal Proposals for Review of Tribunal Decisions", Chitty's Law Journal, Oct. 1970, starting at p.257.

²It seems only natural that with the Courts close adherence to judicial precedents arising from the writ system new life has been given to traditional explanations, con-

1. Controlling the Administrative Process. This chapter is devoted to placing the various facets of judicial control into some sort of 'perspective'; that is, to determine their origin and purpose and, most importantly, to locate them in the larger governmental process. The scope of various statutory appeals and the common features of statutory review are discussed summarily. In addition, the difficulties and confusion that arise from the 'necessity' to classify functions under supervisory review¹ are considered in some detail.

2. Principles and Scope of Supervisory Review. The second chapter is concerned exclusively with supervisory review and concentrates initially on the principle(s) governing that traditional practice. The remedies through which the doctrine of ultra vires has been applied are then considered in some detail. It should become apparent from this chapter that supervisory review has acquired considerable dimensions over the years.

3. Limiting Supervisory Review. To curtail or eliminate the supervisory control of the ordinary courts, the legisla-

cepts and vocabulary - imprecise and confusing as they sometimes may be. For example, in following precedents, the Trial Court is now also involved in trying to classify functions before issuing some of the writs.

¹Also referred to as 'ancillary review'. That is, the judicial review available under the prerogative writs, the injunction and declaratory action.

tive branch has sometimes enacted 'privative clauses'. By so doing, it presumably has wanted to allow certain designated agencies to proceed unfettered by the standards evolved by the judiciary. (It appears, therefore, that certainly with reference to some tribunals, the legislature has wanted to restrict rather than expand judicial control.) But often the courts have limited the effect of those provisions. While the supremacy of Parliament has long been recognized in our system, the restrictive interpretation given privative clauses has sometimes been characterized as a struggle between the judicial and legislative branches. In the final section of this chapter, however, we argue in favour of the courts' restrictive interpretation.

4. The New Statutory Review Provisions. The practice of permitting provincial superior courts to supervise federal administrative agencies was not without its problems. Indeed, it may be argued that the federal government's primary purpose for giving the new Federal Court review powers was to eliminate this practice and the problems stemming from it. In the second half of this chapter, consideration is given to the various review clauses that are to be found at different places in the Federal Court Act.

5. Judicial Review in the Federal Trial Court. Some of

the jurisdiction given to the Trial Division¹ under section 18 of the Federal Court Act is taken back by section 28.

Indeed, it may now be said with certainty that certiorari proceedings, per se, as they relate to decisions made by federal administrative agencies after June 1, 1971 are non-existent. Similar proceedings are now available exclusively in the Appeal Court. In the last part of this chapter, the scope of the review available in the Trial Court is given careful consideration. It will become apparent from a reading of Chapter 2 on the principles and scope of supervisory review and from the precedents cited by the Court itself that judicial review under the Trial Division has so far not acquired any new dimensions.

6. Judicial Review in the Appeal Division.² In the first few pages of this chapter, consideration is given to the Court's interpretation of key phrases³ in section 28(1). Certainly the construction given those phrases does not indicate any desire on the part of the Appeal Court to cut a wider path of control than previously available. And, as will be seen, the Court's interpretation of the grounds of

¹That is the Trial Division of the Federal Court of Canada. Also referred to throughout as simply 'Trial Court'.

²That is, in the Appeal Division of the Federal Court of Canada. Sometimes referred to simply as 'Appeal Court'.

³For example, "decision or order" or "federal board,

review in the judgments rendered so far does not indicate a broadening of the review process.

commission or other tribunal". These are found in s. 28 (1).

CHAPTER TWO

CONTROLLING THE CONTROLLERS

THE ADMINISTRATIVE PROCESS

It was back in the late '20's that Lord Hewart of Bury struck fear in the hearts of those who had long cherished the democratic principles stemming from Representative Government and the Rule of Law. At page 12 of the New Despotism, the former Lord Chief Justice wrote

The citizens of a State may indeed believe or boast that, at a given moment, they enjoy, or at any rate possess, a system of representative institutions and that the ordinary law of the land, interpreted and administered by the regular Courts, is comprehensive enough and strong enough for all its proper purposes. But their belief will stand in need of revision, if, in truth and in fact, an organized and diligent minority, equipped with convenient drafts, and employing after a fashion part of the machinery of representative institutions, is steadily increasing the range and the power of departmental authority and withdrawing its operations more and more from the jurisdiction of the courts.¹

Focusing primarily on the exercise of authority by individual

¹Gordon Hewart, The New Despotism (London: Ernest Benn Ltd., 1945), p.12.

department officials and tribunals, Lord Hewart noted that decisions were being made largely in secret without regard to proceedings or precedent and without any accompanying justification. It was Lord Hewart's intention, therefore, to sound "a note of warning...of the pretensions and encroachments of bureaucracy - the new despotism".¹

If, indeed, there were cause for concern then, the situation in the present day must certainly be more serious, if not, hopelessly dangerous. Since the '20's, the practice of delegating quasi-judicial and legislative powers to individuals and boards has increased enormously - probably somewhat in proportion with the broadening concept of the proper sphere of government² and the increasing complexity of modern society.³ In the words of the Honourable Mr. Justice S.H.S. Hughes:

...particularly in the last 50 years, a growing preoccupation of the State with the regulation of social and commercial activities has led to the proliferation

¹ Ibid., pp.48-49.

² "Since [Lord Hewart wrote those words] there has been a wide development of welfare legislation and state supervision...." See Ontario, Royal Commission, Inquiry into Civil Rights, 1969, Report 1, Vol. 1, p.306. Cited hereafter as McRuer Report.

³ "But regardless of political philosophy, the needs of an increasingly complex society have forced upon one country after another a multiplicity of additional functions" Discussed in W. Friedmann, Law in a Changing Society (London: Stevens and Sons Ltd., 1959), p.38.

of licencing bodies, boards and commissions of this and that, all of them loosely described as administrative tribunals, wielding in varying degree authority to direct the activities of men and women in all walks of life.¹

Very simply, then, in the modern context, it is no longer possible to run a complex state by relying almost exclusively on the judicial and legislative branches of government. While the ultimate control is still to be found in Parliament, in reality much of the power is in the hands of government ministers, civil servants, public corporations and their officers, and most importantly, boards, commissions and tribunals.²

In the case of some commissions and tribunals, regulation of a whole field of human activity is in their hands. Indeed, Professor Willis was hardly exaggerating when he said, "The typical commission is a government in miniature".³ In a number of instances, an administrative agency has the authority to make rules and regulations, and in addition, to adjudicate in disputes involving those

¹Quoted in Reid, p.VII.

²That phenomenon as it relates to Canada is discussed at length in the third report of the Special Committee on Statutory Instruments presented to Parliament in October of 1969.

³John S. Willis, "Three approaches to administrative law: the judicial, the conceptual and the functional", University of Toronto Law Journal, Vol. 1 (1935-36), p.56.

same rules. "While this sort of authority has traditionally been regarded as a serious infringement of the separation of powers, in the 20th. century, "it is commonplace that a strict doctrine of separation...is not only a theoretical absurdity [but] a practical impossibility..."¹

But it is hardly necessary in our society to convince the citizen that government is, to a very large extent, government by administrative officials. For the most part this is now recognized as necessary - a product of our times - a development to meet the requirements of an increasingly complex society. And yet, the people who make the myriad of decisions that affect our daily lives "are neither elected and responsible, nor judicially aloof and impartial".² In this 'administrative state', then, what safeguards are there to protect the citizen from procedural wrong doing, from unreasonable decisions and, generally, from maladministration?³

To maintain an essential balance between individual liberty and public good, there are, of course, a number of

¹ Friedmann, p.12.

² J.E. Hodgetts and D.C. Corbett, Canadian Public Administration (Toronto: The MacMillan Co., 1966), p.438.

³ In 1960, Justice, the British section of the International Commission of jurists noted that maladministration involves inefficiency, delay, negligence, bias, unfair preference or dishonesty. Discussed in David Foulkes, Introduction to Administrative Law (London: Butterworths, 1964), p.137.

'judicial'¹ and 'non-judicial' controls which may be imposed on the administrative process. The focus of this paper is obviously on the former type of control, particularly, statutory and 'supervisory' review, but it may be well to at least note some of the other safeguards. In his book Constitutional and Administrative Law, Professor de Smith succinctly lists some of these in a chapter called "Redress of Grievances":

The activities of...[the official opposition]..., of pressure groups agitating on behalf of their members, of the press and broadcasting services...[all] impose constraints on the exercise of public power and afford prospects of redress by a person injured by its abuse.²

[And, of course,] letters to M.P.'s... may result in informal questions to Ministers and, if satisfaction is not obtained,...[there are]...the various opportunities to ventilate individual grievances in ...the House of Commons, by invoking the doctrine of individual ministerial responsibility at question time and in debate.³

¹As used in this paper a judicial control is one which involves the judges of the ordinary courts in an official capacity. Obviously, then, a non-judicial control does not involve the ordinary courts.

²de Smith, Constitutional and Administrative Law, p.606.

³Ibid., p.605. These methods are not always successful in curbing maladministration. At p.606 Professor de Smith notes that there has been some disenchantment with parliamentary methods of redress. Professor J.F. Garner also notes that "parliamentary action may...be of uncertain effect". He says, "It depends for its effectiveness on far too many uncertain elements." For a brief but excellent discussion of that point see Garner's book, Administra-

There are other safeguards as well. It is now generally recognized that the Ombudsman¹ or some similar institution may be useful in curbing some of the injustices which arise from maladministration.

The institution was so successful in its home countries of Sweden and Finland at helping to protect citizens against arbitrary authority that neighbouring Denmark adopted it in 1955. From there it spread to Norway and New Zealand in 1962 and [to other countries since].²

In Britain, for example, "a near relative of the Ombudsman"³ was introduced in 1967, and it appears that the Parliamentary Commissioner for Administration, as he is called, has been helpful in procuring the redress of some individual grievances.⁴

But the list of non-judicial safeguards noted here is not intended to be exhaustive but merely indicate a variety of approaches that are available to keep administra-

tive Law (London: Butterworths, 1970), pp.94-95. For a brief summary "on the efficiency of the existing [parliamentary] procedure for handling complaints at the federal level in Canada see article by Professor D.C. Rowat and Henry Llamias in D.C. Rowat (ed.), The Ombudsman: Citizen's Defender (Toronto: University of Toronto Press, 1968), pp.189-190.

¹For surveys of Ombudsmen in various countries see Rowat.

²Rowat, p.7.

³Expression used by de Smith, p.607.

⁴de Smith discusses briefly the "useful functions"

tive action in check. Indeed, some forms of redress do not even fit neatly into either the judicial or non-judicial categories being considered. For example, a statutory right of appeal sometimes falls under one head and sometimes under the other. Often, and invariably on a point of law, the body to which an appeal is granted is an ordinary court of law - at the federal level, the Exchequer Court (now the Federal Court) or the Supreme Court of Canada. On the other hand, a more comprehensive appeal - an appeal on the merits - may lie to a strictly non-judicial agency such as a Minister of the Crown or a specially constituted appeal board. But such an appeal may also lie to an ordinary court in which case the court itself may

...substitute its own opinion for that of the tribunal simply because it disagrees, and in the process to consider every alleged error of law, fact or jurisdiction. On this basis not only may it ascertain whether there was any evidence to support the decision below but whether the evidence was 'sufficient'.¹

The absence of a statutory right of appeal, however, does not necessarily mean that a decision cannot be challenged at all in the courts. The legislative branch frequently provides for a right of review in administrative matters, and where this is lacking, there is always recourse

fulfilled by the P.C.A. at pp.611-613.

¹Reid, p.291.

to the superior courts under their inherent jurisdiction to supervise inferior tribunals. It should be noted, however, that, unlike an appeal, review (whether statutory or supervisory) does not normally¹

...provide a safeguard against erroneous decisions which have been made by a tribunal within the area or scope of the power conferred on it by statute. [In review proceedings, a court, theoretically]...has no power to give a decision on the merits, but in essence, in one aspect, the object of the application is the same as appeal: to set aside a decision of an inferior tribunal that is adverse to the applicant and render it inoperative.²

STATUTORY AND 'SUPERVISORY' REVIEW

As indicated, a court's right to review interlocutory or final decisions of administrative agencies may have its origins in one piece of legislation or another. While such enactments have been gaining steadily in popularity in both Britain³ and at various government levels in Canada,

¹ A review is normally not as broad as an appeal. There are, however, a significant number of more-or-less 'cover' exceptions. This will become clearer later.

² McRuer Report, Vol. 2, p.654.

³ "In recent years the common-law and equitable remedies have been augmented and in some instances superseded by statutory remedies." See de Smith, Judicial Review of Administrative Action, p.14.

the United States may still have the lead in this regard. The statutory approach has often been introduced as a way of superseding or reforming the traditional review route which is through the ancient extraordinary remedies or 'writs' as they are often called.¹

Statutory provisions are sometimes found in the same Act which delegates judicial or legislative authority to some official or board.² More often, a specific piece of legislation places all, or at least, a great number of administrative agencies under the 'supervisory' control of the ordinary courts. In the state of Illinois, for example, the provisions of one statute apply to the decisions of all officers, both at the state and local level. "Decision" is defined broadly as any "order or determination ... rendered in a particular case which affects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative agency".³

¹Sometimes, however, review statutes do nothing more than restate the traditional common law principles relating to the supervising control a superior court has over inferior tribunals.

²In Canada, it is quite common to find a statute providing for an 'appeal' on a question of law or jurisdiction to the ordinary courts. 'Review' proceedings based on the writs, however, are not usually part of such a statute.

³In Louis L. Jaffe, Judicial Control of Administrative Action (Boston: Little Brown and Co., 1965), p.161.

The practice of limiting statutory review to final orders is actually quite common in the United States,¹ and that has generally been the case in Canada as well.² It is also not uncommon for statutory review to be limited to decisions rendered after the completion of a hearing. In some cases, therefore, it is necessary to seek review under the common law and equitable remedies instead; at least, in those instances where such action is not expressly prohibited by statute.³

Under the 'common law', the role of the ordinary courts to review administrative decisions is supervisory in nature. In the words of Denning L.J.:

...the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in any appellate capacity, but in a supervisory capacity.⁴

¹Jaffe, Judicial Control of Administrative Action, p.161.

²The practice, however, may not be as common in Canada as it is in the U.S. See Reid, p.286 and p.290.

³Legislation in Illinois, for example, restricts review to that permitted by statute only. Review under the equitable or common law remedies is expressly prohibited.

⁴In R. v. Northumberland Compensation Appeal Tribunal, [1951] 1 K.B. 711. Quoted in P.J. Millward, "Judicial Review of Administrative Authorities in Canada", Canadian Bar Review, Vol. XXXIV (1961), p.363.

This system of judicial control is based on a group of remedies developed by English judges and Parliaments. Very briefly, the English judges were the King's judges and in that capacity exercised the Crown's complete and supreme power of distributing justice. The King's Bench issued writs, the so-called prerogative writs, to all inferior tribunals and officers.

- The writs themselves seem to have been originally mere administrative orders from superior officials to their subordinates telling them to do something, to give some information, or the like.¹

The King's courts also allowed actions for damages to anyone injured by an officer who had exceeded his rightful duties or powers. The theory being that everyone, including public officers, were answerable in the ordinary courts.

In those early times, the scope of judicial review often depended on whether or not the function of the 'agency' was judicial in nature.² In a case² in the late 1500's, for example, the Court recognized that while justices of the peace were normally inferior courts under the supervisory control of the King's Bench, those same officers also had

¹For a more complete summary of the origins of this practice in the 1500's see T.F.T. Plucknett, A Concise History of the Common Law (London: Butterworth and Co. Ltd., 1956), Chapter 7, especially pp.172-173.

²Green v. Hundred of Buccle-churches, [1589] 1 Leon. 323. Cited by de Smith, Judicial Review of Administrative Action, p.36.

non-judicial duties to perform¹ and that those functions were not subject to the same controls imposed on their judicial acts.²

The practice of classifying functions before granting relief is still quite prevalent today, especially with reference to the orders of certiorari and prohibition. Generally speaking, these remedies will issue only to statutory bodies which are under a duty to act judicially. Review, therefore, is normally denied if a board's function is heavily dependent on subjective ingredients.³ It should also be noted that the responsibility for determining the nature of a board's function also rests with the courts. But the matter is not as simple as it might seem. The distinction between judicial and non-judicial functions is usually difficult to draw and equally difficult to explain. In Professor Jaffe's words: "The notion that each administrative act can be classified a priori... is unsound

¹"In [those times]...in addition to their regular judicial business they had many administrative functions such as the upkeep of roads and bridges, the licencing of ale-houses and the administration of the poor law". See H.W.R. Wade, Administrative Law (Oxford: Clarendon Press, 1961), p.99.

²Discussed in de Smith, Judicial Review of Administrative Action, p.36.

³In Chapter 6 of the McRuer Report, "Subjective Ingredients" are discussed under these headings: Subjective conditions precedent to the existence of a power of decision; Subjective provisions governing the scope or area of matters to be decided; Subjective considerations to be taken into account in making a decision.

and unworkable."¹ Indeed, most legal writers² in the field consider the distinction to be probably impossible and hence illusory.³

Nevertheless, the courts continue to feel the need to classify the function before granting relief under the more popular extraordinary remedies.⁴ Professor Garner has noted that by-and-large they usually insist on three essential characteristics before proceeding on the basis that the decision in question is judicial in nature: There must be a dispute between two or more parties (lis inter partes); those directly involved in the dispute must bring the matter before the board or tribunal;⁵ and the board must be permitted little discretion in arriving at its decision - i.e., in general, it must be under a legal obligation to apply pre-

¹Jaffe, p.181.

²See, for example, Willis, University of Toronto Law Journal, p.62 or Reid, p.112.

³In the judicial setting, the situation becomes even more complicated because of a 'practice' which evolves partly from human weakness and partly from the right to wield 'final' power. Periodically, in order to interfere with what is regarded as a damnable decision, an unimaginative court simply labels a decision judicial with little regard to precedent or the concept itself. As a result, the already difficult concept becomes more difficult, more confused and less fathomable for jurists.

⁴As will be seen in Chapter 3 these are certiorari and prohibition.

⁵The tribunal itself may not initiate the proceedings.

scribed rules.¹

Despite a few widely held principles about the nature of a judicial function, the courts have not always seen the same function in the same light. For example, the British courts have shown a considerable degree of vacillation in classifying the authority to grant or revoke a licence. For most of the 19th century, the courts were in the practice of classifying the function as judicial, until a series of cases in the 1890's challenged that practice. By 1906, however, the courts were again on the 'right' path and the authority to grant or revoke licences was again considered to be judicial in nature.² Then, in 1950, the courts again 'reversed' themselves. In the Nakkuda Ali case,³ the Judicial Committee of the Privy Council held that a controller's action in cancelling a licence was administrative and not judicial or quasi-judicial.⁴ Since then, "the English courts have done nothing to clarify the

¹Discussed in Garner, p.12. Professor de Smith in Judicial Review of Administrative Action, pp.37-47 suggests a much more elaborate 'test' for identifying judicial functions.

²Discussed in de Smith, Judicial Review of Administrative Action, p.119 and p.272.

³[1950], 66 T.L.R. (Pt.2) 214.

⁴That case is discussed in H.W.R. Wade, "The Twilight of Natural Justice", The Law Quarterly Review, Vol. 67 (Jan. 1951), p.103.

issues".¹

It would appear, therefore, that "the classification of a function...is often nothing more than a rationalization of a decision prompted by considerations of public policy and/or precedent".² In some instances, it may be much more personal and narrow: It may be nothing more than a judge's 'gut feeling' that the board's decision is either reasonable and should be left untouched, or that is incorrect and should be 'reversed'. And in some cases, the classification decision may not even be based on so noble a consideration: Indeed, R.F. Reid may not be far from the truth when he characterizes the classification record of the courts as one which "may be more the result of art and chance than of logic and reason".³ Interestingly enough, however, inconsistency in this area of law has had some 'positive' results. It appears that to a considerable extent - despite disclaimers - certiorari and prohibition have established themselves in both Canada and Great Britain as "comprehensive remedies for the control of administrative as well as judicial acts".⁴

¹de Smith, Judicial Review of Administrative Action, p.132.

²Ibid., p.50.

³Reid, p.112.

⁴Wade, Administrative Law, p.99.

CHAPTER THREE

PRINCIPLES AND SCOPE OF 'SUPERVISORY'

REVIEW

THE ULTRA VIRES DOCTRINE

Under the 'rule of law' all power or authority must be exercised within its designated limits. It would follow from this general principle, then, that all administrative officials or tribunals must act within the authority granted to them. Under our system of government, it is, of course, the judicial branch which must ultimately define the limits of such power; i.e., to interpret the legislation conferring the power and in this way determine the extent of the delegation. Anything done or proposed to be done outside the limits of a statute is unauthorized and hence illegal.

In their interpretation of statutes,¹ Canadian

¹An excellent summary of the general principles of statutory construction applied by the courts is found in Garner, starting at p.49. But it is well to remember that "the canons of statutory interpretation, far from forming a symmetrical and harmonious body of rules, overlap and contradict one another", See de Smith, Judicial Review of Administrative Action, p.58.

courts, more often than not, have taken an analytical approach. Very simply, they have been primarily concerned with the 'literal' meaning of the language used in the statute¹ rather than the 'mischief' Parliament intended to remedy.² It is interesting to note, however, that even when taking the analytical approach, the courts have felt it necessary to superimpose "a gloss of presumptions as to the intention of the Legislature". The McRuer Commission writes:

Thus the courts presume that the Legislature in carrying out a relatively routine social scheme does not by mere general words intend to restrict the personal freedom of individuals, or impose charges in the nature of taxes³ or intend legislation to have retrospective effect, or to

¹See McRuer Report, p.26. This approach has been called the golden rule: words must be given their ordinary meaning.

²The 'mischief rule' enunciated by Denning L.J. in the Heydon's case is discussed in J.A.G. Griffith and H. Street, Principles of Administrative Law (Toronto: Pitman House, 1967), pp.98-99.

³Professor Garner notes that this is particularly important in connection with a statute conferring a power to make subordinate legislation. He cites the Hall case, [1964], 1 All E.R. 1, in this connection. A local authority was empowered to impose conditions on the grant of a licence. It was held, however, that conditions could not be imposed which would have had the effect of depriving the licensee of his land without compensation in the absence of a precise statutory authorization to that effect. See Garner, p.49.

authorize arbitrary action.¹

In general, judicial review of an administrative decision stems from the allegation that an official or agency has exceeded its statutory power or infringed on certain common law rights. Any action or decision found to do one or the other is quashed - rendered invalid - by the courts. This entire concept (of judicial control) is now commonly said to be based primarily on the doctrine of ultra vires. Indeed, a number of scholars maintain that the doctrine is the basis for all grounds of invalidity:

- 1) Breach of the principles of 'natural justice',
- 2) Excess of powers - often termed substantive ultra vires,
- 3) Errors of procedure,
- 4) Failure to perform a duty,
- 5) Bad faith or abuse of power in the sense of using power in a meaning other than that construed by the courts as authorized by statute
- 6) Errors of law.²

While a few writers ignore or diminish the importance of some of these, most respected authorities speak of them in one way or another under the general head of ultra vires or

¹McRuer Report, p.26. At pp.59 to 60 Professor de Smith in Judicial Review of Administrative Action says virtually the same thing.

²With reference to this last ground, the McRuer Commission explicitly rejects it as part of the ultra vires doctrine: "The principle of ultra vires comprehends all powers of judicial review, except review for error of law on the face of the record. This ground is explicable as an

jurisdiction. In the remaining pages of this section, each of these six grounds will be discussed briefly.

Breach of Natural Justice¹

'Natural justice' encompasses two very significant principles that go to the very heart of 'justice'. These rules are often expressed in Latin as audi alteram partem and nemo iudex in causa sua potest - literally, 'hear both sides'² and 'no one can be judge in his own cause'.³ Both of these precepts are quite old and may be traced back to Greek civilization pre-dating Christ. They were apparent in other parts of Europe during medieval times and quite common in the 19th century.

In Britain, the rules were apparently first applied in the early 1600's in cases relating to the deprivation of offices and various occupational dismissals. About a century later, a second line of cases developed. In these,

historical anomaly". See McRuer Report, p.247.

¹Some define the term generally as "fair play, nothing more". See Reid, p.209. Indeed, the courts often use the term in that general sense.

²More precisely, the judge must "hear both sides and must not hear one side in the absence of the other" said Greer, L.J., in Errington v. Minister of Health, [1935], 1 K.B. 249 at p.268. Cited by Garner, pp.112-113.

³For the litigant, this amounts to a right to be heard by a fair judge or tribunal - one that is unbiased.

the Court of King's Bench applied the two main principles against decisions rendered by justices who had acted 'arbitrarily' in their adjudication of summary offences. Their application was gradually expanded until, in the late 1800's, the two basic principles applied to "every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."¹

It may now be said that the two important principles encompass (1) the right to have sufficient notice of allegations² and proceedings;³ (2) the right to be heard;⁴ (3) actually, the right to be heard by an unbiased tribunal - one which is in fact and appearance unbiased;⁵

¹Wood v. Wood, [1874], L.R. 9 Ex. 190 at 196. Quoted by de Smith, Judicial Review of Administrative Action, p.105.

²See Re Fairfield Modern Dairy Ltd. and the Milk Control Board of Ontario, [1942], O.W.N. 579.

³See, for example, Re Hoogendoorn and Greening Metal Products and Screening Equipment Co. et al., [1968], 65 D.L.R. (2d) (S.C.C.) 641. In this case no notice of the proceedings which resulted in a finding that the employer was in the breach of the collective agreement and a direction to the employer to dismiss the employee if he failed to give an authorization to deduct unions dues, was given to the employee.

⁴See, for example, Re Allinson and the Court of Referees, [1945], O.R. 477.

⁵See, for example, R. v. Sussex Justices, ex parte McCarthy, [1924], 1 K.B. 256. It was held that the conviction (essentially dangerous driving) must be quashed as it

(4) often, the right to cross-examine witnesses;¹ (5) a right to adjournment or sufficient adjournment when the request is reasonable.²

It should be noted, however, that while the above rules apply generally to judicial and quasi-judicial functions, their application really depends "on the circumstances and nature of the decisions".³ Indeed, it might be said that there are no

...clear rules to guide those in administration of government affairs so that they might know when they must apply the rules of natural justice. Lord Hodson said: 'It may be that [we] must retreat to the last refuge of one confronted with as a difficult a problem as this, namely, that each case depends on its own facts....'⁴

Excess of Powers

This is, indeed, the major ground of judicial re-

was improper for the acting clerk, having regard to his firm's relation to the case, to even be present with the justices when they were considering their decision. As the principle applies to Canadian tribunals, R.F. Reid suggests the Hall case, [1963], 39 D.L.R. (2d) 113, as an example.

¹See Re Toronto Newspaper Guild and Globe Printing Co., [1953], S.C.R. 18. It should be noted, however, that the right to cross-examine witnesses has been recognized without reference to the concept of 'natural justice'.

²See Re Ramm and the Public Accountants Council for Ontario, [1957], O.R. 217.

³McRuer Report, p.137.

⁴Ibid., p.187.

view. In very simple terms, any person or body acting without statutory authority exceeds its powers, and decisions or actions taken by it are void. The courts have held all types of decisions - judicial, quasi-judicial and administrative decisions - made by any one of the different branches of government to be ultra vires.

It must be emphasized that, in reviewing a decision under this principle, the courts do not examine the conclusion arrived at by the tribunal, but inquire instead into whether or not the tribunal was legally empowered by statute to start its proceedings and render a decision. A question of ultra vires, therefore, involves the court in a very careful scrutiny and construction of the power delegated by the legislature.

The courts will normally not allow a tribunal to ignore or treat lightly provisions which permit it to proceed only when some 'pre-condition'¹ is in existence. It is only logical that a tribunal be prevented from

...giving itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limits

¹In White and Collins v. Minister of Health, [1939], 3 All E.R. 548, "a local authority had statutory powers to acquire compulsorily any land that did not form part of a private park". In that case the court held that it was entitled to investigate whether or not the land was park land or not. Discussed in Garner, pp.125-126.

of its jurisdiction depends.¹

Parliament, of course, may give the tribunal the power to determine on its own (without judicial intervention) whether or not some preliminary state of facts is in existence and hence whether or not it has the jurisdiction to proceed further. On this point, Lord Esher is quite lucid:

When an inferior court or tribunal... which has to exercise the power of deciding facts, is first established... the legislature has to consider what powers it will give that tribunal.... It may in effect say that, if a certain state of facts exists... [the tribunal] shall have jurisdiction to do such things....

There it is not for them to conclusively decide whether that state of facts exists.... But there is another state of things.... The legislature may intrust the tribunal... with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further....²

¹In Bunbury v. Fuller, [1853], 9 Ex. 111 at 140. Quoted in Wade, Administrative Law, p.71.

²In R. v. Commissioners for Special Purposes of Income Tax, [1888], 21 Q.B.D. 313 at 319. Referred to by McRuer C.J.H.C. as "most often relied on as a clear and comprehensive statement of law dealing with the exercise of administrative functions" in Bawtinheimer v. Niagara Falls Bridge Commission, [1950], 1 D.L.R. 33 at p.47.

Errors of Procedure

Errors of procedure also come under the rubric of the ultra vires doctrine. This branch of that doctrine is also largely concerned with statutory interpretation; this time for the purpose of determining mandatory procedural requirements.

Parliament may demand that in the exercise of its function a tribunal must proceed in a particular manner or form. For example, it may require a tribunal to give notice, hold an inquiry, consider certain reports or refer certain matters to another agency. Failure to proceed along the prescribed course may deprive the tribunal of jurisdiction.

There is, however, a good deal of doubt and confusion as to what exactly is regarded as 'procedural defect'. Generally though, the courts insist on the application of any statutory requirement which is explicitly mandatory and which, if disregarded, would create serious hardship. More specifically, the courts have held

....failure to carry out a statutory duty to hold a hearing,¹ or to make due inquiry,² or to consider objections, in the course of exercising administrative powers affecting individual rights... [as grounds which] nullify the action taken.³ A provision requiring consultation with named bodies [or individuals]⁴ before a statutory power is exercised is also likely to be construed as mandatory.⁵

¹See, for instance, Re Washington, [1967], 60 W.W.R. 410. Where the statute is silent on the matter of a hearing, the courts often apply the 'Rice' principle. In Board of Education v. Rice, [1911], A.C. 179, Lord Loreburn, thinking of either a judicial or quasi-judicial function, said: "...to ascertain the law and also to ascertain the facts...[a tribunal] must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything". That principle was accepted by the Supreme Court of Canada. See Mantha v. Montreal, [1939], 4 D.L.R. 425.

²For a Canadian case, see, for example, Maskall v. Chiropractors' Association, [1968], 62 W.W.R. 129.

³See In re Kucy v. McCallum, [1944], 2 D.L.R. 101.

⁴See Franklin v. Minister of Town and Country Planning, [1948], A.C. 87. Cited in Griffith and Street, Principles of Administrative Law, p.223.

⁵The words of Professor de Smith in Judicial Review of Administrative Action, p.94.

It should be noted, too, that decisions taken by the wrong party, that is, by an improperly constituted tribunal¹ usually go to procedural defect² and are declared ultra vires.

Some breaches of the procedural requirements, however do not go to jurisdiction or the like. In each case the court considers the importance of what has been disregarded in the decision-making process. If it is the opinion of the court that the 'error' is trivial then it is taken to be a mere irregularity and the tribunal's decision is allowed to stand.

Failure to Perform a Duty

This concept is not particularly difficult to explain or understand. In fact, the 'title' itself does much to make it comprehensible. Every tribunal is entrusted with a certain specified area of jurisdiction. Within those limits, the courts demand that the tribunal exercise its authority³ irrespective of any inclination to the contrary.

When the courts compel a tribunal to act, they are

¹For the inclusion of unauthorized person see, for example, R. v. Council of College of Physicians and Surgeons, [1942], 3 W.W.R. 510. For exclusion of necessary personnel, see Wetaskiwin Municipal District v. Kaiser, [1947], 4 D.L.R. 461.

²Other labels are also used.

³Under this branch of ultra vires, the authority may be judicial, quasi-judicial or purely administrative.

not carrying out a 'review' in the traditional sense since no decision based on the 'merits' of the case has yet been rendered. In another sense, however, the courts are re-viewing the tribunal's decision not to look into the matter. It is, of course, sometimes difficult for the courts to determine whether the tribunal's refusal to act was really a dismissal of the application on its merits or truly a refusal to consider the matter and hence a refusal to undertake its true jurisdiction.¹

Generally, a tribunal declines jurisdiction when

- a) it incorrectly claims to have no authority to look into the matter,
- b) it postpones a hearing an unreasonable length of time,²
- c) "it establishes a firm rule beforehand and does not consider each case on its merits"³
- d) and it improperly delegates part or all of its responsibility to make a decision.⁴

It should be emphasized that in requiring a tribunal to act, the courts do not require it to decide in a cer-

¹This point is discussed by de Smith, Judicial Review of Administrative Action, pp.80-81.

²That point is discussed in the McRuer Report, p.266.

³Garnér, p.137.

⁴See Robbins v. Ontario Flue-Cured Tobacco Growers, [1965], S.C.R. 431.

tain way.¹ They merely compel the agency to hear the matter in its entirety.²

Abuse of Discretionary Power³

It is only logical that under the rule of law, power should be exercised strictly within its intended purpose. Power entrusted for one purpose but used for another is obviously unauthorized. Under our system of government, it is to the courts that falls the responsibility of (a) determining the intention Parliament had in delegating some of its power and (b) 'compelling' agencies to use their authority within that prescribed purpose.

In performing the second function, the courts invalidate most blatant perversions of Parliament's intention under a variety of 'names': power used for improper purposes, abuse of power or bad faith.⁴ The last term, however, seems to be reserved for extreme cases of dishonesty (or

¹See, for example, Re Schepull and Bekeschus and the Provincial Secretary, [1954], 2 D.L.R. 5.

²de Smith, Judicial Review of Administrative Action, p.80.

³This might also be discussed as part of section called Excess of Powers.

⁴Bad faith is recognized as a ground of invalidity but it is also sometimes regarded as a general 'quality' such as "abuse of power". In de Smith, p.190.

fraud) and malice.¹ Cases in which that is proven are extremely rare.²

There are a number of cases in which power used for 'improper purposes' has been held to be unauthorized. The Henry's Drive-In case³ is one such example. Under a statute designed to ensure proper standards for handling food, a Licencing Board was empowered to grant licences to operate restaurants. In this case, however, the licencing tribunal refused a permit because it felt a restaurant in the proposed area would create traffic problems. The Ontario High Court quashed the decision.

In Roncarelli v. Duplessis⁴ the abuse of power was more flagrant. The Attorney-General for the Province of Quebec directed a licencing commission to cancel the licence of a particular tavern owner because he had allegedly acted as bondsman for some people accused of distributing

¹"A power is exercised fraudulently if its repository intends to achieve an objective other than that for which he believes the power has been conferred. His intention may be to promote another public interest or his own private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise." In de Smith, p.199.

²Reid, p.263.

³In Re Henry's Drive-In and the Hamilton Police Board, [1960], O.W.N. 468.

⁴[1959], S.C.R. 121.

sedition literature. The Supreme Court of Canada intervened and held the decision of the commission to be beyond its powers. Mr. Justice Rand stated the principle clearly and strongly:

In public regulation of this sort, there is no such thing as absolute and untrammelled 'discretion', that is, that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. 'Discretion' necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.¹

As alluded to above, an authority also abuses its discretionary² power when it exercises it on irrelevant grounds or without regard to relevant considerations³ or with gross

¹ [1959] S.C.R. 121 at 140.

² Of course, discretion as used in this section is judicial or qualified discretion. See de Smith, p.188.

³ "If relevant factors are specified in the enabling Act, it is for the courts to determine whether they are factors to which the authority is compelled to have regard and if so, whether they are to be construed as exhaustive." In de Smith, p.205.

unreasonableness.¹

Errors of Law

It is only logical that in rendering decisions a tribunal should observe the law. Indeed, most of what has been discussed so far amounts to just that. But in administrative law, there is also a seemingly narrower sense to 'observing the law'; one which comes into play after it is determined that a tribunal is acting within the limits granted to it by statute. If, for example, in the course of giving its written decision, a tribunal were to make an incorrect statement about some law - possibly about the effect of some statutory provision or about the common law - and base its decision on such an erroneous assumption, we would of course expect the tribunal to be 'reprimanded' and the error 'corrected'.

Indeed, under the traditional remedies, the courts do in fact review and quash decisions which contain "errors of law on the face of the record".² As the expression it-

¹"So close is the connection between irrelevance and unreasonableness that it is seldom possible to isolate unreasonableness as an independent ground. Unreasonable acts...usually take place because an authority has deviated from the point of relevancy...." In de Smith, p.214.

²Canadian courts seem to have adopted Lord Denning's pronouncement in the Shaw case, [1952], Q.B. 338. In that decision, the record was held to embrace all documents such as the order or decision; the application and like documents used to initiate proceedings; and the pleadings if there had been any. Canadian and British courts now also accept the reasons for judgment, but normally do not

self tends to indicate, the courts, acting in the supervisory capacity,¹ will normally not intervene where the error of law is not readily apparent.² This stipulation, it may be argued, has the adverse effect of promoting, or at least, condoning covert errors. Nevertheless, both British and Canadian courts have been fairly consistent in making that assertion.³ It might be noted, too, that even where

accept transcripts of evidence, as part of the record.

¹Professor Wade notes that when a court reviews for 'error of law', "it is tantamount to allowing appeal on a point of law". See Wade, Administrative Law, p.43. It appears that Professor de Smith tends to agree with that view. See de Smith, Judicial Review of Administrative Action, p.69.

²"...the error must be readily ascertainable by the supervising court and not one which can be ascertained only by a detailed examination of all the evidence that was put before the deciding agency or which needs the assistance of technical experts to explain." See Garner, p.132.

³For a brief discussion of the historical reasons for that stipulation see Wade, Administrative Law, p.74.

the error is readily apparent the court may refuse to interfere if, in its opinion, the tribunal's decision was not affected.¹ In other words, the court may try to determine the 'seriousness' of the legal error relative to the decision rendered by the tribunal.

However, contrary to what the above statements might lead one to believe, quashing for error of law has been neither rare nor particularly 'restrictive'. In fact, the courts have used this ground in a number of 'imaginative' ways. For example, Professor de Smith has noted that where a tribunal has set out the evidence in its decision, findings of primary fact² not based on any evidence whatsoever have been held to be erroneous in law.

In Canada, the following 'errors' have been held to ones of law and have resulted in the quashing of a tribunal's decision:

...an error in the interpretation of a statute...; the censuring of a manager of a pharmacy when only the pharmacy was charged; a failure to allow parties to adduce evidence; considering irrelevant or extraneous

¹See the Mountain Pacific case, [1966], 55 D.L.R. (2d) 189. For a list of British cases see Garner, p.136.

²"A finding of [primary] fact may be defined as an assertion that a phenomenon exists, has existed or will exist, independent of any assertion as to its legal effect. ...the question whether the holder of a policy has renewed the policy before its expiry is one of fact." See de Smith, Judicial Review of Administrative Action, p.84.

evidence; the omission of certain recitals of fact in an order finding an unfair labour practice; admitting extrinsic evidence where no ambiguity in an agreement to be construed; failure to make the necessary enquiry; and a failure to observe a statutory condition; and a holding that a collateral agreement required a breach of a statute.¹

THE REMEDIES

Having dealt with the principles of review in the previous section, it will now be easier to explain and understand the remedies that have evolved over the years. It must be realized that the remedies to be discussed here are 'ancillary' in the sense that they are supplementary to appeal and review procedures that are sometimes provided by statute. These remedies make up the so-called prerogative writ system and are normally used where no other form of redress is available or seems appropriate.

Historically, the 'writs' of

Certiorari, prohibition and mandamus were evolved by the courts of common law. The injunction [on the other hand] is an equitable remedy [while] the declaration is a nineteenth century interloper, akin to an equitable remedy but not fitting into any neat category.²

¹Reid, Administrative Law and Practice, p.363.

²de Smith, Constitutional and Administrative Law,

For convenience, however, all of these remedies are often referred to as 'common law' remedies.

In the next few pages each of these remedies will be examined briefly under one of two headings which indicate generally the frequency of use in the Canadian context.

In reading each section, it should be remembered that "Canadian judges have seldom defined the grounds for granting the remedies with any degree of precision".¹

The Major Remedies

Certiorari and Prohibition: - While it is true that mandamus and certiorari together "are the twin pillars of the common law of judicial control",² in Canada at least, it is certiorari and prohibition which are most frequently used.³ The latter two

...may be appropriately discussed together for prohibition differs, in substance, from certiorari only in the time appropriate for its use. Certiorari quashes something already done: prohibition [as the name denotes] seeks to prevent an error from either occurring or continuing.⁴

Both writs have been issued primarily against bodies that

¹Millward, Canadian Bar Review, (1961), p.353.

²Jaffe, Judicial Control of Administrative Action, p.176.

³Reid, p.319.

⁴Ibid., p.320.

are under a duty to act judicially in determining an individual's rights,¹ but they have been used now and then to control administrative action as well.²

In general

Prohibition is a procedure whereby an application may be made to a superior court to restrain an inferior tribunal from acting without power conferred on it, i.e., beyond its powers.

Certiorari is a similar proceeding whereby an application is made to a superior court after action has been taken...to require the record and decision of the tribunal to be brought before the court,³ so that its legality may be examined to determine whether the tribunal has acted within its powers,⁴ and for an order quashing the decision where it has been made without power.⁵

¹"...a duty to 'act judicially'...will sometimes be inferred from the impact of a decision on individual interests although the decision is analytically administrative. In such cases certiorari and prohibition will issue". See de Smith, Constitutional and Administrative Law, p.580.

²Wade, The Law Quarterly Review, (1951), p.104.

³It appears that this feature is most responsible for the name given to the proceeding: Historically the justices of the King's Bench ordered the inferior bodies to certify their records to the justices.

⁴It should be noted that the remedy is not to be used as a means for reviewing the merits of a decision. See R. v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128, one of the leading British cases on certiorari proceedings.

⁵McRuer Report, p.240. For a more precise account of when certiorari will issue see Re Toronto Newspaper Guild, Local 87, American Newspaper Guild (C.I.O.) and Globe Printing Company, [1951], O.R. 435 at p.442. In that case,

More specifically, these two writs have been issued on any of the following grounds:

- 1) exceeding jurisdiction,¹
- 2) declining jurisdiction,²
- 3) breach of the rules of natural justice,³
- 4) error of law on the face of the record,⁴
- 5) failure to act in good faith,⁵
- 6) bias,⁶ and
- 7) where there is fraud.⁷

Gale J. quotes the judgment of Mr. Justice Gibson in Rex (Martin) v. Mahony, [1910] 2 L.R. 695 at 731 - a judgment which received the approbation of the Privy Council in Rex v. Nat Bell Liquors Ltd. noted above.

¹That ground is one of several listed by Gale J. of the Ontario High Court in the Globe case, [1951], O.R. 435 at 442.

²On the question of declining jurisdiction see Board of Education v. Rice, [1911], A.C. 179. For an excellent Canadian case see Re Toronto Newspaper Guild and Globe Printing Co., [1953], 2 S.C.R. 18.

³See the same cases cited in the preceding footnote.

⁴See, for case example, R. v. Arthurs, ex parte Port Arthurs Shipbuilding Co., [1969], S.C.R. 85.

⁵See Henry's Drive-In case, [1960], O.W.N. 468.

⁶See Glassman v. College of Physicians and Surgeons, [1966], 2 O.R. 81. The court was of the view that the Council of the College of Physicians and Surgeons had been improperly constituted when the order was made by reason of the presence and participation of the members of the discipline committee whose decision was under appeal.

⁷See the Globe case, [1951], O.R. 435 at 442.

Mandamus: - Mandamus is also a proceeding in a superior court; this time, however, to compel an inferior tribunal to exercise the powers that have been conferred on it by statute. The refusal to act on the part of a tribunal may take a number of forms: For example, it may be a refusal to grant something that is being sought such as a licence or, perhaps, a job; it may simply be a refusal to hold a hearing or make a decision; or it may be a refusal to make some regulation that would otherwise give the individual a specific right.¹

It should be noted that before mandamus will issue, the tribunal must show a clear failure to perform its duties. But this may be done in a number of ways:

- (a) by showing a demand by a person entitled to have the duty performed, and a refusal by the tribunal authorized or required to perform it;
- (b) by showing conduct of the tribunal of such a nature that a refusal is to be implied; or
- (c) by showing a purported decision of the tribunal which is ultra vires² or ineffective.³

¹ Jaffe, Judicial Control of Administrative Action, p.176.

² See Re Milk Board (B.C.) and Crowley, [1954], 3 D.L.R. 519 or Re Schepull and Beckeschus and the Provincial Secretary, [1954], 2 D.L.R. 5. Reid suggests those cases to illustrate the point.

³ McRuer Report, p.266.

Mandamus will also issue to order a tribunal to exercise a discretion vested in it by statute. ~~The~~ courts, of course, have no power under this remedy to direct a tribunal to decide in a particular way;¹ they merely command the tribunal to consider the matter and render a decision. If, on the other hand, a discretion is abused, mandamus may issue to order the tribunal to exercise its authority in the proper way, i.e., in keeping with the intent of the empowering statute.² As R.F. Reid puts it:

Mandamus lies to correct an arbitrary exercise of discretion...[and to prevent a decision from being based] upon irrelevant or alien grounds, or on extraneous considerations.³

Normally, the courts will not order the performance of the type of public duty illustrated (in several places) above, unless the applicant can demonstrate some immediate or direct interest in the "performance" he is requesting. It should also be noted that where the Crown is expressly designated, the courts will not issue this remedy to compel

¹ See R. v. Leong Ba Chai, [1954], S.C.R. 10. In that case the Supreme Court held that mandamus will lie directing the Immigration Officer, appointed to fulfil a particular act, to carry out his statutory duty to determine whether the child in question complies with the provisions of the Immigration Act.

² Garner, p.173. These cases seem to substantiate the point: R. ex rel. Lee v. Estevan, [1952], 1 D.L.R. 362 and Re Dyke and McEachern, [1950], 4 D.L.R. 602.

³ Reid, pp.381-382.

it to perform.¹ This does not apply, however, to duties clearly imposed on a servant of the Crown.²

Injunction: - In administrative law, an injunction restrains "an inferior tribunal from acting, or carrying into effect action already taken, beyond its powers."³

The courts will issue such an order against any type of administrative agency - excluding the Crown - irrespective of the type of decision involved - judicial, quasi-judicial or strictly discretionary. Needless to say, then, it is frequently used against administrative agencies.⁴ But as with mandamus, the application is usually denied unless the plaintiff in the proceedings is more-or-less directly aggrieved⁵ by the action or the proposed action. In addi-

¹In fact, prerogative orders of mandamus, certiorari or prohibition will not lie against the Crown as the Crown cannot sue itself. Similarly, the court will not grant an injunction against the Crown per se. See Garner, p.270.

²McRuer Report, pp.265-266.

³McRuer Report, p.240.

⁴At least, that is the situation in Canada. See Reid, p.408. In Britain, however, injunction is not common. See Garner, p.177.

⁵In most legal systems, the petitioner must establish that he is directly aggrieved by the action he seeks to 'correct'. This principle is obviously designed to prevent the "meddlesome interloper" from clogging up the judicial system. Locus standi, therefore, is restricted to those who have a personal interest in the proceedings. In this context, locus standi is simply the legal capacity to challenge an administrative act or decision in the ordinary

tion, the courts will normally require all other forms of redress to be exhausted before granting this remedy.¹ The injunction granted may be temporary,² (i.e., until the court can more fully look into the matter), or it may be permanent. It may also be mandatory³ in the sense that it requires an administrative agency to take certain specified action or it may be preventive in that it prohibits an agency from acting in a particular way.

Interestingly enough, tribunals themselves often seek injunctions to enforce their own orders. For example, a tribunal may commence such proceedings to prevent the practice of a particular profession that it has declared unauthorized in its own deliberations.⁴

courts. Locus standi must be shown to obtain an order of mandamus, injunction or declaration against an administrative body. And in some instances, similar standing must be shown by an applicant for certiorari or prohibition. For a more detailed discussion of this point, see de Smith, Judicial Review of Administrative Action, pp.305-313.

¹Reid, p.407.

²"An interim or interlocutory injunction may be awarded as a matter of urgency ex parte (on the strength of the plaintiff's representations alone) to restrain the commission or repetition of an allegedly wrongful act which is liable to do very serious harm [i.e., irreparable damages] pending a full hearing of the case". See de Smith, Constitutional and Administrative Law, p.584.

³"Mandatory injunctions are granted sparingly; and in administrative law are of little practical importance". Ibid.

⁴Reid, p.408.

The Minor Remedies

Action for Damages: - As discussed earlier, any statutory tribunal must act within the law. Unauthorized action may be quashed, i.e., rendered invalid by the ordinary courts under their supervisory authority. It should also be noted, however, that most administrative agencies are also subject to another 'remedy', namely, action for damages. Thus, if a tribunal were to create an unauthorized nuisance or trespass on private property or perform some other tortious activity,¹ like an ordinary citizen, it, too, would be liable to an action for damages.²

That principle is well established in the common law of Britain and Canada. For example, in the Cooper case³ of 1863, the plaintiff brought an ordinary action for damages for trespass against a local authority which had

¹For a brief discussion of the law of torts see J.E. Smyth and D.A. Soberman, The Law of Business Administration in Canada (Toronto: Prentice-Hall of Canada Ltd., 1968), pp.24-43.

²Similarly, a breach of contract on the part of an administrative agency makes it equally liable for damages. Damages for breach discussed in Smyth and Soberman, The Law of Business Administration in Canada, pp.244-250, and in Friedmann, Law in a Changing Society, Chapter 12, ("Government Liability, Administrative Discretion and the Individual").

³Cooper v. Wandsworth Board of Works, [1863], 14 C.B. (N.S.) 180. Discussed in Wade, Administrative Law, p.82.

demolished a building on his property. Since the authority had acted illegally - contrary to natural justice - Cooper received full damages. In more recent times, an action for damages against the Prime Minister of a Canadian province was successful. It will be recalled that in Roncarelli v. Duplessis¹ the Quebec Premier had directed an administrative agency to cancel a tavern licence because the licensee had indicated support for members of the Jehovah's Witnesses.

But it should be noted that while in Canada and in Britain

...claims for damages are frequently made against tribunals...much stands in the way of their success. [Among other things] legislation exists to protect public authorities in various ways including the imposition of limitation periods and conditions requiring the posting of security for costs.²

And the courts themselves have not always been particularly helpful in holding public authorities liable for damages. A number of judgments, for example, have held that malice as well as lack of authority must be proven against the offending agency to establish a successful claim.³ It should

¹ [1959] S.C.R. 121.

² Reid, p.413.

³ Ibid., p.418.

be noted, too, that the onus is on the plaintiff to show that the public official acted maliciously, and to do this, the courts have required "strong and cogent evidence".¹

Declarations: - In very general terms, a declaratory action is a proceeding designed to obtain a court ruling on whether some action taken or proposed to be taken is 'proper' in the legal sense. It should be noted, however, that the declaratory judgment by itself leads to no remedy. It merely enables a party to discover what his rights are, but

...the judgment may not be enforced against any party and proceedings for contempt are not available against a party who refuses to recognize [its] propriety.²

In the area of public law this is not really a serious drawback since few administrative agencies are willing to ignore the opinion of a higher 'tribunal' concerning the legality of its action.

In Canada, the courts have occasionally issued the declaration for "violation of natural justice, bias, bad faith and, more generally, for lack of jurisdiction".³

¹See Antifaev v. Sherman, [1950], 2 W.W.R. 591. Cited by Reid at p.414.

²Derrel T. Warren, "The Declaratory Judgment: Re-viewing Administrative Action", Canadian Bar Review, (1966) Vol. 44, p.610.

³Ibid., p.641.

But it should be emphasized that

Notwithstanding the clear language of statutory provisions authorizing declarations, where no other relief was or could be claimed, courts have shown an impressive conservatism over the years in considering requests for declaration alone. [In Canada, therefore,] proceedings for declarations remain relatively rare.¹

Some legal writers² and jurists,³ however, have encouraged the use of the declaratory judgment as a substitute for certiorari. Perhaps, the most significant general advantage of the former proceeding is its discretionary nature. In the Barnard case, Lord Denning said:

I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself, and the court should not, I think, tie its hands in this matter of statutory tribunals.⁴

Habeas Corpus and Quo Warranto: - Finally a very few words about habeas corpus and quo warranto. The first of these, although generally a "great bulwark" of

¹ Reid, pp. 398-399.

² Warren, for example.

³ Wade notes this in Administrative Law, p. 107.

⁴ Barnard v. National Dock Labour Board, [1953], 1 All E.R. 1113 at 1119. Cited in Garner, p. 179. Contrast Lord Denning's view of when the declaration should issue with that in the National Trust case, [1940], 3 W.W.R. 650 per O'Halloran at p. 672 or in the Credit Foncier case,

liberty",¹ is relatively unimportant in the field of administrative law.² In this specialized area, it is usually confined to "immigration matters, where it is frequently used to challenge custody and deportation orders."³

Quo warranto, too, is relatively unimportant in modern times at least. Both in Britain⁴ and in Canada⁵ it has been supplanted to a large extent by statutory provisions. In general, this remedy is used to question the legality of an appointment to a public office which has been created by statute. In Canada, this remedy has been successfully used to challenge "the appointment of the members of a provincial municipal board"⁶ and "has been said to be the appropriate means to attack the right of a de facto judge to sit".⁷

[1940] 1 D.L.R. 182 per MacDonald J. at p.616.

¹McRuer Report, p.239.

²Habeas corpus is frequently combined with certiorari and sometimes appears with injunction.

³Reid, p.379.

⁴de Smith, Judicial Review of Administrative Action, pp.353-354.

⁵McRuer Report, p.239.

⁶Reid, p.395.

⁷Ibid., p.396.

CHAPTER FOUR

THE JUDICIARY 'versus' PARLIAMENT

PARLIAMENTARY DELEGATION

In a number of instances it appears that the legislative branch has deliberately tried to curtail or eliminate the 'courts' supervisory role in the administrative process. And it might also be noted, that the practice of delegating to the courts specific areas of responsibility in more-or-less judicial functions has sharply diminished in the last few decades. In fact, in some cases, where, such 'first instance' authority had previously been vested in the courts, the legislature has, in more recent times, taken it back and placed it, instead, in some administrative tribunal.¹

The rationale for eliminating or limiting judicial

¹For example, the determination of the legal right to workman's compensation now resides in some provincial commission, "So badly and so expensively was the task usually performed [by the courts] that, in Canada, the jurisdiction was removed from them". See Willis, University of Toronto Law Journal, (1935-36), p.58.

'involvement' has generally hovered around four or five main points. Apart from the obvious limitation in terms of case-load capacity, it has usually been argued that the courts are just too formal and rigid and the judges obviously untrained and generally unpracticed in the numerous fields of specialization that arise in a complex society.¹ Even the British Committee on Ministers' Powers back in 1932 grudgingly conceded that administrative tribunals might, in a few circumstances at least, be preferable on certain grounds: "cheapness, speed and expert knowledge of their particular field, accessibility to the parties and freedom from technicality".² On this last point, Professor de Smith comments:

The kind of person who is aggrieved by, [say,] refusal of a social security benefit...may be overawed by the atmosphere of a judicial proceeding and reduced to incoherence...if he is precluded by the rules of evidence from telling his story in his own way.³

The courts, on the other hand, have a number of commendable characteristics:

¹The reasons for creating Special Tribunals is covered very succinctly in O.H. Phillips, Constitutional and Administrative Law (London: Sweet and Maxwell, 1962), pp.586-587.

²de Smith, Constitutional and Administrative Law, p.528.

³Ibid., p.530.

They are independent and impartial;
 they are staffed...by persons trained
 in the law who have, generally acquir-
 ed a wide knowledge of humanity...;
 they have a highly efficient system
 for establishing facts.....¹

It would appear, therefore, that each of these two branches
 - the judicial and 'administrative' - has both 'liabilities
 and assets' when it comes to doing the work of government.

In a rather interesting article written some time ago,
 Dalhousie Law School Professor John Willis, considered, in
 some detail, how it might be best to divide up governmental
 powers. Of the three approaches considered, he found the
functional one to be most appropriate. He explains:

[This] approach examines, first, the
 existing functions of existing govern-
 mental bodies in order to discover what
 kind of work each has in the past done
 best, and assigns the new work to the
 body which experience has shown best
 fitted to perform work of that type.
 If there is no such body, a new one is
 created.....²

It is, of course, Parliament which must decide what
 functions will be assigned to what persons or agencies.
 The legislative branch has long realized that if the work
 of government is to be done efficiently, much of its power
 must be delegated. It is generally conceded, for example,
 that Parliament cannot effectively discuss minor details. -

¹Sir Ivor Jennings, The Queen's Government (Harmonds-
 worth, England: Penguin Books Ltd., 1969), p.147.

²Willis, University of Toronto Law Journal, (1935-36),
 p.75.

the form of a licence for instance - or debate highly technical issues. These matters are probably handled much more adroitly in a government department where experience and expertise in a particular field are much more abundant and where the bureaucratic system renders decision-making in such matters much more 'manageable'.

Where broader issues or principles are at stake, Parliament may decide to retain the decision-making power for itself. On the other hand, it may decide to entrust a whole field of human activity (for example, railway transportation) to a small body of persons charged with its regulation. In addition to laying standards under the enabling legislation, the same 'agency' may also be given the power of deciding whether, in a particular case, the standards or requirements it has established are being met.¹

In another instance, involving the determination of legal rights, Parliament may decide to delegate such power to the courts because of their expertise in this area. Parliament may decide, however, that since a great number of disputes involving rights over a particular piece of legislation are apt to occur that it prefers to place the adjudication function in the hands of a special tribunal outside the ordinary court system. Parliament might further decide that the same tribunal should determine finally

¹Traditionally, these two functions would be exercised by separate branches of government rather than one 'body'.

the rights of an individual and that recourse to the courts should be totally prohibited.

All of these allotments of power are within the scope of Parliament, and presumably, as suggested by Professor Willis, have been granted to the 'agency' best suited to handle such matters. Whether or not Parliament has made the proper delegative choice is sometimes difficult to determine and may, therefore, often be no more than a 'matter of opinion'. In any event, no one would seriously suggest that Parliament's decision - good or bad - should not be given effect.

And yet, the vesting of legislative, executive and/or judicial duties in some person or group of people has rarely been accepted with a great deal of docility. In fact, there has always been a persistent school of thought which holds the view that the 'administrative process' represents a dangerous encroachment on the rights and freedoms of the individual and that the ordinary courts should curb such tendencies. In the words of Professor Angus:

...the extreme situations of abuse by administrative agencies demand some form of supervision. Although direct political action is often suggested as an existing remedy, the impracticability of this avenue in most instances is obvious. At this stage in the development of administrative law... [t]he courts must remain the recognized protector from administrative oppression. ... [And he adds:] But [the courts] now seem more willing to assume a passive role. If this trend continues, and administrative tribunals are permitted to pursue

whatever tickles their fancy unchecked, our society would seem destined to suffer rather serious consequences.¹

It would appear, however, contrary to the assessment made by Professor Angus in the 1960's, that the courts have in fact taken their 'supervisory' role quite seriously and that, in some instances, have so broadened the review process that it resembles an 'appeal on the merits'.² And interestingly enough, some of this has occurred in the face of what appear to be explicit attempts by the legislature to either restrict or eliminate recourse to the courts.

PRIVATIVE PROVISIONS

Rather frequently, Parliament seems to make it explicit that the decision of a particular board shall be "final and conclusive", for example, or "final and binding"³ in the sense that they may not be redetermined, reversed or

¹W.H. Angus, "The Waning Jurisdiction of the Courts", Saskatchewan Bar Review, (Dec. 1963), Vol. 28, No. 4, p.146.

²Bora Laskin has said: "An examination of the cases discloses that the courts treat certiorari to labour boards as if they were sitting on appeal from the verdict of a jury". See "Certiorari to Labour Boards", Canadian Bar Review, (1952), Vol. 30, p.936 at 994.

³See, for example, The Arbitration Act, R.S.O. 1960, c. 18, Schedule A, clause 11.

reviewed by any other agency including the courts. Another approach is to include in the delegating statute a clause or two which prohibits review via the traditional remedies - often there is a 'no-certiorari clause'. In other instances, Parliament simply specifies that a particular board has total or "exclusive jurisdiction" to decide certain matters, and sometimes, even all 'secondary' matters arising from it. Some of the most extensive "exclusive jurisdiction clauses" (as they are often called) appear in the workmen's compensation legislation of the different provinces. While there is not total uniformity in these enactments, many of them begin with sections that give the Workman's Compensation Board exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law.¹

On numerous occasions, however, the courts seem to have decided to ignore or, at least, give restrictive interpretations to the different types of privative clauses² mentioned above. To begin with

¹Discussed in Angus, Saskatchewan Bar Review, (1963), p.136.

²As used by a number of authors, "privative clauses" refer to any type of provision designed to exclude or limit court intervention. For this paper, we adopt that broad definition. At pp.179-180 Reid discusses the "variable meaning" of the term.

...the exclusive jurisdiction clause has had only indifferent success. While its literal effect has frequently been conceded, it has more often been interpreted as being no shield against jurisdictional defect....Exclusive jurisdiction to determine all matters [then] depends on whether jurisdiction is established, and...such a clause will not prevent quashing for a wrong decision on a collateral matter.¹

And in the Globe case,² it was held that neither a "finality" clause or some other privative provision was capable of precluding judicial review where an error on the part of the tribunal - in this case, the Ontario Labour Relations Board - went to its jurisdiction. As Mr. Justice Fauteux explained:

The authorities are clear that jurisdiction cannot be obtained nor can it be declined as a result of a misinterpretation of the law, and that in both cases the controlling power of the superior Courts obtains, notwithstanding the existence in the Act of a no-certiorari clause.³

A few years later, in the Woolworth case,⁴ the Sup-

¹Reid, p.198. In Pringle et al. v. Fraser, [1972] 26 D.L.R. (3d) 28, however, the Supreme Court recognized a statutory provision giving the Immigration Appeal Board "sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction" as capable of excluding all Courts from entertaining any type of proceeding in relation to matters exclusively assigned to the Board.

²Toronto Newspaper Guild, Local 87, American Newspaper Guild (C.I.O.) and the Globe Printing Co., [1953] 2 S.C.R. 18.

³Ibid., p.41.

⁴[1955] 5 D.L.R. 607.

reme Court took the same position. The litigation concerned the decertification of a union as a bargaining agent. Under the Saskatchewan Trade Union Act there was to be no appeal from the decision of the provincial Board deciding such matters, nor was the decision to be reviewable by any court or by any of the extraordinary remedies. Locke J., delivering the judgment for the Supreme Court of Canada mentioned the privative provisions, but made no further comment on them before quashing the Board's ruling.

And in a more recent decision - Jarvis v. Associated Medical Services Ltd.¹ - the Supreme Court re-affirmed the stand taken in the Globe case. Cartwright J. in reference to the 'no-certiorari' clause² in question said:

...I cannot take the section to mean that if the Board purports to make an order which, on the true construction of the Act, it has no jurisdiction to make, the person affected thereby is left without a remedy.³

¹ [1964] 44 D.L.R. (2d) 407.

² The privative clause appears in s. 80 of the Labour Relations Act, R.S.O. 1960, c. 202.

³ [1964] 44 D.L.R. (2d) 407 at pp.411-412. See also Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796 et al., 1970 11 D.L.R. (3d) 336. However, it should be noted that in Executors of Woodward Estate v. Minister of Finance, [1972] 27 D.L.R. (3d) 610, the Supreme Court of Canada recognized another type of privative "provision...unlike any other which [had] previously been considered by the Court" as capable of precluding review even where the tribunal exceeded its jurisdiction.

And at the provincial appeal court level for certain

Jurisdiction is not regarded as simply going to the question whether...[a board] can properly entertain the proceeding;...it also goes beyond any jurisdictional fact matters such as whether certain persons are 'employees'....In Saskatchewan and Ontario, it includes rulings on evidence. It has been held to include a failure of a labour board to hold a proper hearing [and numerous other things]....¹

And in the MacCosham Storage case,^{1b} Procter, J.A. of the Saskatchewan Court of Appeal cited Lord Simond's judgment in the John East case² as authority for the proposition that error of law on the face of the record would justify certiorari to quash, notwithstanding the privative clause.³ It would appear, then, that some judges at the provincial

¹Bora Laskin, Can. Bar Review, (1952), pp.994-995.

^{1b}MacCosham Storage and Distributing Co. (Sask.) Ltd. v. Canadian Brotherhood of Railway Employees and other Transport Workers, [1958], 14 D.L.R. 2d 725.

²[1949] 3 D.L.R. 51.

³It has also been suggested that the authorities cited by the Ontario Appeal Court in Re Ontario Labour Board and Bradley, [1957], O.R. 316, should leave no doubt that review for error of law disclosed on the record cannot be prohibited where the tribunal has been given power to decide questions of law. I have studied this case carefully. While it is easy to assume from the cases cited by Mr. Justice Roach (delivering the judgment of the court) that privative clauses should be ignored where there are patent errors of law, the Ontario Court itself did not explicitly state that view nor did it indicate that it might interpret the cases cited in that way.

level, at least, are inclined to allow review notwithstanding privative clauses even for error of law on the face of the record, sometimes as part of the jurisdictional concept and sometimes as a separate ground. And it might also be noted that in a British case, The Queen v. Medical Appeal Tribunal,¹ a "shall be final" provision did not prevent a successful application for certiorari for error of law on the record.²

In general,³ however, Canadian courts are probably not disposed to review for patent error of law where there are strong privative provisions. But the courts are sometimes 'imaginative'. In R. v. Labour Relations Board, ex parte Taylor,⁴ for example, it was held that while privative clauses in general may prevent review for error of law, it was doubtful that the clause in question would have that

¹ [1957], 1 Q.B. 574.

² Discussed in Wade, Administrative Law, p.112.

³ Generalizations are difficult. For one thing, privative provisions are not always worded in the same way, and, as is apparent, the courts are not always clear nor their judgments consistent.

⁴ [1964], 41 D.L.R. (2d) 456.

effect. But the 'clause in question' read:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes....

[Furthermore]...no decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.¹

It might appear, therefore, that Canadian courts have 'intruded' where the legislature seems to have wanted to exclude them.² While that is possibly true in some cases, there must certainly be other explanations as well. Very simply, it might be argued that the privative provisions were never intended to totally bar judicial control. For instance, by including a privative clause of one kind or another, parliament did not intend to permit an agency to exceed its prescribed jurisdiction and adjudicate any con-

¹ Those privative provisions were noted by McRuer, C.J.H.C. in his judgment at p.460. They are sections 79(1) and 80 of the Labour Relations Act, R.S.O. 1960, c.202.

² It must be realized that there is no constitutional principle on which the courts may claim a right to review administrative decisions.

troversy it chooses. And where a statute sets out a procedural format for a board or commission to follow, surely parliament did not intend, notwithstanding general privative provisions, to eliminate the power of the court to 'enforce' those statutory requirements. Such principles are certainly not repugnant to the more general democratic ones we subscribe to, and it is certainly possible that Parliament had no intention of permitting such 'violations' from occurring.

Another explanation, along similar lines, also has some merit. This has been well stated by Lord Sumner in Nat Bell Liquors. Referring to statutes that had been passed long before Jervis's Acts 1848, creating an inferior court and declaring its decision to be 'final' and 'without appeal', he said:

...again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by certiorari. There is no need to regard this as a conflict between the Court and Parliament; on the contrary, the latter by continuing to use the same language in subsequent enactments, accepted this interpretation, which is now clearly established and is applicable to Canadian legislation...when regulating the rights of certiorari and of appeal in similar terms. (Italics added.)¹

¹Quoted by Roach J.A. in Re Ontario Labour Relations Board et al., [1957], O.R. 316 at 333.

But that explanation has not been universally convincing. Certainly, as Lord Sumner contends, the draftsmen, in a number of instances, have seemingly placed the usual 'finality clause' in their enactments almost as a matter of course. But there also seem to be some very lengthy, deliberate and carefully worded provisions which have been written into various statutes to presumably¹ erase any doubt as to what was intended - a total elimination of judicial control.¹ It is little wonder, therefore, that some observers view the courts' restrictive interpretation of privative clauses as a courageous attempt on the part of the judiciary to stand up to the legislative branch which, all too often, seems willing to sacrifice the rights of the individual for the sake of expediency or other considerations. In a number of instances that certainly might explain the approach taken by the courts. And, indeed, such acts of 'judicial activism' are to be commended especially where it is apparent that the populace is unaware of the adverse implications of certain statutory provisions.

But all such explanations seem predicated on the assumption that the "English language is...an instrument of

¹But it may be argued that if that were, indeed, Parliament's intention, it has never sustained a cry of outrage against the judiciary's distortion of that intention. This is discussed more fully in the next section.

mathematical precision"¹ and that the same words mean the same thing to all persons, and that since it is evident what is meant, it is merely necessary to 'explain' why the judicial arbiter varied from what is obvious. The situation is probably not so simple. What one person sees and understands as a result of a series of words may vary considerably from what another understands by the same words. It is, therefore, easy but certainly not always accurate or fair to accuse the courts of "specious interpretation and unsupported assumptions".² That which is held to be clear, unambiguous and explicit to one party may be just the opposite to another. It must be realized, that to each attempt at understanding the meaning of words, each 'interpreter' brings his personal experiences, standards and morals. While some, more so than others, can recognize and deter the tendency to read-in what they wish, others are less sensitive. Sometimes, however, a consensus is overwhelmingly clear, and it may be said with some accuracy that such a phrase denotes such-and-such a meaning to most readers. But all too often, such a consensus is not reached.

¹Denning, L.J. in Seaford Court Estates Ltd. v. Asher, [1949], 2 K.B. 481 at 499. Quoted in Griffith and Street, p.98.

²Laskin, Can. Bar Review, (1952), p.991.

It must also be realized that statutory enactments are rarely "drafted with...perfect clarity".¹ Those who draft legislation are often torn between what they think best, what their political superior considers appropriate,² and, in the end, what the political climate will permit. Obviously, then, where legislation is purposely or accidentally vague or incomplete or impractical or unsuited to new circumstances, it is to the courts that falls the task of making it all workable - of clarifying ambiguities, ferretting-out contradictions and filling in the omissions. In such instances, for sure, the courts may appear to be performing a legislative function; at times, they may appear to be going against the original intention of the legislation and, in some cases, also against current public opinion. Their actions may be variously interpreted as may the reasons behind their actions. But often the validity of such

¹Denning in the Seaford case, [1949] 2 K.B. 481 at 499. It might be well to quote a larger portion of what Lord Denning said: "Whenever a statute comes up for consideration, it must be remembered that it is not within the human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized."

²That is, in terms of what is best from a statutory or policy point of view, excluding political considerations.

analysis is rather limited if not defective.

THE MERITS OF JUDICIAL CONTROL

Having discussed in some detail the involvement of the courts in the administrative process, it might be wise to entertain at this point a more deliberate discussion about the merits of this type of control in our system of government. It is towards this goal that the remainder of the chapter is directed. But so as not to mislead the reader, it is necessary to immediately qualify our objective.

While the advantages of either judicial control or the lack of it may be stated with relative facility, it is much more difficult to make a clear choice between one or the other. For instance, while a total lack of judicial involvement would probably assure a more expedient decision-making process, few seem willing to sacrifice fairness for expediency. And it appears, too, that non-judicial devices and safeguards¹ are generally inadequate by themselves as checks to administrative abuses. Given these sort of premises and conditions, (perceptions though they may be), the moderate man would probably favour some sort of synthesis or compromise and presumably speak in terms of degree: judicial review - yes - but not too much.

¹Noted above in Chapter 2.

Indeed, whether or not the foregoing statement of the problem is accurate or not is truly a matter of opinion, as is the contention that limited review is generally a beneficial condition. Pages and pages of 'argument' have already been amassed on either side of the question and on various positions in-between. Yet in the end, each individual is more-or-less on his own when it comes to balancing-off one advantage against another and making a final choice. In sum, we are of the view that judicial review has been beneficial, and that it should continue at a limited level. It is also our view that the courts - to this time at least - have tried to achieve no more than just that - a limited level of involvement. It is really to help substantiate these views that this section is devoted.

The courts may, indeed, have had some purpose for maintaining the 'myth' that they will not normally 'interfere' with administrative decisions and that, unless expressly empowered by statute, they will not reconsider the merits of a decision. By so doing, they have been able to withdraw from control where it appears to have been in the public interest or generally to their advantage to recoil from intervention. In such instances, the court may be making "an ally of time and relying on the processes of community give-and-take and compromise to yield, in time, a clear

policy solution."¹ What appears periodically, then, as a haphazard inconsistency on the part of the courts may be more-or-less a conscious attempt to reach some sort of a desirable balance between human rights, public opinion and administrative necessity. It might also be ventured that the area to be controlled is so thoroughly complex and relatively new² that neither the judiciary nor scholarly writers have been able to discern or evolve a general consensus concerning the proper limits for judicial control.³

While aware of the dangers of extreme judicial positivism, we remain convinced that, in this area of law, the courts have exercised judicious restraint and have often intervened only to correct manifest injustice.⁴ It is difficult to fault the courts for coming out on the side of fairness and justice, often on the side of the average citizen rather than on the side of big business, big money and the invisible hand of big government. If, however, the

¹Edward McWhinney, Judicial Review (Toronto: University of Toronto Press, 1969), p.219.

²Ibid., p.201.

³Professor Wade, it appears, would agree with this view. Wade, Administrative Law, p.32.

⁴The McRuer Commission concurs with this view. See McRuer Report, p.307.

disposition of the courts were to change, it would then become necessary to condemn their actions and to struggle against "rule by appointees."

It is rather interesting to note that while legislation, at times, seems to make an express attempt to give wide powers to the administrative branch and totally exclude judicial review, the political arm of government has never really sustained a cry of outrage against judicial involvement. Indeed, it would appear that the elective arm is fearful of bringing the subject of these extensive delegations and restrictive intentions under full public debate.

In Canada, for example, it has often been the courts and not the legislative branch that has required administrative officers and tribunals to adhere to basic 'procedural' requirements.¹ But as alluded to earlier, where the courts have insisted on such procedural requirements, even in the face of legislation which seemingly wishes to dispense with

¹ See, for example, the Traders Service case [1958], 15 D.L.R. (2d) 305. The Supreme Court held that failure to give notice and to afford the accused an opportunity to make representations amounted to a declining of jurisdiction. Accordingly, the decision of the Labour Relations Board was quashed by certiorari. In the Alliance case, [1953], 4 D.L.R. 161, Rinfret C.J.C. (as he then was) held that want of notice and failure to hold a hearing went to jurisdiction even though the Labour Relations Board was not required by statute to meet such requirements. And Davey J.A. of the British Columbia Court of Appeal in the Perepolkin case, [1958], 11 D.L.R. (2d) 245, held that failure to have the witnesses sworn in a judicial proceeding destroyed jurisdiction.

such 'formalities',¹ legislatures are unlikely to return to the fray by amending the statute and clarifying their position.

In general, it is probably erroneous to believe that the courts' willingness to 'supervise' inferior boards will necessarily result in a flood of litigation² and the usurpation of administrative initiative.³ Especially with reference to such things as procedural requirements, if consistently held, they are more apt to correct administrative behaviour that result in the frequent use of the judiciary as the final arbiter. And in other instances, a court-ruling on a manifestly unjust decision, only tends to keep an administrative official or board in check - to prevent abuse in a particular case and usually to correct tendencies that lead towards this sort of behaviour.

Judicial control is also helpful in maintaining a desirable degree in the 'separation of powers'. Often the legislature entrusts the right of making and also enforcing the law to the same individual or body. Intervention by

¹Mr. Justice S.H.S. Hughes would agree with this assessment. See Reid p.VII.

²This statement is supported by the McRuer Commission findings. See McRuer Report, p.307.

³Ibid.

the courts in situations where this sort of 'double trust' is breached is obviously desirable. And finally, periodic, cautious judicial 'reprimand' may, at times, also serve to temper abrupt changes in 'policy'. For example, in the United States, the Civil Aeronautics Board, for a time, encouraged competition by a three to two vote and then, following a shift in Board membership, suddenly reversed its stand.¹ It might be argued that in such matters, as elsewhere, at least some degree of equality and regularity is desirable.² In similar circumstances, the Courts incensed by hardships resulting from abrupt 'reversals' have shown themselves to be the only expedient method available to temper "the distortions begot of too much intensity".³

In sum, we rest with the view expressed by Edward McWhinney:

The case is made that the liberal democratic society rests, at bottom, on certain basic ideals...and that when these are threatened by executive-legislative authority, it is absurd to rest on any abstract academic conception of separation of powers and say that the judges may not properly intervene in protection of them. This is the civil libertarian activist conception of the judicial office and it bespeaks an affirmative right and even duty on the part of the judges to keep the political processes open, and free and unobstructed.⁴

¹Jaffe, p.25.

²Ibid., p.7.

³Ibid.

⁴McWhinney, p.231.

CHAPTER FIVE

THE NEW FEDERAL COURT ACT:

"NEW" STATUTORY REVIEW PROVISIONS

SUPERVISION OF FEDERAL ADMINISTRATIVE AGENCIES

PRIOR TO 1971

The Exchequer Court

In 1875, under the provisions of section 101 of the British North America Act,¹ the Canadian Parliament established a Supreme Court and a Court of Exchequer for the entire Dominion. At that time members of the appellate court were also members of the 'trial' court. In 1887, however, by virtue of the Exchequer Court Amendment Act² the two tribunals were separated and the Exchequer Court given additional jurisdiction in matters of Admiralty. Some nineteen years later, the Exchequer Court was established under its own separate act and although amendments and revisions were subsequently made, the Exchequer Court Act

¹ 30 and 31 Victoria, c. 3.

² Can. Statutes, 50-51 Vitt., c. 16.

that applied in 1971 was "substantially identical in form to the 1906 Act."¹

Through-out the years, however, the Exchequer Court acquired new and interesting 'appellate jurisdiction' from other federal statutes. In 1952, for example, the Excise Tax Act² granted an appeal, strictly on questions of law, from decisions rendered by the Tariff Board. And a few years later, the Trade Marks Act³ conferred on the Exchequer Court specific power to substitute its discretion for that of the tribunal created by the same statute.

But the Court's control over administrative agencies did not include a "general supervisory jurisdiction".⁴ Very simply, the Court took the position that

In the absence of a statutory enactment conferring supervisory power...it [did] not have supervisory jurisdiction over inferior federal tribunals.⁵

¹Roger T. Hughes, Federal Court of Canada Service (Toronto: Butterworth and Co. (Can.) Ltd., 1970), p.531.

²R.S.C. 1952, c. 100.

³S.C. 1954, c. 49.

⁴Expression used by D.J. Mullan, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform?" University of Toronto Law Journal, (1973), Vol. 23, p.14.

⁵Henderson, Special Lectures..., p.58.

While it is true that a few statutes did seem to grant the Court exclusive original jurisdiction to hear and determine applications under the writs, those provisions were usually made inoperative by privative clauses in the same statute.¹

Provincial Superior Courts

Prior to 1971, therefore, judicial control of federal statutory boards and tribunals - at least, under the common law writs - rested, in the first instance, largely with the provincial superior courts. In fact, it is still questionable whether the provincial courts have, indeed, lost this jealously guarded supervisory authority. It is possible, for example, that the Federal Parliament does not have the constitutional authority to deprive the provincial courts of the right to issue the extraordinary remedies in the area of administrative law² or, for that matter, in any area of law. This question has yet to be finally resolved by the ultimate arbiter, the Supreme Court of Canada.

In any event, prior to 1971 federal boards, such as

¹ Discussed briefly in Mullan's article, p.14, n. 3.

² It is also possible that, despite the Government's intention, the federal statute does not, according to the clear meaning of its words, transfer this jurisdiction to the Federal Court of Canada.

the Immigration Appeal Board,¹ Canada Labour Relations Board,² the Tax Review Board³ and also such important 'policy-making' bodies as the C.R.T.C.⁴ and the Canadian Transport Commission were all under the supervisory authority of the provincial superior courts. Considering the way in which our federal system evolved, such an arrangement was not particularly peculiar or, for that matter,

¹In R. v. Immigration Appeal Board, ex parte Ng Tam Kiu, [1969], 2 D.L.R. (3d) 437, in which the Supreme Court did not question the B.C. Court of Appeal's right to grant certiorari against the Immigration Appeal Board where justified.

²In Three Rivers Boatmen Ltd. v. Conseil Canadien des Relations Ouvrieres, [1967], S.C.R. 607, it was held that the Quebec Supreme Court had supervisory jurisdiction over a quasi-judicial decision rendered by the Canada Labour Relations Board.

³In Re Nanaimo Community Hotel v. Board of Referees, [1944], 61 B.C.R. 354, the provincial court denied jurisdiction in certiorari because, in part, it erroneously believed such jurisdiction was lodged in the Exchequer Court.

⁴See R. v. Board of Broadcast Governors, Ex Parte Swift Current Telecasting Co., [1962], O.R. 657. On appeal the Court held that the order quashing the Board's decision and prohibiting the issuance of the licence should be set aside. Had the Board failed to fulfil its obligations under s. 12 of the Broadcasting Act certiorari would have lain to quash its recommendations, which would have been invalid.

without merit.¹ But, needless to say, the system also had some difficulties.

For one thing, federal agencies were being subjected to the "diverse jurisdictions of the various provincial courts".² That is,

...with ten provincial courts all having jurisdiction at times over a particular federal tribunal, there was a serious chance of multiplicity of interpretations across Canada of that tribunal's empowering statute.³

There was also the problem of "multiple supervision".

Under the old system, a single federal tribunal could be

¹Such a system allowed an aggrieved party to challenge an unjust decision often in the superior court of his province. Approaching a special federal court poses problems both for the plaintiff and his counsel(s). Certainly, the provincial courts are more 'accessible': In Ontario, for example, any one of nearly thirty judges, including the Chief Justice of the 'trial' branch could eventually hear the application. And since the Ontario High Court of Justice is on circuit, the applicant could approach the court in any one of 48 judicial districts where it sits at least once every six months.

²Words used by Attorney-General John Turner, M.P., Can. H. of C. Debates, March 25, 1970, p.5470.

³Mullan, University of Toronto Law Journal, (1973), p.22. Mullan also notes that the Supreme Court of Canada was not a suitable forum for reconciling conflicts. He says at p.24: "Assuming two provincial superior courts conflicted on the same point and the Supreme Court of Canada upheld the latter in time of the two decisions, it may have been too late to appeal the former incorrect decision."

subjected to a multiplicity of provincial court jurisdictions. Taken to extreme, an agency like the Canada Labour Relations Board could be attacked on the same issue in every single provincial superior court in Canada if, for example, it were dealing with a national union and with a national employer, as it does quite often. It was thus possible for the 'same party', displeased with a particular decision of the Board, to deliberately harass it by applying for relief in the different provincial courts and forcing the agency to respond in each jurisdiction.¹

The supervision of federal agencies by the provincial courts was unsatisfactory in another way as well. In some instances, the provincial superior court would refuse to grant relief to a party once the offending federal agency had left its "territory".² For example, in Re Bence, the Supreme Court of British Columbia refused to issue a writ of prohibition against a federal agency. In that case, the Restrictive Trade Practices Commission which had held hearings in British Columbia had returned to Ottawa at the time of the application.³ Davey J. (as he

¹Professor H.W. Arthurs discusses "two virtually identical actions" in different jurisdictions against the Restrictive Trade Practices Commission. See "Comments on Administrative Law", Canadian Bar Review, (1962), p.508.

²The word was used by Laidlaw J.A. in McGuire v. McGuire and Desordi, [1953], O.R. 328 at 334.

³Discussed in Arthurs, Can. Bar Review, (1962), p.507.

then was) said:

Under these circumstances, I cannot see how they [i.e., the Commissioners] can be reached effectively if...they should disregard [the writ]. On the contrary, I am satisfied that they are within the jurisdiction of the Courts of Ontario...¹

Obviously, this was not the view of all provincial supreme courts. The British Columbia Court of Appeal, for example, in Re Vantel Broadcasting Co.² held that while it might not be able to make its order effective in another province, it was nevertheless within its inherent jurisdiction to review a federal board under the prerogative writs. And in the case of Three Rivers Boatmen Ltd. v. Conseil Canadien des Relations Ouvrieres,³ the Supreme Court of Canada held that it was within the jurisdiction of the Quebec Superior Court to supervise the Canada Labour Relations Board with reference to quasi-judicial decisions. Nevertheless, since most federal tribunals are domiciled in Ontario most applications for review were made in Ontario so as to ensure an enforceable judgment.⁴ Needless to say,

¹ [1953], 22 C.P.R. (pt. 2) 1 (B.C.S.C.) pp.2-3.

² [1962], 35 D.L.R. (2d) 620.

³ [1967], S.C.R. 607.

⁴ Henderson, Special Lectures..., (1971), p.59.

for those outside of Ontario, the 'necessity' of that practice was both inconvenient and expensive.

THE POWER OF REVIEW UNDER THE
FEDERAL COURT ACT

By the late 60's the Federal Department of Justice began speaking of the need to reorganize the 'federal trial court' and to substantially broaden its jurisdiction. By the spring of 1970 legislation incorporating those ideas had been drafted and introduced to the third session of twenty-eighth Parliament as the Federal Court Act.

Much of the official explanation for presenting the new proposals had to do with the state of 'administrative law' in Canada. Foremost in the Government's mind was a desire to eliminate supervision of federal agencies by the provincial courts and in so doing to eliminate "multiple supervision with a lack of consistent jurisprudence and application".¹ It was also the Government's desire to provide a modernized procedure for "the judicial control of statutory powers" and by so doing take "a further step toward balancing the rights between citizen and the state."²

In the following session of the same Parliament, the

¹ John Turner, H. of C. Debates, March 25, 1970, p. 5470.

² Ibid., p. 6474.

Federal Court Act¹ received third reading and was brought into force by proclamation in June of 1971. As a result, of that statute, the Exchequer Court of Canada was replaced by a new two-tiered court made up of a Court of Appeal and a Trial Division. Interestingly enough, however, each division was given original jurisdiction to 'review' in one way or another the decisions of federal administrative agencies.² In the remaining pages of this Chapter, careful consideration will be given to the provisions that relate to the Federal Court's power of review.

Section 18 of the Federal Court Act is really the first of several sections that deals exclusively with the new Court's review capacity. It is this section that transfers the issuance of the prerogative writs from the ten provincial superior courts to the Trial Division of the Federal Court.² Of course, it must be realized that the Trial Division's "exclusive original jurisdiction" in this area

¹S.C. 1970-71, Chapter I.

²In so doing, s. 18 "represents a significant change in the constitutional balance of powers between the provinces and the federal authorities". By shifting a rather large segment of administrative law from the provincial courts to the new federal court, "encouragement will be given to the growth of 'federal common law'". The views and words of G.V.V. Nicholls of the Faculty of Law, Dalhousie University in H. of C., Standing Committee on Justice and Legal Affairs, Minutes, May 12, 1970, p.8.

applies only to a "federal board, commission or other tribunal". That is,

...any body or any person having or exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada.¹

Under section 18(a), the jurisdiction of the Trial Division appears to be restricted to the issuance of the ancient remedies. That jurisdiction, however, seems enlarged somewhat by s. 18(b) which grants the Trial Division the right "to hear and determine any...other proceeding for relief."² But in a manual of practice written by the President of the new Court, Mr. Justice W.R. Jackett says of that section:

...it does not seem to create a new kind of proceeding in relation to such matters; any such proceeding in the Trial Division under the Federal Court Act must, I should have thought, be a proceeding that would have been available in some court if that Act had not come into force.³

¹Section 2(g) of the Federal Court Act.

²According to Section 2(m) of the Federal Court Act, "relief includes every species of relief whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise."

³W.R. Jackett, The Federal Court of Canada, A Manual of Practice (Ottawa: Information Canada, 1971), p.18.

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Of course, that statement is not to be taken as judicial opinion. In any event, since the Act does not require the Trial Division to issue the writs along principles established by other courts, the new Court has the opportunity to establish its own views as to when these should be issued.

To understand more precisely what powers are conferred on the Trial Division in respect of federal administrative agencies, s. 18 must be considered together with s. 28, and, to a considerable extent, s. 29. Section 28 grants the Appeal Division original jurisdiction to review and set aside decisions of federal boards and tribunals on certain grounds; at the same time, 28(3) deprives the Trial Division of jurisdiction to entertain any proceeding in respect of a particular decision where the Court of Appeal, under s. 28 has jurisdiction to set it aside.

The Trial Division's jurisdiction to grant relief is subject to one other exception contained in s. 29 of the Act: where a federal statute provides for a right of appeal from a decision of a tribunal to the Federal or Supreme Court of Canada, the Cabinet or Treasury Board that decision

...is not, to the extent that it may be so appealed subject to review or [to be] otherwise dealt with, except to the extent and in the manner provided for in

the Act.¹

That provision also applies to the review provided under s. 28 in the Appeal Court.

Section 29, however, does not apply to a great number of federal tribunals from which no statutory appeal is provided. The following agencies are but a few examples of those that come under this categorization: the Agriculture Products Board, the Anti-dumping Tribunal, the Atomic Energy Control Board, the Restrictive Trade Practices Commission, the National Parole Board and the Copyright Appeal Board.

Section 28 seemingly confers on the Court of Appeal original jurisdiction to hear and determine applications to review and set aside judicial decisions of federal boards. Under the terms of that section, administrative decisions may be reviewed only if the law requires a tribunal to make such decisions on a judicial or quasi-judicial basis.²

¹Section 29 of the Federal Court Act.

²In R. v. Manchester Legal Aid Committee, ex p. Brand, [1952], 2 Q.B. 413, Parker J. "asserted that the duty to act judicially might arise in the course of arriving at a decision based wholly or partly on grounds of 'policy'.... However, the procedure required to be followed must be analogous to the judicial, though the final decision may be wholly or partly based on policy". That case is quoted in part in D.S.M. Huberman, Administrative Law (Vancouver: University of B.C.), p.843. While all judges and legal writers would not agree, it is fair to assume that the type of decision referred to above by Parker J. could well be described as quasi-judicial in nature.

According to the Minister of Justice, the Appeal Court was so limited because

...it is not the function of the Federal Court, which is a continuation of the Exchequer Court, to substitute its judgment for Parliament's... On policy matters. These boards have... been given powers delegated to them by Parliament to administer the policy set by Parliament. Under the Broadcasting Act [for example] the C.R.T.C. is given the power of interpreting and administering the Canadian Broadcasting Policy. It is not the function of a court... to substitute a judicial judgment for an administrative judgment in the exercise of administering that policy.¹

Under s. 28, the Appeal Court's power to review "a decision or order" applies only if the tribunal did one or more of three things:

- (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (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 without regard for the material before it.²

However, those grounds for review do not apply to decisions or orders made by the "Governor-in-Council, the Treasury

¹ H. of C. Debates, Oct. 28, 1970, p.680.

² All three grounds quoted directly from the Act: Sections 28(a), (b) and (c).

Board, a superior court or the Pension Appeals Board or in respect of a proceeding for a service offence under the National Defence Act."¹ And again, it is noted that s. 28 does not apply to the extent that there is a statutory right of appeal to the Federal or Supreme Court, Cabinet or Treasury Board.²

Section 28, of course, does not provide for a right of appeal; that is, the Appeal Court is not able to rehear a case, both as to law and as to fact, and substitute its decision for that of a board. It may merely 'set aside' the decision. Although this term is not defined in the Interpretation Sections of the Act, 52(d) may help in understanding the effect of that procedure:

[I]n the case of an application to review and set aside a decision of a federal board...the [Appeal Court may] either dismiss the application, set aside the decision, or set aside the decision and refer the matter back to the board...for determination in accordance with such direction as it considers appropriate.

Nevertheless, the legal status or position of a decision which has been set aside has generally been unclear.

Mr. N.A. Chalmers, a Regional Director in the Dept. of Justice has submitted this as a working definition:

¹Section 28(6) of the Federal Court Act. The National Defence Act that applies now is R.S.C. 1952, Chapter 184.

²Section 29 of the Federal Court Act.

...the position is the same as if the decision of a tribunal had been quashed on certiorari; [permitting]...the government or agency concerned...to commence proceedings again on a proper basis.¹

¹N.A. Chalmers, "The Federal Court as an Attempt to Solve Some Problems of Administrative Law in the Federal Area", McGill Law Journal, Vol. 18, No. 2, p.215.

CHAPTER SIX

THE ANCILLARY REMEDIES UNDER THE FEDERAL TRIAL COURT

REVIEW OF DECISIONS MADE

BEFORE JUNE 1, 1971

Under sub-section 61(2), any jurisdiction created by the Federal Court Act "shall be exercised in respect of matters arising as well before as after the coming in force of [the] Act". There are, however, a few exceptions to this general rule. For example, the right to apply to the Court of Appeal under s. 28 to have a decision reviewed and set aside is effective only against decisions or orders made after the Federal Court Act came into force on June 1st of 1971.¹ That provision combines with s. 28(3) to restrict, to a significant degree, the Trial Division's authority to review administrative decisions made after that date. Under 28(3) of the Federal Court Act, it will be recalled, that "the Trial Division has no jurisdiction to entertain any proceeding...where the Court of Appeal has

¹Section 61(1) of the Federal Court Act.

jurisdiction under 28(1) to hear and determine an application to review and set aside an order".

Interpretation of these various sections and their effects on the authority of each division to review administrative decisions were raised in each of three cases involving the National Indian Brotherhood et al. and Pierre Juneau et al. In case Number 1,¹ the Brotherhood applied to the Trial Division for writs of mandamus and certiorari to compel the C.R.T.C. to hold a public hearing into their complaint. This action was in response to a decision of the Executive Committee of that agency dated May 28, 1971 not to inquire into the complaint of the Brotherhood and three other associations against the telecast of an allegedly slanderous film about Indians. Noting that the Brotherhood had also proceeded under s. 28 to set aside the same decision, the Trial Court judge said:

...the Court of Appeal will itself be deciding whether it has jurisdiction to hear and determine an application to review and set aside the decision...and if it decides in the affirmative, [it] will be dealing with the matter. In the event it decides it has the jurisdiction, then by virtue of s. 28(3), the Trial Division will have no jurisdiction under s. 18.²

As a result, no decision was rendered in that case pending

¹[1971], F.C. 66.

²Ibid., p.70.

the Appeal Court's decision concerning its own jurisdiction.

In National Indian Brotherhood, No. 2,¹ the Appeal Court held that it had no jurisdiction to review and set aside a decision or order made on May 28, 1971. It cited s. 61(1) of the Federal Court Act as authority for this conclusion. Back in the Trial Division, Walsh J. was, therefore, free to determine the merits of the motion before him for a writ of mandamus and certiorari.²

With the question of determining jurisdiction in review cases having been so clarified, Heald J. in Lingley v. Hickman³ said:

...the report of the board of review here was in Dec. of 1970, it seems to me [therefore] that there is nothing in section 28 which prevents this [Trial] Division from exercising jurisdiction under section 18.⁴

REVIEW OF DECISIONS MADE AFTER

JUNE 1, 1971

The question, then, re-shaped itself into one which

¹ [1971], F.C. 73.

² National Indian Brotherhood et al. v. Pierre Juneau et al. (No. 3), [1971], F.C. 502.

³ [1972], F.C. 171.

⁴ [1972], F.C. at p.184.

focussed precisely on which division had jurisdiction to review administrative decisions made after the Federal Court Act came into force. It will be remembered that under s. 28(3) of that Act, the Trial Division has no jurisdiction to review such decisions "where the Court of Appeal has jurisdiction under...section [28.]" And under that latter section, the grounds for review are basically those which rely on the doctrine of ultra vires; error of law and, possibly, a third principle.¹

Certiorari and Prohibition

It appears that with reference to decisions made after June 1, 1971 that certiorari is no longer available in the Trial Division. In the Medi-Data case,² Walsh J. referring to the Postmaster General's failure to give notice of an order within a prescribed period said:

In my view [failure to abide by such a mandatory requirement] merely gives the person against whom it has been made the opportunity of asking that it be set aside by appropriate proceedings before a court having jurisdiction to do so by way of certiorari. Since this [Appeal] Court does not have jurisdiction over such proceedings with respect to an order made prior to June 1, 1971, I express no views on whether

¹This may be in 28(1)(c) though it is most unlikely. That section is discussed in some detail below.

²[1972], F.C. 469.

such proceedings would have succeeded.
(Italics added.)¹

It appears, therefore, that certiorari or, at least, certiorari-like jurisdiction as it relates to decisions made before June 1, 1971 is not to be found in the Appeal Court, but that with reference to decisions made after that date, the Appeal Court does have such jurisdiction. Does this mean, however, that when the Appeal Court has this jurisdiction, the Trial Division has no power to issue certiorari? A positive response seems indicated if one applies the provisions of 28(3) of the Federal Court Act. But such speculation is not really necessary. Other court judgments have helped to clarify the issue. Gabriel v. the Queen² is one such judgment. In that case, Walsh J. was acting as Trial Judge. Referring to a claim that the rules of natural justice had been ignored in a demotion decision, the Trial Judge made it clear that the Plaintiff should "proceed before the Court of Appeal under section 28 ...and not before the Trial Division".³ Traditionally, of course, certiorari has issued "to quash orders for breach of the rules of natural justice".⁴

¹Ibid., pp.496-497.

²[1972], F.C. 1148.

³Ibid., 1149.

⁴de Smith, Judicial Review of Administrative Action, p.294.

And in another case,¹

...the main issue raised [was] whether certiorari and prohibition proceedings lie to remove into the trial division ...the record relating to the making by the Minister of National Revenue on May 31, 1971 of certain prescriptions.²

Mr. Justice Thurlow, delivering the judgment of the Appeal Court, dealt with that issue and concurred with a Trial Division decision by Walsh J. that

...with respect to decisions or orders of federal boards, commissions or tribunals, as defined in section 2(g) of the Federal Court Act, made on or after June 1, 1971, section 28(3) of that Act applies to oust the jurisdiction of the trial division which otherwise would arise under section 18 of the Act to grant relief in respect of such decisions or orders....³

And in a subsequent case, Mr. Justice Thurlow said:

...with respect to decisions or orders made after June 1, 1971...certiorari jurisdiction of the trial division has been withdrawn...in favour of the new and even broader jurisdiction conferred by section 28(1) on the Court of Appeal.... (Italics added.)⁴

¹ M.N.R. and the Queen v. Creative Shoes Ltd., [1972], F.C. 993.

² Ibid.

³ [1972], F.C. at p.998.

⁴ Armstrong v. State of Wisconsin and U.S.A., [1972], F.C. 1228 at p.1232.

In sum, it appears that certiorari with reference to federal administrative decisions made after June 1, 1971 is no longer available. That is, certiorari, per se, is no longer available in the provincial courts¹ and, secondly, it may not issue from the Trial Division of the Federal Court. It appears, however, that the type of review previously available under that writ is now found exclusively in the Appeal Court under section 28 of the Federal Court Act.

The Other Writs

As for the authority to make a declaration² or to grant injunctive³ or prohibitory relief,⁴ that jurisdiction continues to lie in the Trial Division irrespective of when.

¹In Re Milbury and the Queen, [1972], 25 D.L.R. (3d) 499, the Appeal Division of the New Brunswick Supreme Court held that the jurisdiction of the provincial courts to issue certiorari against federal agencies has been excluded by the Federal Court Act.

²"A declaration will lie to question the validity of any administrative agency's decision...." See Garner, p.178. Review in the Federal Court of Appeal, however, is restricted to judicial and quasi-judicial decisions.

³"In administrative law [injunction] will most frequently be sought and granted on the grounds that what the agency proposes to do will or would be ultra vires." Garner, p.176.

⁴Prohibition is similar in scope to certiorari, but it looks "to the future rather than to the past". Wade, Administrative Law, p.98.

the decision was made.¹ Similarly with mandamus,² the Trial Division's jurisdiction to issue this prerogative remedy has not been ousted by the jurisdiction given the Appeal Court by s. 28. Applications for that remedy were made in Weatherby v. Minister of Public Works³ and in Szoboszloi v. Chief Returning Officer.⁴ While the application for mandamus in each of those cases was dismissed, it was done on the basis of the merits of the motion and not because of lack of jurisdiction.

Habeas corpus as it applies to federal administrative tribunals is still available in the provincial superior courts. It was not transferred by any provision of the Federal Court Act to either the Trial Division or the Appeal Court. In the Armstrong case,⁵ Thurlow J. and Cameron D.J. noted that by applying to the provincial court for habeas corpus, the applicant involved could still test the validity of his committal for extradition.

¹In Can. Radio-Television Communications v. Teleprompter Cable Communications Corp., [1972], F.C. 1265, esp. 1270.

²"It commands any person to whom it is directed to carry out a public duty imposed by law". Garner, p.173.

³[1972], F.C. 952.

⁴[1972], F.C. 1020.

⁵[1972], F.C. 1228.

'GROUNDS' ON WHICH THE TRIAL DIVISION
HAS ISSUED THE WRITS

The Exchequer Court of Canada has not had any jurisdiction to fetter it in defining the scope of application of certiorari, prohibition, mandamus or declaratory relief against federal boards, commissions or other tribunals. There are no definitions limiting their scope. There is nothing in the [Federal Court] Act expressly requiring the Court to give these terms a meaning given by courts in any other jurisdiction. The opportunity exists to give each of these writs and the grant of a declaratory order a wide meaning to ensure a realistic protection of the subject against the bureaucratic action of the state. (*Italics added.*)¹

As will be shown, however, the Trial Division has not been imaginative in this regard at all. It has continued to issue these remedies along traditional lines, and in some instances, to prefer those precedents which lead to a conservative approach rather than a more liberal one.

Prohibition and Certiorari

Review of administrative decisions: - In an application to the Trial Division for certiorari to review the proceedings of the C.R.T.C., Walsh J. found that the decision of the Executive Committee of that agency not to hold a public hearing into a complaint was administrative in

¹Henderson, Special Lectures..., (1971), p.68.

nature.¹ There is nothing in that opinion, to cause concern, but a subsequent statement was somewhat disconcerting, i.e., if it were intended as the statement of a general principle. He said:

This was an administrative decision and the right to make it has been conferred by Parliament on the Executive Committee....There is nothing to indicate that it was ever intended that it could or should be reviewed by the Court,² nor does the law relating to prerogative writs³ permit judicial review of a decision of this nature. (Italics added.)⁴

Mr. Justice Walsh supported that view with reference to the decision of Thorson P. in Pure Spring Co. v. M.N.R.⁵ which dealt with the discretionary powers of the Minister of National Revenue.⁶ At the same time, however, he con-

¹In National Indian Brotherhood et al. v. Juneau et al., No. 3, [1971], F.C. 498 at p.516.

²In part, s. 19 of the Broadcasting Act (R.S.C. 1970, c. B-11) reads: "A public hearing shall be held by the Commission if the Executive Committee is satisfied that it would be in the public interest to hold such a hearing, in connection with...a complaint by a person with respect to any matter within the powers of the Commission."

³The prerogative writs are certiorari, prohibition, mandamus, habeas corpus and quo warranto.

⁴[1971], F.C. at p.517.

⁵[1946], Ex. C.R. 471.

⁶In Nat. Indian Brotherhood, No. 3, [1971], F.C. 498 at 518.

ceded that

...more recent jurisprudence, and in fact the prior Supreme Court...[decision in the Wrights' case¹] would extend the right of the Court to review the exercise of Ministerial discretion further than [did Thorson]....²

In a subsequent case, Mr. Justice Walsh seemingly mollified his position.³ In Creative Shoes Ltd. v. M.N.R.,⁴ he said:

...even in the case of a purely administrative decision affecting private rights, which has been made with disregard of the rules of natural justice⁵...[the Court, in a certiorari proceeding such as this] may inquire as the reasons for the decision....Furthermore, there is a constant line of jurisprudence to the effect that the opposite party must be given a full opportunity to be heard and be confronted with any evidence against him in order that he may have an opportunity of answering.... (Italics added.)⁶

¹Wrights' Can. Ropes Ltd. v. M.N.R., [1946], S.C.R. 139.

²[1971], F.C. at 518.

³While it may be true that Walsh J. mollified his position, it should be noted that his more 'liberal' position was not, indeed, broader than the traditional one.

⁴[1972], F.C. 115.

⁵Walsh J. cited Ridge v. Baldwin [1964], A.C. 40 to support his point.

⁶[1972], F.C. at p.138.

Mr. Justice Walsh cites several authorities for his position: In the Wrights case, for example, Hudson J. made it clear that the Minister of National Revenue in exercising his discretion under 6(2) of the Income War Tax Act was, nevertheless, obliged to provide reasons for his decision so that the Court could decide whether or not the Minister's decision had been based on sound reasoning and a fair appraisal of the evidence before him.

In Creative Shoes, therefore, it was Walsh's decision to grant the plaintiff's application for a writ of certiorari and prohibition against the Minister of National Revenue. Citing failure to provide reasons for his decision and a failure to observe a principle of natural justice,¹ the Minister's prescriptions² were quashed.

Bias: - The question of bias on the part of a member of a tribunal was the central issue in Re Anti-dumping

¹In a more recent Appeal Court decision, Chief Justice Jaccett stated the principles of natural justice: "Every person has a right to be heard and to be given a fair opportunity for correcting or contradicting what is alleged against him. This is a fundamental rule of British justice. It applies not only when the power is upon judicial tribunals...but whenever such a power is conferred upon administrative agencies, Ministers of the Crown or other purely executive authorities."

²These were taken under s. 11 of the Anti-dumping Act, R.S.C., 1970, c. A-15 and s. 40 of the Customs Act, R.S.C., 1970, c. C-40.

Tribunal and re transparent sheet glass.¹ In that case, the 'objectivity' of the recently appointed chairman of the Anti-dumping Tribunal was in doubt with reference to a particular inquiry carried out by that agency.

For several years prior to his appointment, the Chairman had been employed as a consultant by two Canadian manufacturers of sheet glass, Canadian Pittsburg Ltd. and Pilkington Bros. (Can.) Ltd. In his consultative capacity, Mr. W.W. Buchanan had made several representations to government authorities with regard to alleged dumping of imported sheet glass in Canada. On his appointment to the Tribunal, however, Mr. Buchanan terminated his employment with the two companies. But a few months later, the same firms brought a complaint before the Tribunal about dumping of sheet glass on the Canadian market. At this point, Mr. Buchanan reiterated his former association with the two firms and assigned the conduct of a hearing to the other members of the Tribunal. The two remaining members heard the case and decided that anti-dumping duties should be assessed against certain sheet glass imported from east European countries. The Chairman then returned, read the decision, made three grammatical changes and signed the decision along with the other members. This was then forwarded to the Deputy Minister of Customs and Excise and an unsigned

¹[1972], F.C. 1078.

copy of the order retained in the records of the Tribunal. Aware of the Chairman's possible bias, the Attorney-General of Canada subsequently applied to the Federal Court (Trial Division) for certiorari to quash the decision.

Judgment was eventually rendered in August of 1972 by Mr. Justice Cattanach. Citing several precedents,¹ the Trial Judge held that the Chairman was, indeed, disqualified from participating in the decision-making process because his prior relationship to the complainants gave rise to reasonable apprehension of bias.² The Court also held that by signing the Tribunal's order the Chairman "presumably"³ participated in the making of the decision. In arriving at this conclusion, Mr. Justice Cattanach applied the Hughes case.⁴

Despite those findings, the Court felt obliged to

¹Rex v. Sussex Justices, [1924], 1 K.B. 256; Ghirardosi v. Minister of Highways, (B.C.) [1966], S.C.R. 367; McKay v. Campbell 3 N.S.R. 522; Sims v. Seller, [1927] 2 D.L.R. 251.

²[1972], F.C. at p.1105. The Court did not find actual bias on the part of the Chairman. Cattanach J. discusses that point at p.1103.

³A form of that word was used in similar context in the Hughes case [1962], 31 D.L.R. (2d) 441 at 446 by Verchere J.

⁴Hughes v. Seafarers' International Union, [1962], 31 D.L.R. (2d) 441.

dismiss the application to quash the finding of the Anti-dumping Tribunal. That decision turned on a 'technicality'. Very simply, an unsigned copy of the order was retained in the records of the Tribunal and subsequently removed into the Court. At pp.1131-1132 of his judgment, Cattanach J. said:

In my opinion the preponderance of authority,¹ which I am compelled to follow, is that it is to the face of the record of the Tribunal that I must look to determine whether certiorari to quash should be granted. It has been established that the record of the Tribunal does not contain a decision that was signed by Mr. Buchanan. That being so it follows that he did not participate in making the decision. (Italics added.)

If one considers the fine points of reasoning, the judgment is generally coherent, but it does little to sustain the rule that justice should not only be done but appear to be done. Applying that rather broad principle, the courts have sometimes quashed administrative action on grounds much more effete than those apparent in Re Anti-dumping Tribunal.²

¹See, for example, Rex v. Northumberland Compensation Appeal Tribunal, [1952] 1 K.B. 328 or Rex v. Northumberland Compensation Tribunal, Ex parte Shaw, [1951], 1 K.B. 711.

²See, for example, R. v. Sussex JJ., ex p. McCarthy, [1924] 1 K.B. 256. Cited by de Smith, Judicial Review of Administrative Action, p.154.

The words of Mr. Justice Cattanach quoted above cause concern for some other questions as well. For one thing, they seem to point to a very narrow conception of when certiorari should issue and what should form the record.¹ And apart from what the "preponderance of authority" has held, as mentioned earlier, the Trial Division is not really "compelled" to follow any particular line of decisions. It is apparent, however, that it prefers to take rather 'conservative' pathways.

Writs against the Crown: - The question of whether or not the writs may issue against the Crown came up in Weatherby v. M.N.R.² In that case, however, Kerr J. was able to side-step the question and base his decision on other considerations. But shortly after, in an application before him,³ Cattanach J. felt compelled to meet the question head-on. In Re Anti-dumping Tribunal,⁴ he expressed his conclusion quite succinctly: "The prerogative writs . .

¹For a brief discussion of a broad view of the 'record' see Reid, pp.372-377.

²[1972], F.C. 952.

³The application was for certiorari.

⁴[1972], F.C. 1078.

[including certiorari] do not lie against the Crown."¹

This, indeed, has been the traditional practice. Orders of mandamus, certiorari or prohibition have not normally issued against the Crown. Generally, this has also been the practice with granting injunctive relief.

Mandamus

In mandamus proceedings, too, it appears the Federal Court is well on its way to issuing this remedy along traditional grounds. In National Indian Brotherhood, No. 1,² Walsh J. made it clear that the Court will continue to follow a long line of decisions³ not to grant mandamus unless the applicant is someone who has a specific interest in the matter that is being complained of. And in the Weatherby case,⁴ Kerr J. accepted the long standing view that mandamus lies to secure only the performance of those public duties that are specifically required by law. To that, Noël A.C.J. added in the Szoboszloi case:

¹[1972], F.C. at p.1123.

²[1972], F.C. 66.

³See, for example, Watson v. Cobourg, [1923-24], 55 O.L.R. 531 or The Queen v. Guardians of the Lewisham Union, [1897], 1 Q.B. 498.

⁴[1972], F.C. 952.

Mandamus is only to be granted in clear cases...[and to those who have a] right to secure the performance of a public legal duty....¹

Injunction and Prohibition

In National Indian Brotherhood et al. v. C.T.V. Television Network Ltd.,² the Trial Court was asked to issue an interim injunction to restrain the Television Network from broadcasting a film - The Taming of the Canadian West - which was allegedly racist and slanderous to Indians. Through such a restraining order, the Brotherhood hoped to maintain the status quo until a decision was handed down in an application for mandamus to direct the C.R.T.C. to hold a public inquiry into the broadcast of the film. Kerr J., however, refused to grant the application for injunction. He gave this as one of his main reasons:

...there has not, in my opinion, been a prima facie showing either that if the film is broadcast such broadcast will violate some legal right or commit some legal wrong that ought to be enjoined by an injunction, or that the film in fact slanders or libels any living person.
(Italics added.)³

Elsewhere, Kerr J. made it clear that the Court would normally enjoin the broadcast of a program which appeared to be

¹[1972], F.C. at 1023.

²[1971], F.C. 127.

³[1971], F.C. at p.130.

legally actionable by reason of being slanderous or libelous.¹ While the decision of the Court not to grant an injunction against the broadcast of that particular film may be questionable, the general principles expressed about the remedy are more-or-less acceptable and based on past practice.

In the Filion case,² Pratte J. left considerable doubt whether or not he would allow an injunction to issue against an administrative decision. But since he was able to decide the case without meeting the issue face-on, the views he expressed in that regard must be considered strictly as obiter. But it should be remembered that this remedy has, in the past, issued against all types of administrative agencies irrespective of the nature of their functions.³

The question of whether or not injunctive relief may issue against the Crown was also discussed in the Filion case. But by permitting the applicant to amend his declaration and motion, Kerr J. did not have to fully confront that issue either.⁴ In Britain, certainly, the practice

¹Ibid., p.129.

²[1972], F.C. 1202.

³See Garner, p.176.

⁴That matter is dealt with elsewhere in more detail.

has been

...not to grant an injunction against the Crown, nor against a Minister of Crown who is carrying out functions conferred on him by statute as a representative or officer of the Crown.¹

In Canada, that rule has not always been followed. In Carlic v. the Queen,² for example, an injunction was "granted against Her Majesty enjoining action on an immigration order".^{2a}

As for the declaratory order, it appears that Heald J. would basically support the view that it should issue against any 'irregular' decision rendered by an administrative agency irrespective of its function. In the Lingley case³ the Trial Court Judge quoted a number of authorities supporting that view. For example, he included a passage from Pyx Granite Co. v. Ministry of Housing and Local Government in which Lord Denning said:

It is one of the defects of certiorari that it so often involves an inquiry into the distinction between judicial acts and administrative acts which no one has been able to satisfactorily define. No such difficulty arises

¹Garner, p.270.

²[1968], 65 D.L.R. (2d) 633.

^{2a}Reid, p.410.

³[1972], F.C. 171.

with the remedy by declaration....It applies to administrative acts as well as to judicial acts whenever their validity is challenged because of a denial of justice, or for other good reasons.¹

And in C.R.T.C. v. Teleprompter Cable Communications Corp. the Court of Appeal held that the power of the Trial Court

...to grant declaratory relief is [not] ...necessarily ousted where the statute governing the particular matter provides a special procedure in another court in which the question involved might arise.²

On that point, the Court of Appeal applied the Ealing case.³ Indeed, it would appear that Walsh J. would extend that principle to some of the other writs as well. In Creative Shoes Ltd. v. M.N.R., he said:

Unless the right to certiorari or prohibition is specifically taken away by [statute]...; plaintiffs have a right to avail themselves of it despite the fact that certain [statutory] appeal procedures are set out.⁴

While such a practice might be viewed in Britain as a sig-

¹[1958], 1 Q.B. at p.571.

²[1972], F.C. at p.1267.

³Ealing London Borough Council v. Race Relations Board, [1972], 2 W.L.R. 71.

⁴[1972], F.C. at p.138.

nificant departure from the norm,¹ it is not so in Canada. A number of Canadian cases show that "the existence of a right of appeal is not, ipso facto, a bar to certiorari or prohibition."²

¹See Garner, p.171.

²Reid, p.351.

CHAPTER SEVEN

STATUTORY REVIEW IN THE FEDERAL COURT OF APPEAL

THE STATUTORY PROVISIONS

Section 28(1) of the Federal Court Act gives the Appeal Division the following power to review the decisions of federal administrative agencies:

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

- (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (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.

"Federal board, commission or other tribunal"

The question of what constitutes a "federal board, commission or other tribunal" is partly resolved by a clause in the Interpretation Section of the Federal Court Act itself. According to 2(g), the phrase

...means any body or any person having exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such persons appointed under or in accordance with a law of a province or under section 96 of the British North America Act, 1867.

Clarification of those provisions came in the Lavell case.¹ In that case, the female applicant had been a registered member of the Wikwemikong Band of Indians. Shortly after her marriage to a non-Indian, however, the federal Registrar had her name removed from the Band list. Her protest to the Registrar was dismissed and his decision confirmed by Judge Grossberg, a County Court Judge, acting under 'review' procedures established by s. 9(3) of the Indian Act.² In the Federal Court, the question arose as to whether or not the Appeal Division could review, under s. 28, a decision rendered by such a 'board', i.e., Judge

¹ [1971], F.C. 347.

² R.S.C. 1970, c. I-6.

Grossberg.

Grossberg had obviously been appointed to the County Court under section 96 of the British North America Act. However, the Appeal Court held, that in reviewing the Registrar's decision, Judge Grossberg was not acting as a County Court Judge nor exercising jurisdiction under some provincial statute, but rather was acting as a persona designata under the Indian Act which is, of course, federal legislation.

And in the Armstrong case,¹ the Appeal Court held that a County Court Judge when acting as a judge under the Extradition Act² performs that function as a designated person also.³ Within the meaning of s. 2 of the Federal Court Act such a person is therefore "a federal board" and on the grounds listed in s. 28(1) of the same Act, his decision is subject to judicial control by the Federal Court.

The interpretation of "federal board, commission or

¹[1972], F.C. 1228.

²R.S.C. 1970, c. E-21.

³The Court was unanimous in this opinion. At p.1238, Sweet D.J. said: "I am in agreement with their Lordships that His Honour Judge Waisberg did not sit as a judge appointed under section 96 of the British North America Act. When s. 9(1) of the Extradition Act includes judges of the County Courts of a province...in my view it merely designates and describes certain persons who may act judicially in extradition matters. It does not confer jurisdiction on the County Court per se."

other tribunal" also came up in the Ontario High Court.

In the Bedard case,¹ the provincial court held that its power to issue the traditional writs or provide similar relief may only be taken away by the most clear and unambiguous language. Where it is not clear that a certain person or board is indeed a federal agency as defined in the Federal Court Act, then a provincial superior court may assume its traditional role to review decisions rendered by inferior tribunals. The Ontario High Court further held that a decision of the Federal Court of Appeal has the same persuasive value as a decision rendered in any other provincial appellate court and is, therefore, not binding on itself.

"decision or order"

The question of what exactly is a "decision or order" under the terms of s. 28 of the Federal Court Act has also received some judicial clarification. In National Indian Brotherhood, No. 2,² Chief Justice Jaccett gave some insight into his thinking about the expression. He said:

Clearly, those words apply to the decision or order that emanates from a tribunal in response to an application that has been made to it for an exercise of its powers after it has taken

¹ 25 D.L.R. (3d) 551.

² [1971], F.C. 73.

such steps as it decides to take for the purpose of reaching a conclusion as to what it ought to do in response to the application. (Italics added.)¹

The Chief Justice made it clear that he did not think that interlocutory decisions, such as those relating to setting dates, allowing or dismissing requests for adjournments or even decisions concerning the admissibility of evidence were intended to be reviewed under s. 28. He did note, however, that irregular decisions made in the adjudication process might "well be part of the picture in an attack made on the ultimate decision of the tribunal on the ground that there was not a fair hearing".²

In Puerto Rico v. Hernandez,³ the Appeal Court was unanimous in holding that the refusal of an Extradition Judge to issue a committal warrant⁴ is not a "decision or order" within the meaning of the Federal Court Act. In rendering that judgment, the Appeal Court followed the ruling of the Supreme Court of Canada in U.S.A. v. Link and

¹ [1971], F.C. at p.78.

² Ibid.

³ [1972], F.C. 1076.

⁴ Such action is authorized by s. 18(1) of the Extradition Act (R.S.C. 1970, c. E-21).

Green.¹

In the Armstrong case,² the question arose as to whether a decision to actually issue a committal warrant was reviewable under the terms of the Federal Court Act. In the Appeal Court, the majority decision was that such an action was, indeed, a "decision or order" and hence subject to review. Sweet D.J., however, dissented on that point. It was his view that if a refusal to commit a fugitive is not a "decision or order" within the meaning of the Federal and Supreme Court Acts, then the issuance of a warrant of committal is, for the same reasons, not a "decision or order".³

"decision or order of an administrative nature"

It will be remembered that under the terms of section 28, the Court of Appeal has no jurisdiction to review "a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". From a more positive perspective, it appears that

¹[1955], S.C.R. 183. In that case all nine Supreme Court Judges held that the refusal of an Extradition Judge was not a decision which could be appealed under the terms of the Supreme Court Act (R.S.C. 1952, c. 259).

²[1972], F.C. 1228.

³Ibid., at pp.1233-1237.

under the section some administrative decisions, at least, are subject to judicial control. Obviously, then, the Court will have to classify the functions of administrative tribunals or, to put it another way, it will still have to distinguish among judicial decisions, administrative decisions which must be made along judicial lines, and purely administrative decisions. That trichotomy is probably quite similar to the traditional judicial - quasi-judicial - administrative breakdown discussed elsewhere.¹ But as also mentioned and as succinctly expressed by Pennell J. in the Voyager Explorations case

The test to distinguish between an administrative act and a quasi-judicial act is almost as elusive as the Scarlet Pimpernel.²

In any event, since the Appeal Court has been left with the task of classifying decisions, it is therefore necessary to probe into actual cases to discover the Court's understanding of the distinctions involved.

In National Indian Brotherhood, No. 2, Chief Justice

¹It might be worthwhile to note the comments of Davis J. on that subject. In St. John v. Fraser, [1935], S.C.R. 441 at 451, he said: "Broadly speaking, there are only two divisions - judicial and administrative - though within those two broad divisions there have been tribunals with certain features common to both which have given rise to a somewhat loose, perhaps almost unavoidable, terminology in an effort to again subdivide the two broad classes of tribunals."

²[1970] 1 O.R. at 242.

Jackett took considerable time to speculate about "a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". He said:

A typical example of such a decision or order is [one]...made by a minister in the process of carrying out his statutory function of managing his department.¹

The Chief Justice then went on to consider whether a decision rendered under s. 19 of the Broadcasting Act² would be strictly administrative in nature. Under that section, the C.R.T.C. is empowered to hold a public hearing "if the Executive Committee is satisfied that it would be in the public interest to hold such a hearing". Consequently, there was some doubt in the mind of the Chief Justice as to whether a decision of that Committee either to hold or not to hold a hearing could be reviewed by the Appeal Court. Such a decision appeared to be "one of absolute discretion for the Executive Committee".³

In the Gateway case,⁴ the Chief Justice again took

¹[1971], F.C. at p.79.

²1967-68 (Can.), c. 25.

³[1971], F.C. at p.79.

⁴[1971], F.C. 359.

to speculation.¹ This time, he wondered whether a decision taken by the Canadian Transport Commission under ss. 170 or 181 of the Railway Act² was not, strictly speaking, an administrative act. Under the latter section, "any deviation, change or alteration" in a railway must "be submitted for the approval of the Board, and may be sanctioned by the Board". Taking that into consideration, the Chief Justice said:

...while there can be considerable difference of opinion as to what is and what is not an authority of an administrative character, I should have little doubt that an authority to exercise a supervisory and restraining power over the manner in which a railway company exercises its statutory power is of an administrative character. (*Italics added.*)³

Nevertheless, the Chief Justice would be inclined to treat that type of decision as one which is quasi-judicial in nature⁴ in that he felt both the railway company and those

¹In these early cases Mr. Justice Jackett was inclined to "raise questions...so that counsel [would] be prepared to assist the Court on them when they...[arose] in a particular matter". In Nat. Ind. Brotherhood, No. 2, [1971], F.C. at p.79.

²R.S.C. 1952, c. 234.

³(1971), F.C. at p.372.

⁴That is, an administrative decision required by law to be made on a judicial or quasi-judicial basis.

seriously affected by the proposed relocations were entitled to a hearing before the Transport Commission. Commenting on the second point, he said:

I would be reluctant to conclude, even though there were no special [statutory] provision...that a person threatened with the loss of transportation services had no right to be heard on the question whether such services should be terminated.¹

While the above remarks are obiter as far as the Gateway case is concerned, it might be argued that the Supreme Court decision in Wiswell et al. v. Metropolitan Corp. of Greater Winnipeg² leans in the same direction.³

In Re Creative Shoes Ltd.,^{3a} the Appeal Court decided that the Minister of National Revenue in prescribing the manner in which the value of imported goods is to be determined is not under an obligation to act in a judicial or quasi-judicial manner. This type of prescription is authorized by s. 40 of the Customs Act⁴ and s. 11 of the Anti-

¹ [1971], F.C. at p.372.

² [1965], S.C.R. 512.

³ Jakkett C.J. noted that point in his judgment at p.372.

^{3a} [1972], F.C. 115.

⁴ R.S.C. 1970, c. C-40.

dumping Act.¹ Both sections are similarly worded. Section 11 reads as follows:

Where in the opinion of the Deputy Minister, sufficient information has not been furnished or is not available to enable the determination of normal value or export price under section 9 or 10, the normal value or export price...shall be determined in such manner as the Minister prescribes.²

It was the view of the Court that the expression "as the Minister prescribes", which appears in both sections, conferred on the Minister legislative power³ which could be used to lay down rules of general application.⁴ It was the Court's view, however, that an importer has a right

...to be heard as to why the prescription was not applicable [in his circumstances]⁵ and it would require, as

¹R.S.C. 1970, c. A-15.

²The underlined words also appear in s. 40 of the Customs Act.

³In coming to that conclusion, the Appeal Court referred to Procureur général du Canada v. La Campagne du Publication La Presse, Ltée., [1967] S.C.R. 60 per Abbot and International Harvester Co. of Canada Ltd. v. Provincial Tax Commission, [1941], S.C.R. 325, per Rinfret J. speaking for himself, Crockett and Kerwin JJ.

⁴In this case, the Minister set out the method for determining the value of imported goods where the method prescribed in the statute could not be applied because of lack of information.

⁵In other words, the importer has a right to challenge the facts on which the Ministry decides that it is necessary to apply the prescription.

well, that the question be determined fairly in accordance with the principle of natural justice expounded...[in the Rice case¹].²

In the Nanda case,³ it was the opinion of the Court that an appeal board appointed under s. 21 of the Public Service Employment Act⁴ is under a duty to act judicially. It is that section which permits an unsuccessful candidate in a closed public service competition to appeal an unfavourable decision.⁵ The appeal is "to a board established by the [Public Service] Commission to conduct an inquiry at which the person appealing and the deputy head concerned or their representatives are given an opportunity of being heard." In the words of Thurlow J.:

[It] appears...that the inquiry is intended to be of a judicial nature to determine

¹Per Lord Loreburn in Board of Education v. Rice, [1911], A.C. 179.

²[1972], F.C. of p.1003.

³[1972], F.C. 277.

⁴S.C. 1966-67, c. 71.

⁵A closed competition is restricted to those who are already public service employees. For each competition, a rating board is established to assess the applicants on the basis of merit. Under s. 21 of the Public Service Employment Act, an appeal from the decision of the rating board lies to another board referred to above as simply 'an appeal board'.

whether the appointment attacked has been made in accordance with the law.¹

Jackett C.J. and Kerr J. agreed totally with that assessment. However, Mr. Justice Kerr did not agree with the majority opinion which held that the appellants were denied a fair hearing.²

And in the Blais case,³ the Appeal Court was unanimous in holding that in issuing or in cancelling a trustee's licence under the Bankruptcy Act,⁴ the Minister of Consumer and Corporate Affairs is under a duty to act in a judicial manner.⁵ Authorization for the issuance or renewal of such a licence is found in 9(3) and 9(4) of the Act.^{6a} In those

¹[1972], F.C. at p.313.

²Ibid., p.330.

³[1972], F.C. 151.

⁴R.S.C. 1970, c. B-3.

⁵Per Thurlow J. (Walsh J. concurring), p.164.

^{6a}Section 9(3) reads: "The Minister, as soon as he has received a report from the Superintendent as to the character and qualifications of the applicant for a licence, may, if he considers it will be of public advantage to do so, authorize the issue of a licence, which shall specify the bankruptcy district or districts or any part in which the licensee is entitled to act." Section 9(4) reads: "The licence shall be in the prescribed form and will expire on the 31st day of Dec. in each year but may be renewed from year to year subject, however, to such qualification and limitation as the Minister may seem expedient...."

sections there is no specific mention that the applicant is entitled to a hearing.¹ It was, however, the majority opinion of the Court that the Minister must reach his decision

...not by caprice but on the basis of what he honestly considers to be of public advantage to do. He is also required... to reach his decision having regard both to what is stated in the applicant's application and what is stated in the Superintendent's investigation. He must do this fairly and justly for as said by Lord Loreburn L.C. in Board of Education v. Rice [1911] A.C. 179 at p.182, to act in good faith and fairly listen to both sides is a duty lying upon every one who decides anything.²

THE GROUNDS FOR REVIEW

Excess of Jurisdiction

It may be remembered that under 28(1)(a) of the Federal Court Act, the Appeal Division has the authority to review and quash decisions which go beyond the jurisdiction conferred on the agency or agencies making them. In the Blais case,³ it was the opinion of the Associate Chief Jus-

¹Only when a licence is cancelled or suspended is it required by statute that the licensee be heard. See s. 10(2) of the Bankruptcy Act.

²[1972], F.C. at p.164.

³[1972], F.C. 151.

tice that, in limiting the licence of the applicant, the Minister of Consumer and Corporate Affairs had exceeded the jurisdiction granted him under the terms of the Bankruptcy Act. Under s. 9(4) of that Act the Minister may renew from year to year the licence of a trustee, and at the same time, place qualifications or limitations on the licence. In so doing, the Minister is not under a statutory obligation to hear the applicant. If, however, the trustee's licence is suspended or cancelled, the Minister, under s. 10(2) of the Act, must give the licensee a "reasonable opportunity...to be heard".

In the Blais case, after being made aware of allegedly improper conduct on the part of the trustee, the Minister proceeded under subsection 9(4) to limit the applicant's licence rather than suspending it under section 10(2) of the Bankruptcy Act. It was the opinion of Noël A.C.J. that in doing that "the Minister exceeded his jurisdiction and adopted a procedure not authorized by law".¹ He explained in more detail

By successive licence renewals under subsection 9(4), the effect of which is to terminate the applicant's activities as a trustee and eventually cancel his licence, [the Minister] may be able to prevent the applicant from exercising the right to a hearing conferred on him by subsection 10(2)

¹[1972], F.C. at p.154.

of the Act....¹

Walsh J. concurred with that view.

In the Thomas case,² the applicants alleged that the Public Service Staff Relations Board had no authority to determine a question of law referred to it by a Grievance Adjudicator³ under s. 23 of the statute creating the Board.⁴ That section, insofar as it applies to the question, reads as follows:

Where any question of law or jurisdiction arises in connection with a matter that has been referred to...an adjudicator pursuant to this Act,...either of the parties may refer the question to the Board for hearing or determination

Using that clause as authority, the employer asked the Board to determine if the adjudicator had made a mistake in interpreting the collective agreement as precluding the hiring of casual help in certain circumstances.⁵ In its Reasons for

¹ Ibid., p.155.

² [1972], F.C. 208.

³ Also known as a board of adjudication. See s. 94 of the Public Service Staff Relations Act.

⁴ That is, the Public Service Staff Relations Act, R.S.C. 1970, c. P-35.

⁵ That is, the hiring of casual employees to deliver mail on walks left unmanned due to the illness of regular letter carriers.

Decision, the Board made it clear that the adjudicator had erred in his interpretation of the law. The Federal Court of Appeal concurred with that decision and, in addition, upheld the right of the Board to determine any question of law under s. 23 including the interpretation of a contract that arises in connection with a matter referred to an adjudicator under the Public Service Staff Relations Act.

Jackett C.J. (Smith D.J. concurring) said succinctly: "I find in the statute no qualification, express or implied, on the power to determine such a question of law...."¹

In the Medi-Data case,² the applicants asked the Appeal Court to set aside the decisions and recommendations of a Board of Review nominated by the Postmaster General because, among other things, the Board had exceeded its jurisdiction. Under s. 7 of the Post Office Act,³ the Postmaster General may issue an interim order "prohibiting the delivery of all mail to [a] person" that he believes is, "by means of the mails, committing or attempting to commit an offence".⁴ Under the same section, however,

¹ [1972], F.C. at p.218.

² [1972], F.C. 469.

³ R.S.C. 1970, c. P-14.

⁴ Parts of s. 7(1).

the Postmaster General must then establish a Board of Review to "inquire into the facts and circumstances surrounding the interim prohibitory order".¹ And under s. 7(4),

The Board...has all the powers of a commissioner under Pt. I of the Inquiries Act, and, in addition to the material and evidence referred to by the Postmaster General, the Board may consider such further evidence, oral or written, as it deems advisable.

It was a brochure entitled 'WOMAN: Her Sexual Variations and Functions' which first moved the Postmaster General to place an interim prohibition on the mail service to the distributors, Book Bargains Inc.² Inquiring into the case some days later,³ the Board of Review based its report and recommendation on the transmission of the brochure mentioned and also on another called 'More Blazing Sex Films'. The second brochure, however, was not mentioned in the interim prohibitory order. In any event, the Board found both to be obscene and that their transmission by mail an offence under s. 153 of the Criminal Code. It was the contention of the applicant, however, that the Board exceeded its jurisdiction in considering material which was really not in question and in so doing prejudiced

¹In s. 7(3).

²Apparently, they are a subsidiary of Medi-Data Inc.

³Normally this occurs within 15 days of the issuance of an interim order. See 7(2) of the Post Office Act.

their case in that the Board's 'double finding' tended to persuade the Postmaster General to make the interim order final in a general way.¹ The Appeal Court did not agree. Speaking about those points, Thurlow J. said:

It seems to me that the statutory direction to the Board of Review to inquire into the facts and circumstances surrounding the interim prohibitory order is broad enough to embrace not merely an inquiry into the specific facts of such particular mailings as may have come to the attention of the Postmaster General but to include as well an inquiry into the nature of the business in which the person affected was engaged, the sort of materials which he dealt in and his conduct in the use of the mails both before and after the making of the interim prohibitory order.²

And he added: "What effect the Postmaster General gives to ... [such evidence] is for him to decide."³

Natural Justice

The Right to Notice: - In 1844, discussing the maxim audi alteram partem, Lord Denman C.J. said in Innes v. Wylie et al.: "No proceedings in the nature of a judicial proceeding can be valid unless the party charged is

¹In less serious cases, the Postmaster General may place some limitation on the prohibition.

²[1972], F.C. at p.486. Similar views were expressed by Jackett C.J. (pp.477-478) and Walsh J. (pp.493-494).

³[1972], F.C. at pp.486-487.

told that he is so charged...." (Italics mine.)¹ In Canada, a number of cases involving administrative tribunals has dealt with the form and content of notice. In general, the courts have held that

...notice must be clear and definite and particularize the grounds of complaint so as to enable the person to whom it is directed to know what he must meet.²

Under s 28(1) of the Federal Court Act, the Appeal Division may review and set aside an 'administrative' decision if the tribunal or board making it "failed to observe a principle of natural justice". The question of sufficient notice was an issue in Re North Coast Air Services Ltd.³ In that case, it was the air company's contention, (among other things), that in coming before the Air Transport Committee⁴ it was not aware of the statements prejudicial to its position. It was, nevertheless, the Committee's intention that representations be made to it as why certain conditions should not be attached to the licence

¹Quoted in Re Brown and Brock, [1945], 3 D.L.R. at p.329.

²Reid, p.68.

³[1972], F.C. 390.

⁴That is a Committee of the Canadian Transport Commission.

of the air carrier.¹

The Chief Justice considered the merits of the applicant's submission. It was his view that any restrictions placed on the licence of the air carrier should be based on a factual situation which demonstrated that "public convenience and necessity"² required such changes. The Chief Justice said:

...it is the statement of that factual situation which, in my view, the [applicant] should have an opportunity to correct or contradict.³

While it was acknowledged that the notice⁴ to the air carrier did not specify the factual situation (which might necessitate the change), the Honourable Mr. Jackett did not feel the

...appellant showed any sign of having been at a loss as to what possible basis there could be for such a general rule as that with which it was being faced.

¹At the time North Coast Air Services was a Class 4 carrier and the Committee wished to place certain restrictions on its licence so as to protect the routes served by Class 1 and Class 2 carriers.

²Those words appear in 16(8) of the Aeronautics Act, R.S.C. 1970, c A-3.

³[1972], F.C. at p.407.

⁴That was in the form of a brief letter from the Air Transport Committee of the Canadian Transport Commission dated August 10, 1970.

Indeed, I think that the balance of probability is that any person involved in, or familiar with, this type of regulated transportation industry, knows, without being told, of the factual situation that gives rise to the necessity of considering some form of route protection for scheduled operators. (*Italics added.*)¹

In that regard, Walsh J. was of the same opinion.²

Sheppard D.J., however, did not agree. It was his view that the Aeronautics Act conferred on the Commission sole responsibility for determining the circumstances under which it could amend a licence. It was his opinion, therefore, that the Commission was under no legal obligation "to give any specific kind of notice or to hear any representation by anyone or even to proceed in a judicial manner".³

In the Rodney case,⁴ the Appeal Court was unanimous in the view that an 'opportunity' to answer what is alleged against a person

¹[1972], F.C. at pp.407-408.

²At p.417, he said: "...it would be superfluous to require the Commission to disclose in its letter [i.e., notice] to each Class 4 carrier the voluminous evidence which it had undoubtedly acquired over the years as a result of its investigations which would justify [its] conclusion...[to offer protection to Class 1 and 2 carriers].

³[1972], F.C. p.422.

⁴[1972], F.C. 663.

...must involve a warning of what is alleged in sufficient time before the time for reply so as to enable reasonable preparation of...[a] reply.¹

In that case, Mrs. Juliet Rodney² was asked to accompany her husband to a hearing to determine if Mr. Rodney should be deported because he had allegedly been convicted in Canada of an offence under the Criminal Code.³ Having heard his case, the Special Inquiry Officer then had Mrs. Rodney brought before him and informed her, for the first time, that she might be included in the deportation order as well unless she could establish then and there reasons why she should not be so included.

Following the Supreme Court ruling in Moshos v. M.M.I.,⁴ the Federal Court of Appeal held that, under the circumstances, the wife had not been given sufficient opportunity to establish that she should not be included in the deportation order as required by s. 11 of the Immigration

¹The words of Jackett C.J. speaking also for Cameron and Sweet JJ. at p.669.

²Like her husband and son, Mrs. Rodney was not a Canadian citizen.

³A hearing into such circumstances is authorized by s. 19 of the Immigration Act.

⁴[1969], S.C.R. 886.

Inquiries Regulations.¹ Speaking for the Court, the Chief Justice compared the 'opportunity' given Mr. Rodney to that given his wife:

He was sent a notice, some time in advance of the hearing, of what was alleged against him and [in addition] was given information to assist him in obtaining legal aid....The wife...was given no advance notice that there was any possibility of any order being made affecting her and was merely informed [unexpectedly]...that the resulting [deportation] order...might include her. (*Italics added.*)²

The Right to be Heard: - In the Blais case, the Associate Chief Justice considered in general terms the principles of natural justice as they relate to a hearing and, also, the necessity for a hearing in the case before him. He said:

It is possible that the applicant, who has performed the function of trustee since 1953 [under the terms of the Bankruptcy Act] has the right to a hearing even though ...[the statute] does not say so, on a decision...which infringes upon his rights.³

¹Section 11 reads: "No person shall, pursuant to subsection (1) of section 37 of the Immigration Act, be included in a deportation order unless the person has first been given an opportunity of establishing to an immigration officer that he should not be so included".

²[1972], F.C. at pp.669-670.

³[1972], F.C. 151.

Indeed, it is a bit strange that Noël A.C.J. should have found it necessary to be so cautious. In both Britain¹ and in Canada,² there are a significant number of precedents in which interference with rights, especially a right to property or one's livelihood,³ have been held to be a

¹In Britain some very early decisions extended the right to a hearing into almost every sphere of administration. There was, however, a period when the courts were not particularly willing to grant a hearing, notwithstanding interference with personal and property rights. In more recent times their attitude has again changed. In Schmidt v. Home Office, [1968], 3 All E.R. 795, for example, Lord Denning relying on the Ridge case [1964, A.C. 40] concluded that the distinction between an administrative power and judicial one was no longer valid. He would make the principles of natural justice dependent "on whether [the individual] has some right or interest, or... some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

²See Reid at p.34. It might be noted too that Walsh J. recognized that principle in Creative Shoes, [1972], F.C. 115.

³In the Abbott case [1952], 1 K.B. 189 at 198, Lord Denning referring to a trade union committee said: "These bodies...which exercise a monopoly in an important sphere of human activity, with the power of depriving a man of livelihood must act in accordance with the elementary rules of justice. They must not condemn a man without giving him an opportunity to be heard in his own defence...." At p.34 Reid suggests the following cases in which interference with property and financial rights have been held as a ground for requiring a hearing: Re General Accident Assurance Co. of Canada, [1926], 2 D.L.R. 390 and Lee Wing v. Peter Don Chang et al., [1954] 4 D.L.R. 821. And in Re Halliwell and Welfare Institute Board, [1966], 56 D.L.R. 754 at 758, the Court made it clear that "there was ample authority...for the proposition that where the revocation or suspension of a licence is under consideration, the person affected by such a decision should be given an opportunity to be heard and to be informed of the allegations with which he is faced and given an opportunity to reply thereto."

sufficient ground for requiring a hearing.¹

Using a somewhat different approach to deciding the issues in the same case, Thurlow J. was of the opinion that although there was no express language in the statute, the Minister of Consumer and Corporate Affairs was under a duty to hear the applicant. It was his reasoning that in reviewing a trustee's licence under the terms of the Bankruptcy Act, the Minister was by implication required to exercise his authority on a judicial or quasi-judicial basis.

In another licencing case before the Appeal Court - Re North Coast Air Services² - the right to a hearing³ was a key issue. Under s. 16(8) of the Aeronautics Act,³ the Canadian Transport Commission "may suspend, cancel or amend any licence...where, in the opinion of the Commission, the public convenience and necessity so requires". There is no statutory provision for a hearing.⁴ It was, nevertheless, the view of both Jockett C.J. and Walsh J. that the rules of natural justice applied and that the Commission could only amend an air carrier's licence under

¹Of course, clear and unequivocal language in a statute has normally abrogated that common law right.

²[1972], F.C. 390.

³R.S.C., 1970, c. A-3.

⁴Jockett C.J. conceded that point. See p.404.

16(8) after giving the licensee a fair opportunity for correcting or contradicting any relevant statement prejudicial to him.¹ The Chief Justice said:

...having regard to the realities of modern commercial life, it seems to me that the requirements of natural justice are just as applicable to the cancellation or amendment of a licence of indefinite duration for the operation of a substantial transportation undertaking as they are to deprivation of property in the traditional sense.²

Sheppard D.J. did not agree. It was his view that the Commission was authorized to amend a licence without any hearing where in its opinion public convenience and necessity so required it.³

In Re Magnasonic Canada Ltd.,⁴ the Appeal Court was unanimous in its judgment to set aside a decision of the Anti-dumping Tribunal because it did not give Magnasonic and others an opportunity to be heard. Under the Anti-dumping Act,⁵ the Tribunal is authorized to conduct hear-

¹Board of Education v. Rice [1911], A.C. 179 per Lord Loreburn L.C. (at p.182) referred to.

²[1972], F.C. at p.404.

³See p.421 of the Judgment.

⁴[1972], F.C. 1239.

⁵R.S.C. 1970, c. A-15.

ings with respect to complaints about dumping in Canada.

The same statute sets out, in general terms, the procedure to be followed¹ in such inquiries, and confers on the

'parties involved' a statutory right to appear or be represented in those hearings.² Jackett C.J., speaking also for Thurlow J. and Basten D.J. said:

...we have no doubt that such a right to be heard..., at a minimum, includes a fair opportunity to answer anything contrary to the party's interest and the right to make submissions with regard to the material on which the Tribunal proposes to base its decision. A right of a party to 'appear' at a 'hearing' would be meaningless if the matter were not to be determined on the basis of the 'hearing' or if the party did not have the basic right to be heard at the hearing. (Italics added.)³

It was, therefore, held¹ that the Tribunal made the decision under attack without conducting a proper hearing in that it acted on information which it accumulated privately and of which the applicants had no knowledge and hence could not correct or contradict.

It is perhaps worth noting that a failure to grant a fair hearing before making an order does not, of itself, nullify the tribunal's order. In the Medi-Data case, the

¹ Sections 25-29 of the Act.

² Section 29(1).

³ [1972], F.C. at p.1247.

Chief Justice said:

What it does is to make the order voidable at the instance of the party affected. That is, it enables the person who was deprived of a hearing to challenge the order and have it declared void...as against him. No other person is entitled to challenge it and the person who was deprived of a hearing may refrain from challenging it, in which event, it continues in full force and effect.¹

While that statement is not to be taken as ratio, it should, nevertheless, be noted that it contrasts with that of Lord Reid in Ridge v. Baldwin:

Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void.²

A Right to Call Witnesses: - In the Nanda case,³

it was the majority opinion of the Court that the refusal of an Appeal Board established under the Public Service Act⁴ to hear witnesses brought forward by the appellants was reasonably to be regarded as a refusal to hear them on a relevant matter. In the dispute before the Appeal Board, the appellants alleged that at least one member of

¹ [1972], F.C. at p.480.

² [1963], A.C. 40 at p.80.

³ [1972], F.C. 277.

⁴ Actually, the Public Service Employment Act, S.C. 1966-67, c. 71.

the Rating Board, a Mr. J.H. Freke, had been biased and that several witnesses were ready to testify that they had heard him make remarks about the outcome of the competition. The Chairman of the Appeal Board apparently still refused to allow the appellants' representative to call the witnesses to testify on that aspect of the evidence.

Taking the view that a refusal to hear irrelevant evidence is not a refusal of a full hearing, the Chief Justice said:

I should have thought, that it would have called for some investigation and consideration by the Appeal Board as to whether Mr. Freke had so firmly set his mind against certain of the candidates before the decision that he could not really participate in a selection according to merit on the information and material that would be developed during the competition. I cannot say...that the proposed evidence was not relevant.¹

The reasoning of the Chief Justice might be compared to that in Re Koressis.² In that case, an officer conducting an immigration inquiry was not required to call a witness proposed by a party because the officer was correct in believing that the evidence to be derived from such a witness was irrelevant to the issues that had to be decided. It should be emphasized, however, that the Chief Justice him-

¹[1972], F.C. at p.308.

²[1968], 63 W.W.R. 556.

self did not compare, refer to or apply this case in rendering his judgment.

Adopting a somewhat broader view of the issues involved in the Nanda case, Thurlow J. said:

I would...be inclined to the view that ...the right to be heard includes the right to call witnesses.¹

...

...while I think it is wrong to treat the inquiry [of the Appeal Board]...as if trial practices apply,² an opportunity to be heard...which included the right for one of them, but not for the others, to call witnesses could hardly be regarded as fair.^{2a}

Acting under s. 52(d)³ of the Federal Court Act, the Appeal Division set aside the Appeal Board's decision and referred the matter back to the same Board with instructions to re-open the inquiry for the purpose of hearing the

¹Both Jackett C.J. and Thurlow J. characterized the Appeal Board's function as judicial in nature. See Jackett at p.295 and Thurlow at 313.

²That view might be compared with a similar approach taken in Furniture and Bedding Workers' Union v. Board of Industrial Relations, [1969], 69 W.W.R. 226.

^{2a}[1972], F.C. at p.313.

³Under s. 52(d), the Court of Appeal may "in the case of an application to review and set aside a decision of a federal board, commission or other tribunal, either dismiss the application, set aside the decision, or set aside the decision and refer the matter back to the board, commission or other tribunal for determination in accordance with such directions as it considers to be appropriate."

witnesses in question and reconsidering its decision in light of the new evidence.¹

Kerr J. (dissenting) was of the opinion that the application to set aside the decision of the Appeal Board should be dismissed. It was his view that the evidence before the Court did not show that the Chairman² denied the appellants the right to a fair hearing or failed to observe the principle of natural justice.³

Right to Cross-Examination: - On the whole, it appears that in Great Britain the right to cross-examine witnesses before tribunals is not particularly well established. At least, it seems that the British Courts have required nothing more than the opportunity for each party to comment on the material put forward by their respective opponents.⁴ In the Rice case, for example, Lord Loreburn, L.C., speaking of the Board of Education, said:

¹That direction was prescribed by Jackett C.J. at p.311. Thurlow J. concurred with the prescription at p.318.

²The Appeal Board and Chairman are one and the same. A Mrs. Irene Clapham was the sole member of the Appeal Board.

³At p.330.

⁴The 'merits and disadvantages' of permitting cross-examination are discussed briefly by R.F. Reid, pp.80-81.

...I do not think they are bound to treat...a question [before it] as though it were a trial.

...

They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.¹

In R. v. Housing Appeal Tribunal,² the Court held that the appellant, while having a right to be heard, was not necessarily entitled to an oral hearing. And in the Miller case, Lord Denning said:

No doubt in admitting it, the tribunal must observe the rules of natural justice, but this does not mean that it must be tested by cross-examination. It only means that the tribunal must give the other side a fair opportunity of commenting on it and of contradicting it...³

¹ [1911], A.C. at p.185. In the Blais case [1972], F.C. 151, Thurlow J. seemed to follow the same line of thinking. Referring to an adverse report which might affect the licencing of a bankruptcy trustee, he said (at p.165): "...it would to my mind be plainly unfair, if there were material in the report which the applicant had never had an opportunity to answer, and the matter were thereupon decided upon such material without first affording the applicant an opportunity to make an answer and thereafter again considering the material in light of such answer."

² [1920], 3 K.B. 334.

³ [1968], 2 All E.R. at p.634. Similar views are found in Haggard v. Worsbrough, [1962], 1 All E.R. 468.

And in Ridge v. Baldwin,¹ Lord Hodson did not list the right to cross-examination as a feature of natural justice.²

In Canada, the pattern has perhaps been less consistent. R.F. Reid comments:

Even in the Supreme Court...it has been observed that there is no...right [to cross-examine before tribunals] and assumed that there is.³ Generalization in this area is [therefore] dangerous.⁴

In the Nanda case,⁵ the right to cross-examine witnesses was an important issue. The appellants alleged that in the hearing before the Appeal Board, their representative, H.E. Done, was not given an opportunity to cross-examine certain parties. It was, however, the view of

¹[1963], 2 All E.R. 66.

²See p.114.

³In Canada, "a refusal to permit cross-examination may amount to error in law or to a denial of natural justice of jurisdiction or it may amount to a denial of natural justice or of jurisdiction or it may amount to none of these". Reid, p.85.

⁴Reid, p.80. See also Hogg, Osgoode Hall Law Journal, (1973), pp.219-221.

⁵[1972], F.C. 277.

both Jackett C.J.¹ and Thurlow J.² that while Mr. Done was not permitted to do so at the opening stage of the hearing, full opportunity was given to him on a subsequent day. That conclusion was based on the premise that since the statute did not specify the rules of procedure, the Appeal Board could establish its own method for inquiry provided it did not breach any provision of statute or of the common law.³ Thurlow and Kerr JJ., however, were of the opinion that the Board should follow the procedure it outlines for the disputants. Both judges were also of the opinion that the procedure set out in the Guide to the Public Service Appeals System, while useful, was not a Regulation that must be complied with strictly.⁴ In reaching that conclusion, Kerr J. applied Re O'Byrne and Bazley.⁵

¹Ibid., at pp.302-303.

²Ibid., at p.311.

³That view is similar to the one expressed by Lord Shaw of Dunfermline in Local Government Board v. Arlidge [1915], A.C. 120. At p.138, he said that although an administrative agency must arrive at "just ends by just means,...it must be master of its own procedure".

⁴[1972], F.C. 277, per Thurlow at p.311 and per Kerr at p.321.

⁵[1971], 3 O.R. 309.

The Nanda case, however, is not particularly a good one for discerning the disposition of the Appeal Court with regards to cross-examination. In that case, the Chairman of the Appeal Board had established a procedure similar to that found in the Guide referred to above which permitted cross-examination. The Court was, therefore, left with the task of deciding whether each party was treated fairly and given equal opportunity to cross-examine its opponents in keeping with the established procedure. It would appear, however, from a careful consideration of the entire judgment that Thurlow J., at least, was inclined, at that moment anyway, towards the view expressed by Lord Denning in the Miller case.

Error of law

In the Gateway case,¹ it was alleged that the Railway Transport Committee erred in law by

- (a) sanctioning a "deviation" of trackage under s. 181 of the Railway Act on the application of a city corporation rather than as "required" by a railway company,² and
- (b) by concluding that what the applicant sought was a "deviation" within s. 181 and not an "abandonment" of a "line of railway" within s. 188 of the same Act. The

¹[1971], F.C. 359.

²Obviously, then, that point of attack had to do with the interpretation of s. 181.

attack failed on both points: The Court was unanimously of the opinion that the relocation was "required" by the railway within the meaning of s. 181 and that the "deviation" in the railway was valid under the same section.

In the Nanda case,¹ the Appeal Court characterized a failure to comply with a statutory requirement as error of law. Under the terms of s. 21 of the Public Service Employment Act, a Board established to consider an appeal from an 'in-service' appointment must conduct an "inquiry" at which the "person appealing" and the "deputy head" concerned are to be "given an opportunity of being heard". With that provision in mind, Chief Justice Jackett said:

...if, on an inquiry..., the Appeal Board has not given such an opportunity, there has been a failure with the requirements of s. 21 and, therefore, an error of law....²

It was, however, the view of the Chief Justice that the appellants were not refused a full hearing and that, in fact, there was "a failure on the part of the Appeal Board with reference to only one question out of many that had to be considered".³

In Seafarers' Int. Union v. Kent Line Ltd.,⁴ the

¹ [1972], F.C. 277.

² [1972], F.G. at p.296.

³ Ibid., at p.318.

⁴ [1972], F.C. 573.

Appeal Court held that the Canadian Labour Relations Board did not error in law in finding that Kent Line Limited was not the 'employer' of certain personnel who had requested certification.¹ Thurlow J. was rather definitive on the point:

...I can see no error of law on the part of the Board in reaching that conclusion, whether the word 'employer' as used in...the Canada Labour Code is regarded as having its ordinary meaning or its meaning as defined in s. 107(1) of the statute...or as referred to in the reasons of the Board since there is...no difference for present purposes among the three.²

Erroneous Finding of Fact

In Re North Coast,³ it was alleged, among other things, that the manner in which the applicant's licence was amended by the Canadian Transport Commission⁴ "amounted to a decision founded on an erroneous finding made without

¹ Certification was denied because Kent Line was not the employer of the men in respect of whom certification was asked.

² [1972], F.C. at p.576.

³ [1972], F.C. 390.

⁴ Actually the Air Transport Committee of that Commission.

regard to the material before the Commission".¹ In his Memorandum to the Court, counsel for the applicant explained:

It is submitted that the file the Commission produced, which is the material in the possession of the Commission, that it considered before it issued the Order in question, does not disclose any material that could remotely allow the Commission to properly conclude there were any merits in amending the applicant's licence. (Italics added.)²

It must be realized that under section 16(8) of the Aeronautics Act³ the Commission may "suspend, cancel or amend a licence...when it has formed its opinion that the public convenience and necessity so requires...it after it has afforded the licensee a fair opportunity for correcting or contradicting any relevant statement prejudicial to his view".⁴

In the North Coast case, the Chief Justice promised to consider the weight of each objection submitted by the

¹From the applicant's Memorandum to the Court.

²Noted by Jockett, C.J. in his Judgment at p.397.

³R.S.C. 1970, c. A-3.

⁴Per Jockett C.J. at p.404.

applicant. In his Judgment, however, the Honourable Mr. Jackett considered only the allegations based on the traditional aspects of natural justice; namely,

Was the applicant afforded a "fair opportunity for correcting or contradicting any relevant statement prejudicial to his view?"¹ and secondly,

Did the Commission make a final decision concerning restrictions to the licence of the applicant before giving him an opportunity to make representations?

Having concluded that in both 'questions' the essentials of natural justice were complied with, the Chief Justice moved to dismiss the application. There was no comment about the objection that the Commission did not have "any material" on which to make its finding.

It should be noted that under the traditional writs

An administrative decision may be invalidated on judicial review on the basis of lack of evidence where there was no material of probative value before the inferior tribunal relevant to the overall decision it had to make, or to a non-

¹ Words of Lord Loreburn L.C. in Board of Education v. Rice [1911], A.C. 179 at 182 cited by Jackett C.J. in his Judgment [1972], F.C. at 404.

severable subsidiary issue vital to its overall decision.¹

In a rather lucid decision, Berger J. of the British Columbia Supreme Court supports the first part of that formulation. In the Westburne case, he writes:

If there was no evidence here, then certiorari will go. If there was evidence which offers reasonable grounds for the Board's determination that these men were employed by Westburne, that is the end of the case. (*Italics added.*)²

In the North Coast case Walsh J. said:

The finding of the Commission on 'public convenience and necessity' are not subject to review on the merits by this Court, being within the sole jurisdiction of the Commission, but the principle of natural justice³ entitles the Court to enquire whether it appears that there was any evidence on which the conclusion of the Commission could have

¹David W. Elliot, "No Evidence: A Ground of Judicial Review in Canadian Administrative Law?" Saskatchewan Law Review, (1972-73), Vol. 37, No. 1, pp.80.

²[1973], 6 W.W.R. at p.454.

³"No evidence" has periodically been seen as "another form of natural justice, as independent and distinct as the bases of bias and audi alteram partem. Thus "no evidence" even as part of the concept of natural justice "is concerned with the existence of the material before the tribunal". In Elliot, Saskatchewan Law Review, Vol. 37, No. 1, pp.96-97.

been reached.¹

But from what follows in his Judgment, it is not clear whether Mr. Justice Walsh made an independent inquiry into whether or not there was any evidence to support the Commission's decision. He did say, however, with reference to the Notice sent the air carrier that the Commission was not under an obligation to list the

...voluminous evidence which it had undoubtedly acquired over the years as a result of its investigations to justify the conclusion that public convenience and necessity made it necessary to restrict certain licences. (Italics added.)²

And at another place, he says:

In order to conclude that the Commission in deciding to amend the applicant's licence did not consider any evidence relating specifically to it as opposed to evidence relating to Class 4 carriers generally, it would be necessary to base this on an assumption that this must be deduced from the fact that no exceptions have been made to date for any Class 4 licensees. I do not believe such an assumption can be made in face of the positive statement in the [Commission's] order that all matters relevant to the proposed amendment (i.e. the amendment to the applicant's licence) have been considered. (Italics added.)³

¹ [1972], F.C. at p.416.

² [1972], F.C. at p.417.

³ Ibid., pp.419-420.

It appears, therefore, that Walsh J. is prepared to "accept the inferior tribunal's word that its inquiry was proper wholly at fact value without asking independently if there was any evidence before the tribunal in the course of its inquiry."¹ That position is 'extreme' in that it does not accord with a majority of Canadian decisions which have recognized 'no evidence' as requiring an independent inquiry by the court.²

In the Professional Institute case,³ the applicants alleged that the material before the Public Service Staff Relations Board "contained no evidence"⁴ to exclude two lawyers from a bargaining unit under the terms of the Public Service Staff Relations Act.⁵ The Court, however, dismissed the application after a careful consideration of the Act and also the material on which the Board had based its decision.

¹ Elliot, Saskatchewan Law Review, (1972-73), p. 74.

² Ibid.

³ [1972], F.C. 1316.

⁴ Ibid., per Jackett C.J. at p. 1321.

⁵ Under that Act the Board is authorized to certify various employee organizations within the public service as bargaining agents to carry out collective bargaining. For the purpose of determining membership in each bargaining unit, "employee" is defined in section 2 of the same Act as being a person employed in the Public Service other than certain excepted classes. One such class is "a per-

son employed in a managerial or confidential capacity".
The statute takes some care to expand on that class of
persons.

CHAPTER EIGHT

CLOSING REMARKS

GENERAL SUMMATION AND OBSERVATIONS

The certiorari proceeding, per se, as it relates to federal administrative agencies seems to have disappeared as a remedy. The Federal Court Act as interpreted by the Federal Court permits certiorari to issue from the Trial Division only against decisions made prior to June 1, 1971.¹ And since certiorari must normally be sought within six months after the date of the proceedings, it appears that the Trial Court has lost all jurisdiction to issue that remedy.² And the provincial courts seem to have accepted the terms of the Federal Court Act as depriving them of certiorari and other review jurisdiction as it relates to federal administrative agencies.³

¹In Creative Shoes and in the Armstrong case.

²Of course, a statutory remedy similar to that provided under certiorari is now available exclusively in the Federal Court of Appeal.

³In the Milbury case, for example.

In the Trial Court the other writs have so far issued along traditional lines. For instance, it has been established that the prerogative writs are not available against the Crown;¹ that mandamus and injunctive relief will issue only to someone who has a direct interest in the performance he is requesting;² that mandamus secures only public duties specified by law;³ and, the very basic principle, that the injunction will issue only to prevent violation of a legal right or prevent some legal wrong.⁴

The 'uncertainties' that may arise from classifying functions are again apparent. In National Indian Brotherhood, No. 3, certiorari was denied because the decision in question was held to be purely administrative in nature. But in Creative Shoes, the same remedy issued to quash a "purely administrative decision affecting private rights". And there is still some confusion as to whether or not mandamus⁵ or injunctive relief⁶ will be granted against ad-

¹In Re Anti-dumping Tribunal.

²In Nat. Indian Brotherhood, No. 1 and No. 3.

³In Nat. Ind. Brotherhood, No. 3.

⁴In Nat. Indian Brotherhood v. C.T.C. Television.

⁵In Nat. Ind. Brotherhood, No. 3.

⁶In Filion.

ministrative decisions, but it seems to have been clearly established in the Lingley case that declaratory relief will issue against such decisions. (It might again be noted that in Canada both mandamus and the injunction have issued against administrative decisions.)

In the Appeal Court the decisions rendered so far do not indicate a broadening of the powers of review beyond those previously available under the writs:

(1) Review under "excess of jurisdiction" and "error of law" have so far involved the Appeal Court in an interpretation of largely 'obvious' statutory provisions. That is, provisions whose meaning appears quite clear.¹ Nothing new or unexpected resulted from cases argued on those grounds.

(2) Under the principles of natural justice, the Appeal Court has recognized the traditional features: the right to sufficient notice² in sufficient time for a reply;³ the right to a hearing when one's rights are affected;⁴ the

¹In Thomas and Medi-Data, for example.

²In Re North Coast.

³In Rodney.

⁴In Blais and Re North Coast.

right to call relevant witnesses¹ and possibly a right to cross-examine witnesses before a tribunal.²

(3) And nothing new in terms of a ground for review appears to have evolved so far from section 28(1)(c) of the Federal Court Act. From Re North Coast it appears that Walsh J. might be disposed to quash a determination of the Transport Commission if "there was [not] any evidence on which the conclusions of the Commission could have been reached".³ But certainly there is nothing new in that pronouncement. And in Professional Institute, the Appeal Court was unanimous in rejecting the contention that there was "no evidence which could bring the two lawyers in question within the ambit"⁴ of those excepted classes of "employees" under the terms of the Public Service Staff Relations Act.

In sum, then, both Divisions have been strongly inclined to 'support' their Judgments by reference to British and Canadian decisions that have resulted from review under

¹In Nanda.

²Ibid.

³[1972], F.C. at p.416.

⁴Words used in the applicant's Memorandum to the Court and quoted by Jackett C.J., [1972], F.C., p.1321.

the ancient writs and, so far, no decision either in the Trial Division or in the Court of Appeal has resulted in a broadening of the traditional grounds of review.

SOME OTHER OBSERVATIONS

The Trial Division

Heavy Reliance on Staid Precedents:- It appears that despite expectations to the contrary, the Trial Division has decided to issue the writs along conservative, traditional lines. While it may be argued that the Federal Court Act itself does not 'compel' the Trial Court to issue the writs along "a meaning given by the courts in any other jurisdiction",¹ it appears that the Trial Division is rather determined to keep in line with past judicial pronouncements. In addition, it has been extremely conservative in selecting the precedents it will apply. Perhaps this is to be expected from a Court which has 'suddenly' received jurisdiction to review² administrative action.

But as indicated elsewhere, there may be found within administrative law a whole series of decisions which support a limited pattern of review and another, generally quite separate, set of decisions which lead to a broader

¹Henderson, Special Lectures..., 1971, p.68.

²Review here is used in a narrow sense to refer to supervisory control.

review process.¹ At another level, it may be said that some jurisdictions, more so than others, have adopted 'grounds' of review which are generally broader than in others.² Indeed, here and there throughout the realms of reported judgments are a number of examples in which the writ system has been used to provide a pattern of review which is sometimes as broad as that available in an appeal on the merits,³ and that, periodically, in cases involving administrative acts.⁴

¹For example, in The Queen v. Metropolitan Police Commissioner, [1953], 1 W.L.R. 1150, it was held that a London taxi-driver could be deprived of his licence without a hearing. (That case is aptly discussed in Wade, p.160). Certiorari was refused in that case as it was in Nakkuda Ali v. Jayaratne, [1951], A.C. 66, on a similar matter. Those decisions contrast with others both in Britain and in Canada where certiorari has issued to quash the decision of a licencing granting authority for failure to hold a hearing.

²Contrast the issuance of the declaratory judgment in the Alberta Superior Court to the much narrower view as to when it should issue in the Saskatchewan Court. Discussed above:

³See Laskin's remarks quoted above re Labour Relation Boards. We add the remarks of Professor Hogg: "In brief, the Supreme Court has used the jurisdictional fact doctrine to substitute its opinion for that of the agency on matters which...were peculiarly within the competence of the agency. It has used the doctrine as a kind of underground appeal when no appeal had been expressly provided". In U. of T. Law Journal, Vol. 11, No. 2, p.205.

⁴Ibid., p.207.

The Trial Court is feeling its way into this varied plethora. So far, it seems to have adopted those decisions which exemplify a conservative notion of supervisory review. It is of course difficult to say whether or not the Court with time and experience will become less 'cautious' and lean towards a slightly broader review pattern. If it should some day decide to branch out into more adventuresome pathways, it will still be able to garner support from a number of rather respected authorities.

Loss of Certiorari: The loss of certiorari proceedings in the Trial Court is unfortunate. Even if the draftsmen intended to provide a similar, though somewhat broader, proceeding in the Appeal Court, it may have been well to leave certiorari in the Trial Court as well.¹ It is probably more convenient - in terms of saving time and money - for the litigant to obtain a hearing in the Trial Court than in the Appeal Division. And, indeed, if both forums were handling that type of proceeding, it would certainly have been more convenient.

¹Others, as well, have seen some merit in permitting the old remedies to exist alongside statutory review proceedings. For example, as originally drafted the new Ontario Judicial Review Act provided for such a scheme. And the New Zealand Public and Administrative Law Reform Committee has apparently made the same recommendation.

The Declaratory Judgment: - From judicial judgments rendered so far, it is virtually impossible to say much about the possible fate of that remedy in the Trial Court. Some writers and jurists have suggested that a wide scope be given that remedy as a supervisory vehicle for control of federal inferior tribunals. It seems unlikely, however, that the Appeal Court will allow¹ that remedy to grow to such an extent that it would virtually usurp its own power of review under section 28.² In other words, it seems unlikely that the Appeal Court would interpret section 28(3) as denying the Trial Division certiorari; proceed to clarify its own review powers under 28(1); and then, virtually re-instate the Trial Court's certiorari-like jurisdiction by permitting a broad scope for the declaratory judgment.³ But judicial reasoning is sometimes difficult to

¹It must be remembered that under section 27 of the Federal Court Act an appeal lies to the Appeal Division from, among other things, any final judgment of the Trial Division.

²It was suggested before Bill C-192 became law that "the intention of the draftsmen...was to abolish substantially the use of the injunction, the prerogative writs and declaratory relief in the field of administrative law." See Nicholls, Chitty's Law Review, 1970, p.256.

³The declaration has issued for violation of natural justice, bias, bad faith and, more generally, for lack of jurisdiction. In Warren, Canadian Bar Review, (1966), p.631. It might be noted, however, that in the Hollinger case [1952], 3 D.L.R. 162 it was held that, to the extent that certiorari, prohibition or mandamus provided an

appreciate and that might, indeed, happen. It might, therefore, be best to reserve judgment on the possible fate of the declaration.

Confusion in Administrative Law: - By relying quite heavily in these initial stages on relatively 'staid' precedents, the Trial Court has obviously given new life to old concepts, principles and terminology - confusing as they sometimes may be. But the degree of confusion that has developed around the traditional remedies does not cause this writer much concern. Obviously, it would be convenient if everyone used the term 'judicial' in the same sense and if, indeed, there were little packages of strictly judicial decisions quite separate from administrative ones. But as mentioned elsewhere, the confusion may indeed emanate from something more complex than a simple misuse of terms or a poor understanding of the principles. The confusion may rest largely on an attempt to fix, in a relatively new field and in a short period of time, "ideal-like" strictures on the ever changing, ever expanding bureaucratic process.

In earlier times, the courts could quite easily apply to the judicial-like agencies the theoretical concepts of supervisory control. But with the development of new circumstances and new institutions, the application of the

aggrieved person with a remedy, a declaration was not available as an alternative.

theoretical framework to the administrative process has become increasingly difficult. And, interestingly enough, all this has had to occur in the midst of considerable 'disharmony' as to what is an appropriate degree of judicialization. No doubt, the complexity of the problems and the equal diversity of the structures that have developed to cope with them have probably been significant factors in working against the development of a consensus about judicial involvement.

Nevertheless, it is to the judicial branch, through the litigation process, that has been 'delegated' much of the responsibility for resolving some rather difficult issues. For instance, while the complexity of our society demands expediency, our democratic upbringing expects 'due process'; and while we are encouraged to recognize the vital necessity of change, we still cherish consistency and equality. Aware of the 'temper' and circumstances of the society, the courts have had to evolve a system of judicial control which, among other things, does not by-pass the decision-making apparatus of the administrative branch and which, at the same time, corrects instances of 'maladministration'.

In the modern context, then, the traditional principles of supervisory control have often provided a 'useful' basis upon which the courts might hinge their decisions and avoid undue involvement. For example, where a purely administrative decision was involved but where no blatant

injustice was apparent or where it seemed best not to interfere in the development of a 'reasonable' policy, the courts were able to apply without much difficulty the restricted theoretical concept of supervisory review. Where, however, it was apparent that an individual's rights were being seriously curtailed or where the decision appeared to go against good social policy, it was necessary, in some cases at least, to get involved in some rather convoluted 'reasoning' to support a decision to quash along principles usually associated with supervisory control. As a result, the rules of intervention became confused.

To suggest that the courts have invariably been so noble or that the 'confusion' has resulted solely from such circumstances is ludicrous. But the explanation synthesizes a number of contributing factors into a more comprehensive arrangement and helps place a more positive light on the supervisory system which has served us reasonably well.

The Appeal Division

Natural Justice, Excess of Jurisdiction and Error

of Law: - It seems fair to assume that section 28 of the Federal Court Act may legitimately support an interpretation which would lead to grounds of review broader than previously available under the writs. At the same time, it is obvious that

...a large proportion of the questions that arise under section 28 are questions as to the extent of statutory powers, as to whether the rules of natural justice apply or as to whether the rules of natural justice have been complied with.¹

In other words, "generally...grounds that are of the same general character as the grounds for certiorari."² It is, therefore, only logical that the decisions of the Appeal Court - or at least many of them - made under section 28 should "fall...in accordance with well established rules".³ But as the Chief Justice has pointed out in an article in the Osgoode Hall Law Journal,

...[these grounds] are...restated in statutory language so that decisions on certiorari have no necessary application. In addition, certain lines of jurisprudence in connection with certiorari are definitely inapplicable by reason of the very specific language employed.⁴

For example, section 28(1)(b) provides for review where a

¹Per Jackett C.J. in M.N.R. v. Creative Shoes, [1972], F.C., 1425, p.1429.

²W.R. Jackett, "The Federal Court of Appeal", Osgoode Hall Law Journal, (1973), Vol. 11, No. 2, p.258.

³Per Jackett C.J. in Creative Shoes, p.1429.

⁴Vol. 11, No. 2, p.258.

tribunal "erred in law in making its decision or order, whether or not the error appears on the face of the record". Certiorari, of course, has issued only where there has been patent error of law, i.e., where the error has appeared on the face of the record. But it should also be remembered that Canadian courts have sometimes defined the 'record' rather broadly.¹ It might also be noted that the courts have reviewed for error of jurisdiction - whether or not on the face of the record. And jurisdictional error has sometimes been so broadly defined that it is difficult to conceive of errors which might not be caught under it.²

¹At p.367 Reid says: "Thus in the scale of probability of inclusion in what is, in law, the record - whether, or not, part of the physical return made by a tribunal to a certiorari motion - some documents are always included, such as the order, decision or award; some will probably be included, such as applications and other initiatory documents and pleadings; some possibly, possibly not, such as reasons; some are unlikely to be included and some highly unlikely, such as transcripts of evidence."

²In the Anisminic case, [1969], 2 A.C. 147, Lord Reid said at p.171 of a tribunal making a jurisdictional error: "It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may have in perfect good faith have misconstrued the provision giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted it. It may have refused to take into account something which it was required to take into account. Or, it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account." Reid at pp.360-361 notes that among other errors held to go to jurisdiction are: "...failure to allow time to answer and the participation of members of the tribunal who had not heard the evidence in the deci-

It is, of course, impossible to predict exactly what the Appeal Court will eventually review under "error of law whether on the face of the record or not". None of the cases so far have differed from previous ones argued on the basis of patent error or jurisdictional error. Judging from the Court's general adherence to precedents and also from the breadth error of law and jurisdictional error have reached under the writs, it seems doubtful that section 28(1)(c) will lead to much new ground for review.

Erroneous Findings of Fact: - In certiorari proceedings, the courts have been willing to determine the facts where a tribunal's jurisdiction has been found dependent on the existence of certain pre-conditions. Indeed, in reviewing jurisdictional facts, the courts exercise an appeal-like function since they are sometimes prepared to weigh the evidence as it relates to the issue.¹

It appears, however, that "errors of fact" within jurisdiction are not reviewable under the writs.^{1a} But

~~it is also remembered that it falls on the court to deter-~~

sion; failure to act judicially in various ways, such as failure to allow a fair hearing through a refusal to divulge information; errors regarding the reception of evidence, such as receiving evidence after the hearing or improperly admitting evidence or refusing to admit evidence....[These]...errors of jurisdiction [have been] dealt with in certiorari and prohibition proceedings".

¹See Wade, Administrative Law, p.72 or Griffith and Street, p.220.

^{1a}It has, therefore been said: "A tribunal acting

mine which questions within jurisdiction are ones of law (and reviewable) and which are questions of fact (and not reviewable).

[Indeed] it has often been remarked that policy considerations...influence the decision of a court: ...it is apt to hold a finding or inference was one of law if satisfied that it was wrong but that it was one of fact if satisfied that it was right.¹

In general, however, it may be said that findings of primary fact² are usually held to be erroneous in law where there is no evidence whatsoever to support them.³ And inferences which the tribunal purportedly draws from the facts are usually treated as inferences of law, where the

within jurisdiction...must be at liberty to go wrong". In Wade, p.73.

¹de Smith, Judicial Review of Administrative Action, p.85.

²"The question whether the holder of a policy has renewed the policy before its expiry is one of [primary] fact. [A judge] hears evidence...to find what were the true facts; it may then be necessary for him to draw a series of inferences from these primary findings in order to determine what were the material facts on which he has to base his decision..." In de Smith, pp.84-85.

³At least, this seems to be the practice where the tribunal has set out the evidence in its order.

...inference is wholly unsupported by any of the primary facts but also when the inference is one that no reasonable body of persons could draw (as where the evidence and primary facts point unmistakably to a contrary conclusion) or is based on the application of an erroneous legal test or on irrelevant considerations.¹

The Appeal Court did not go beyond those principles in either the North Coast case or in the Professional Institute case and it is doubtful that it will. Indeed, it might even be argued that the draftsmen did not intend the Court to transcend those established rules. In a letter written May 6 of 1970 to Professor G.V.V. Nicholls, the Minister of Justice says:

Breaking new ground in this area of law has not been easy, and difficult decisions must necessarily be made respecting the adoption of existing concepts and principles. In this regard, the present Bill follows the philosophy of using established concepts and principles to define the perimeters of jurisdiction within which relief may be obtained. (Italics added.)²

¹de Smith, p.87.

²Nicholls, Chitty's Law Journal, (1970), p.258.

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