The Trial Division of the Federal Court: An Addendum

I read with interest the recent article in this Journal by Mr Norman M. Fera,[1] in which he assessed the work of the Trial Division of the Federal Court under section 18 of the *Federal Court Act*.[1a] I should much appreciate an opportunity to contribute an *addendum*, a form of legal writing of, perhaps, dubious authority, but one which has recently found favour with the Federal Court of Appeal itself.[2] My remarks are addressed both to some specific points made by the author and to some more general comments on the Federal Court.

The problems that have arisen in determining the extent of the Federal Court's jurisdiction may simply be the inevitable attendants of the early years of superimposing a federal court upon the existing court system.[3] However, the linguistically cumbersome and conceptually obscure terms by which the Act[4] divides the Court's non-appellate jurisdiction between the Trial Division and the Court of Appeal have, all too predictably, caused considerable difficulty. It

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[1] (1976) 22 McGill L.J. 234.

[1a] R.S.C. 1970 (2d Supp.), c.10.

[2] See *e.g., Button* v. *Minister of Manpower and Immigration* [1975] F.C. 277, 298 (C.A.).

[3] Whilst the Ontario Court of Appeal in *City of Hamilton* v. *Hamilton Harbour Commissioners* (1972) 27 D.L.R. (3d) 386, gave a liberal interpretation to the *Federal Court Act*, R.S.C. 1970 (2d Supp.), c.10, s.2(g), more recent pronouncements suggest some limitations. See *e.g., Canada Metal Co. Ltd* v. *C.B.C.* (1976) 11 O.R. (2d) 167 (C.A.), where it was held that although created by a federal statute, *Broadcasting Act*, R.S.C. 1970, c.B-11, the C.B.C. is not a "federal board, commission or other tribunal", because its functions are of a business, not regulatory nature; *Desjardins* v. *National Parole Board* [1976] 2 F.C. 539, 547 (T.D.), where Walsh J. held that the Governor in Council is not a federal board within s.2(g), although the specific exclusion by s.28(6) of decisions or orders of the Governor in Council from the scope of s.28 review, suggests that the Governor in Council would otherwise fall within s.2(g); in *Vardy* v. *Scott* (1976) 66 D.L.R. (3d) 431 (S.C.C.), a superior court of a province was held to have jurisdiction to review the taking of depositions under the *Extradition Act*, R.S.C. 1970, c.E-21, on the ground that the magistrate is there exercising "only peripheral powers under the *Extradition Act*, analogous to his usual judicial functions...". This is a not altogether convincing gloss upon the Court's decision in *Commonwealth of Puerto Rico* v. *Hermandez* [1975] 1 S.C.R. 228.

[4] R.S.C. 1970 (2d Supp.), c.10, s.28(1) confers jurisdiction upon the Federal Court of Appeal 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...".

is not my purpose here to analyze all the relevant decisions. Suffice it to say that, whilst the creation of jurisdictional disputes is an inevitable cost of establishing new courts with specialized responsibilities, the draftsman of section 28 selected language that, even before the Act was passed, was quite obviously going to perpetuate and exacerbate one of the hoariest and most sterile controversies of the remedial law of judicial review.[5] The problems that have surrounded the interpretation of the words, "decision or order", were, perhaps, less predictable; the draftsman is entitled to plead, in mitigation, that on this issue his prescience was no less than that of the draftsman of the Ontario *Judicial Review Procedure Act, 1971*.[6] Which draftsman has been better served by the courts is a nice question.

The interpretation of the decision in *Howarth* v. *National Parole Board*[7] is crucial in determining whether there is anything of substance upon which the Trial Division's jurisdiction to issue *certiorari* can bite.[8] I concede, of course, the transitional jurisdiction of the

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[5] See Mullan, *The Federal Court Act: A Misguided Attempt at Administrative Law Reform?* (1973) 23 U.T.L.J. 14, esp.28-31.

[6] See S.O. 1970, c.48, s.1(f), (g). For a recent decision suggesting a liberal interpretation of the terms "statutory power" and "statutory power of decision" see *Chadwill Co. Ltd* v. *Treasurer and Minister of Economics etc. for Province of Ontario* (1976) 1 M.P.L.R. 25 (Ont.Div.Ct).

[7] (1974) 50 D.L.R. (3d) 349 (S.C.C.).

[8] After stating that the Trial Division has, by virtue of s.28(3), no jurisdiction to issue *certiorari* in respect of a decision or order reviewable by the Federal Court of Appeal under s.28(1), Mr Fera writes, *supra,* note 1, 237:

> "It should be emphasized, however, that authority to make a declaration or to grant injunctive or prohibitory relief is definitely still with the Trial Division irrespective of when the decision was made. Similarly with mandamus, the jurisdiction of the Trial Division to issue that prerogative remedy does not appear to have been ousted by the jurisdiction given to the Court of Appeal by section 28 of the *Federal Court Act*" (footnotes omitted).

The reader may be misled by this statement into thinking that a decision otherwise reviewable under s.28 may be reviewed by the Trial Division in proceedings under s.18 other than through the order of *certiorari*. S.28(3), of course, is not so limited, referring as it does to *"any* proceeding respecting that decision or order". The cases cited by Mr Fera do not support a narrow reading of s.28(3), and, *supra,* note 1, 257, he appears to accept this.

It is unclear how far s.28(3) also pre-empts a collateral attack upon the validity of a decision, to which s.28(1) applies, in proceedings, for example, for a claim for damages. In *Wright* v. *The Queen* [1975] F.C. 506 (T.D.), Heald J. awarded the plaintiff a declaration that he had been invalidly dismissed from his employment, and damages. In fact, the Federal Court of Appeal had already set aside the decision to dismiss the plaintiff from his employment. *Quaere,* whether the plaintiff could have sought damages from the Trial

Trial Division in respect of decisions made by agencies before June 1, 1971, and the jurisdiction that has emerged from the narrow interpretation given by the Federal Court of Appeal to the words, "decision or order".[9] Moreover, if the majority opinion in *Howarth* is read to decide no more than that section 28 applies only to those decisions required to be made after an agency has conducted a hearing substantially similar to that afforded a litigant by the courts of law, then the Trial Division of the Federal Court will have ample opportunity for considering the exercise of its power to issue *certiorari*. I have avoided expressing the decision in *Howarth* in terms of the application of "the rules of natural justice", because of the recent tendency to equate them with *any* duty imposed by the courts upon an administrative agency allowing individuals to participate in the procedure adopted by the agency prior to its decision. It is by now a truism that the contents of the "rules of natural justice" or "procedural fairness" in any particular context should reflect the degree to which the agency's functions diverge from those performed by courts of law.[10] Indeed, the Supreme Court expressly did not decide what procedural standards of "fairness" might, by implication, be imposed upon the Board.[11] Nor did it decide that all those decisions within the scope of the common law writ of *certiorari* were reviewable under section 28. Recent English decisions have severed the availability of *certiorari* and prohibition from the requirement that the body must act "judicially" in the sense that

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Division, without first having the decision to dismiss him set aside under s.28. Where the applicant's relief includes a claim for damages, to give s.28(3) its broadest scope may well necessitate two separate proceedings.

[9] See *e.g., A.G. of Canada* v. *Cylien* [1973] F.C. 1166 (C.A.); *Re War Amputations of Canada and Pension Review Board* (1975) 55 D.L.R. (3d) 724 (Fed.C.A.).

[10] For a discussion of some recent decisions, see Mullan, *Fairness: The New Natural Justice* (1975) 25 U.T.L.J. 281. The very flexibility of the duty of fairness may, however, enable the courts to relax previously established procedural rights as readily as it may be used to confer procedural rights where none may previously have been thought to exist. In *Howarth*, the *Parole Act*, R.S.C. 1970, c.P-2, s.11 expressly excluded the right to an oral hearing.

[11] However, in *Mitchell* v. *The Queen* (1976) 61 D.L.R. (3d) 77 (S.C.C.), the Court held that the National Parole Board's failure to hold a hearing before suspending the appellant's parole did not violate the *Canadian Bill of Rights*, S.C. 1960, c.44 (see R.S.C. 1970, Appendix III), s.2(e). Relying upon a statement made by Sir Lyman Duff in 1923 (*Security Export Co.* v. *The Hetherington* [1923] S.C.R. 539), Ritchie J., *obiter*, doubted whether the Board was amenable at all to the writ of *certiorari*. For decisions after *Howarth* in which the courts have not adopted this view, see *infra*, note 31.

it is bound by the rules of natural justice.[12] It may be concluded, therefore, that there is nothing in the judgment of Pigeon J. to prevent the Trial Division from quashing decisions of a "purely administrative" nature or from developing procedural requirements derived from the "duty to act fairly".

This conclusion is reinforced by the reliance which Pigeon J. placed upon the decision in *Calgary Power*.[13] Here the appropriate procedural standards of the agency were in issue, rather than its amenability to *certiorari*. The weakness of this argument, however, is that while *Calgary Power* did not, on its facts, require any decision as to the scope of the writ of *certiorari*, the Court relied heavily upon *Nakkuda Ali* v. *Jayaratne*.[14] Viscount Radcliffe in *Nakkuda Ali* appeared to predicate the availability of the writ on *any* ground upon the applicability of the rules of natural justice. It may, of course, be contended that *Nakkuda Ali* decided no more than the procedural rights of the individual before the Controller of Textiles, and not, as has been contended, that *certiorari* was inapplicable to a decision of the Controller based, for example, on manifestly irrelevant considerations. Attractive as this suggestion may be, the fact remains that Viscount Radcliffe sought his solution to the case in the *Electricity Commissioners*[15] and the *Church Assembly*[16] cases, both of which dealt squarely with the availability of *certiorari* on any ground. Nonetheless, *Nakkuda Ali* is generally considered an anomalous decision

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[12] See especially *R.* v. *Liverpool Corporation, ex p. Taxi Fleet Operators' Association* [1972] 2 Q.B. 299 (C.A.); *R.* v. *Hillingdon London Borough Council, ex p. Royco Homes Ltd* [1974] Q.B. 720 (Div.Ct); *R.* v. *Barnsley Metropolitan Borough Council, ex p. Hook* [1976] 3 All E.R. 452 (C.A.). It may be significant that most of the decisions in which the English courts have shown impatience with the administrative/judicial dichotomy have concerned local authorities. In *Hook*, Scarman L.J. stated:

> "Historically, going right back to the beginning of the history of the prerogative writs of certiorari and prohibition, they were the writs that enabled the King's justices to control the actions of local authorities. Of course, in those days, almost invariably, the justices of the peace were the local authorities charged with administrative as well as judicial duties. There are, therefore, good, respectable historical antecedents for expecting a local authority to be a body of persons amenable to control by orders of certiorari and prohibition" (at p.458).

[13] *Calgary Power Ltd* v. *Copithorne* [1959] S.C.R. 24. However, only in *Royco* did the court grant an order on grounds unrelated to considerations of procedural fairness.

[14] [1951] A.C. 66 (P.C.).

[15] *The King* v. *Electricity Commissioners* [1924] 1 K.B. 171 (C.A.).

[16] *R.* v. *Legislative Committee of the Church Assembly, ex p. Haynes-Smith* [1928] 1 K.B. 411 (Div.Ct).

by the English Courts[16a] and it would surely not take extraordinary judicial boldness for the Supreme Court to declare that is it no longer conclusive of the availability of *certiorari.*

It is premature to assess the impact that *Howarth* may have upon the general development of the law of judicial review.[17] The careful language of Pigeon J. gives every encouragement to the view that the case was decided on very narrow grounds: *i.e.* the decisions of the Parole Board are not reviewable by the Federal Court of Appeal. Given the quasi-appellate nature of proceedings under section 28 (indicated, for example, by the grounds of review, the three-judge Bench, the fact that decisions reviewable under section 28 are subject to one less level of appeal, and the procedural superiority of proceedings in the Trial Division for making findings of fact) there is much to be said for restricting the scope of section 28 to those bodies which proceed in a formal manner after full argument on the legal and factual

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[16a] *Ridge* v. *Baldwin* [1963] 2 All E.R. 66, 80 (H.L.) *per* Lord Reid; *R.* v. *Gaming Board for Great Britain* [1970] 2 Q.B. 417, 421 (C.A.) *per* Lord Denning. Compare *Duryappah* v. *Fernando* [1967] 2 A.C. 337, 349 (P.C.) *per* Lord Upjohn.

[17] The dissenting opinion of Dickson J. draws heavily upon the willingness shown both by the Supreme Court of Canada and by the English courts to extend procedural safeguards against the exercise of power by public authorities and to escape the archaisms of the prerogative writs of *certiorari* and prohibition. *Howarth* has had little discernible effect upon either of these developments; see *e.g., Re Lacewood Development Company and City of Halifax* (1976) 58 D.L.R. (3d) 383 (N.S.S.C.App.Div.); *Re Seven-Eleven Taxi Co. Ltd and City of Brampton* (1976) 10 O.R. (2d) 677 (Div.Ct); *Re Cluney and Registrar of Motor Vehicles of Nova Scotia* (1975) 53 D.L.R. (3d) 468 (N.S.S.C. App.Div.); *Re Liquor Control Board of Ontario and Keupfer* (1975) 4 O.R. (2d) 138 (Div.Ct); *Saulnier* v. *Quebec Police Commission* (1976) 57 D.L.R. (3d) 545 (S.C.C.); *Re Hardayal and Minister of Manpower and Immigration* (1976) 67 D.L.R. (3d) 738 (Fed.C.A.). For a careful consideration of the issues, see *Edwards and Woolfenden* v. *Alberta Association of Architects* [1975] 3 W.W.R. 38, 48-60 (Alta S.C.).

Perhaps the most striking application of *Howarth,* outside the Penitentiary and Parole Board contexts, is *"B"* v. *Commission of Inquiry, Dept. of M. & I.* [1975] F.C. 602 (T.D.) where Addy J. held that prohibition would not lie to restrain the Commission, established to inquire into allegations of misconduct by members of the Immigration Service, on the ground that the Commission's function was to report and recommend, rather than to make determinations of the applicant's legal rights. The learned judge relied heavily upon *Howarth* for its reiteration of the requirement of a "superadded" duty to act judicially, but he gave no satisfactory explanation for not following the more recent decision of the Supreme Court in *Saulnier,* even though the statutory context of *"B"* bore a much closer similarity to that of *Saulnier* than of *Howarth.*

issues, and which normally produce a record.[18] Insofar as the reasoning in *Howarth* is concerned with the formulations of principles for determining the applicability of "the rules of natural justice", the opinion should be understood to relate only to the procedural obligations of bodies to which section 28 applies. Had Pigeon J. adopted the approach of Lord Reid in *Ridge* v. *Baldwin*[19] he would not necessarily have been compelled to decide *Howarth* differently. Finally, the evident unwillingness of the courts to "judicialize" the administration of parole and prison discipline[20] makes it hazardous to conclude that *Howarth* will have far reaching implications for the common law development of the remedies of judicial review and for the procedural standards to which other agencies will be held.

Mr Fera's statement, that *certiorari* has issued from the Trial Division only against decisions made during the transitional period,[20a] requires some qualification. For example, in *Re MacDonald*[21] Mahoney J. allowed the applicant to amend his motion from an application for declaratory relief to " 'an order in the nature of *certiorari* to review the proper statutes to be applied and the interpretation thereof, to the sentences being served by the Applicant' ". The order was granted, but shortlived; on appeal, the decision was reversed

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[18] In *War Amputations, supra,* note 9, 451 Jackett C.J. stated that s.28(1) conferred exclusive jurisdiction upon the Federal Court of Appeal to review decisions of a purely legislative nature, although he did not find it necessary to base his judgment upon this issue. Whilst this reading of s.28(1) is quite tenable, it does not fit easily with the grounds of review under s.28, insofar as they envisage review for breach of the rules of natural justice, excess of jurisdiction (rather than *ultra vires*), review for findings of fact that are unsupported by the evidence before the decision-maker and the production of a record.

[19] [1964] A.C. 40. It will be recalled that Lord Reid emphasized the importance to his decision of the appellant's being dismissable only for cause; however, in *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578, Lord Wilberforce indicated that the width of the statutory discretion might not be conclusive against importing the principles of natural justice.

[20] See especially *Mitchell* v. *The Queen* (1976) 61 D.L.R. (3d) 77 (S.C.C.); *Martineau* v. *Matsqui Institution* [1976] 2 F.C. 198 (C.A.); *Kosobook* v. *Solicitor General of Canada* [1976] 1 F.C. 540 (T.D.); *R.* v. *Lewis* [1976] 3 W.W.R. 605 (B.C.C.A.). Compare *Re Hardayal and Minister of Manpower and Immigration, supra,* note 17, where on a s.28 application the Federal Court of Appeal was unwilling to extend *Howarth* to the withdrawal, during its currency, of a Ministerial permit issued to a person who had entered Canada as a non-immigrant. The court emphasized the reliance placed by Pipeon J. upon *Ex parte McCaud* [1965] 1 C.C.C. 168 (S.C.C.).

[20a] *Supra,* note 1, 238.

[21] [1975] F.C. 543 (T.D.).

on the substantive issues.[22] The Court of Appeal also made it quite clear that Mahoney J. had erred on the procedural question:

> The notice, as amended, remained an application seeking a declaratory judgment. Insertion of the words "an order in the nature of *certiorari*" did not change the essential nature of the claim. The claim, as amended, did not, for example, seek a review or quashing of any order or decision. It remained, in its true character, a claim for a declaration... A consequence may be that an inappropriate procedure was followed in the proceedings below.[23]

The problem here was caused by the 1973 amendment of Rule 603 requiring that declaratory relief under section 18 be sought by way of an action[24] rather than by the motion procedure of Rule 319.

In addition to *Millward* v. *Public Service Commission*,[25] other cases have come to my attention in which *certiorari* was not, for one reason or another granted, but where the Trial Division, nonetheless, had shown itself willing to do so had the grounds been established. Thus in *Royal American Shows Inc.* v. *M.N.R.*,[26] the Trial Division rejected a motion to strike out an application for *certiorari* to quash a seizure of papers from the applicant. Gibson J. held that since a decision to exercise the power of search and seizure entailed a "judicial" element (in that questions of law and fact would have to be determined), *certiorari* was available to review, on jurisdictional grounds, any *act* done pursuant to the decision. No authority was cited to support the novel proposition that *certiorari* is available to review the legality of a physical act, rather than of a decision.[27]

Another unusual application for *certiorari* was made to the Trial Division in *Cathcart* v. *Public Service Commission*.[28] The primary relief sought was an order of prohibition to prevent a Board of

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[22] [1976] 1 F.C. 532 (C.A.), rep. *sub nom. National Parole Board* v. *MacDonald.*

[23] *Ibid.*, 533-34.

[24] *Federal Court Rules*, amendment P.C. 1973-526, of 6 Mar. 1973, S.O.R. 73-128, para.9, Can.Gaz. Part II, vol.107, no.6, p.429, 8 Mar. 1973.

[25] [1974] 2 F.C. 530 (T.D.), discussed by Mr Fera, *supra*, note 1, 244-46.

[26] [1976] 1 F.C. 269 (T.D.).

[27] The legality of the seizure could be tested in other proceedings; for example, it might be raised collaterally in a damages action for trespass. An action for a declaration that the seizure was unlawful might be another possibility; but see *Re Dorfman et al. and Town of Fort Erie* (1975) 54 D.L.R. (3d) 186 (Ont.Div.Ct). The disadvantage of both of these, however, is that they must be commenced by action. A decision by a judicial officer to issue a search warrant may be attacked through an application under s.28: *In re Shell Canada Ltd* [1975] F.C. 184 (C.A.).

[28] [1975] F.C. 407.

Inquiry appointed under the *Public Service Employment Act*[29] from proceeding with a hearing to review a recommendation to dismiss the applicant from his job. Prohibition was granted on the ground that a real likelihood of bias had been raised by the fact that the Board had received and read the complete departmental appeal file before the hearing. The point of present interest, however, is that the applicant also asked for an order of *certiorari* to require the defendants to produce for the court's inspection the documents that had been forwarded to the Board. *Certiorari* was not granted, but only because an order was not needed since the documents were voluntarily produced to the court. The use of *certiorari* for the sole purpose of getting evidence before the court in order to support an application for prohibition is unusual,[30] although it is well known as ancillary to *habeas corpus* and *mandamus*, where it may quash a prior decision standing in the way of the other remedy or expand the range of judicial review.[31] Finally, in *Auger* v. *Canadian Penitentiary*

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[29] R.S.C. 1970, c.P-32, s.31(3).

[30] In effect, *certiorari* was here being used to obtain discovery in proceedings instituted by notice of motion; *cf.* Rule 333. By virtue of Rule 603, proceedings for *certiorari* can be instituted either by motion under Rule 319 or by action under Rule 400.

[31] An important question has recently arisen as to whether the effect of s.18 of the *Federal Court Act* is to prevent superior courts of the provinces from entertaining an application for the writ of *habeas corpus* aided by *certiorari*, when the body whose proceedings it is thereby sought to examine falls within s.2(g). In *Mitchell* v. *The Queen* (1976) 61 D.L.R. (3d) 77 (S.C.C.), Ritchie J. (with whom Judson, Pigeon and Beetz JJ. concurred) stated, *obiter*, at p.95, that the *Federal Court Act* did, indeed, have this effect. Laskin C.J.C. entered a vigorous dissent, emphasizing that this would seriously impair the efficacy of a remedy that has traditionally been regarded as of the utmost importance in the protection of fundamental freedom; he cited the *Canadian Bill of Rights*, s.2(c)(iii) as a statutory recognition of this. It would, surely, be very surprising to find that although *habeas corpus* was omitted from the battery of remedies administered by the Federal Court (save for the limited provision in s.17(5)), the broad words of s.18 had nonetheless incidentally restricted the usefulness of this remedy in the superior courts of the provinces.

Support for the Chief Justice's view can be found in two earlier Ontario decisions, *Re Ostello and Solicitor General of Canada* (1976) 9 O.R. (2d) 780, 783 (H.C.), where Osler J. stated that, "it would take most express language to deprive this court of any powers necessary to make an effective order on an application for *habeas corpus*". See also *Ex parte Carlson* (1976) 26 C.C.C. (2d) 65 (Ont.C.A.). It is interesting to note that leave to appeal to the Supreme Court of Canada was refused in *Carlson* by Chief Justice Laskin, Judson and Spence JJ. However, in *Pereira* v. *M.M.I.* (1976 Ont.H.C., unrep.) Krever J. felt himself bound by *Mitchell*. The issue is whether *certiorari* in s.18 refers only to those situations where *certiorari* is used, "to quash a

Service[32] *certiorari* was sought in aid of *mandamus*, to require the respondents to bring the applicant's record before the court and to order the deletion from it of a reference to a breach of parole. The applicant further required the respondents to substitute a date of release different from that which the record then contained.[33] The application failed on its merits. The judgment of Walsh J. is, however, silent on the propriety of using *certiorari* for these purposes, although *MacDonald* may cast doubts upon this form of proceeding.

Mr Fera detects an inconsistency between the views of Cattanach J. in *Millward* v. *Public Service Commission*[34] and that of Jackett C.J. in *Danmor Shoe*[35] regarding the propriety of quashing a ruling made by an agency in the course of proceedings but prior to its "final" decision.[35a] What the Chief Justice said in *Danmor* does not necessarily apply to the review by the Trial Division of intermediate rulings of administrative agencies. For one thing, the grounds of review of decisions under section 28 are broader than under the

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conviction or an order by its own strength" (per Laskin C.J.C., *supra*, 83), or whether it embraces its use to extend the material before the court on which to determine the legality of the applicant's detention. *Mitchell* was distinguished in *Ex parte Collins* (1977) 30 C.C.C. (2d) 460 (Ont.H.C.) where *certiorari* in aid of *habeas corpus* was held to be available to determine whether a substantive condition precedent to the assumption of jurisdiction by the National Parole Board existed. For another example of a judicial distinction between procedural and substantive jurisdictional error, see *Re Canada Labour Relations Board and Transair Ltd* (1976) 67 D.L.R. (3d) 421, 440 (S.C.C.).

A formal quashing will normally not be necessary when the material reveals that the tribunal exceeded its jurisdiction; but where the record brought before the court by *certiorari* reveals a non-jurisdictional error of law on its face then a formal quashing would seem to be necessary: see de Smith, *Judicial Review of Administrative Action* 3d ed. (1973), 524-26; Harvey, *The Law of Habeas Corpus in Canada* (1974), 106-25.

[32] [1975] F.C. 330 (T.D.).

[33] Compare *R.* v. *Paddington Valuation Officer, ex p. Peachey Property Corporation Ltd* [1966] 1 Q.B. 380 (C.A.), where the majority held that it was necessary to quash a rating list for non-jurisdictional error before *mandamus* would lie to compel the compilation by the officer of a new list.

[34] [1974] 2 F.C. 530 (T.D.); see *supra*, note 1, 244-46. An oddity in *Millward*, to which Mr Fera does not advert, is that Cattanach J. appears to have raised no objection to an application by motion for declaratory relief, despite the amendment to Rule 603, *supra*, note 24. On the extent to which declaratory relief and the prerogative orders may overlap, see *"B"* v. *Commission of Inquiry*, *supra*, note 17.

[35] *In re Anti-Dumping Act and In re Dannor Shoe Co. Ltd* [1974] 1 F.C. 22 (C.A.). Cattanach J. refers to this *dictum*, *supra*, note 34, 532.

[35a] *Supra*, note 1, 245.

common law remedies. It is perfectly understandable why the section 28 jurisdiction to review, which establishes proceedings analogous to an appeal, should be used sparingly.[36] This would justify a narrow interpretation of the phrase "decision or order".[37] The Trial Division, after all, has jurisdiction to review on the more limited grounds available under the common law remedies. Although non-final decisions may have a significant, adverse impact upon an individual,[38] the Trial Division should be alive to the dangers inherent in reviewing interim decisions on jurisdictional grounds.[39] In particular, attention should be given to the delay and expense attendant upon judicial review and to the need to view the alleged error in the context of the proceedings as a whole.[40] These are matters, however, that properly go to the exercise of the discretion of the Trial Division in awarding one of the common law remedies. In contrast, the Court of Appeal's statutory remedy available under section 28 is not discretionary. The apparent approval given by Cattanach J. to the use of *certiorari* as an appropriate method of attacking an intermediate ruling of an administrative agency may, conceivably, broaden the scope of review if the agency has produced a record (*e.g.*, by giving reasons), in which a non-jurisdictional error of law is apparent.

Mr Fera draws our attention to two points of interest respecting the issue of prohibition by the Trial Division.[41] First, he states that

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[36] However, in *Commonwealth of Puerto Rico* v. *Hernandez* [1975] 1 S.C.R. 228, the Court held that the words of s.28 were not as limited as "trial judgments" appealable to the Supreme Court by virtue of the *Supreme Court Act*, R.S.C. 1970, c.S-19, s.41(1), as defined in s.2(1).

[37] The quasi-appellate nature of s.28 proceedings may explain why the courts appear to have attached little independent significance to the phrase, "a decision or order ... made ... *in the course of proceedings* before a federal board, commission or other tribunal ..." (emphasis added).

[38] See *e.g.*, *National Indian Brotherhood* v. *Juneau (No.3)* [1971] F.C. 498 (T.D.); *Saulnier* v. *Quebec Police Commission* (1976) 57 D.L.R. (3d) 545 (S.C.C.); *Chadwill Coal Co. Ltd* v. *Treasurer and Minister of Economics for Province of Ontario* (1976) 1 M.P.L.R. 25 (Ont.Div.Ct).

[39] It may be, but probably is not, significant that Cattanach J. states the issue to be whether the Board's allegedly defective procedure "makes the inquiry *voidable* at the option of the applicants", *supra*, note 34, 544 (emphasis added).

[40] Indeed, Cattanach J. suggested that the normal remedy for reviewing procedural rulings is "an attack on the ultimate decision of the tribunal on the ground that there was not a fair hearing with respect to which such adverse decisions may well be factors". *Supra*, note 34, 544.

[41] *Supra*, note 1, 246.

the traditional grounds of review have been broadened[41a] in *Wardair Canada Limited* v. *C.T.C.*, where Walsh J. stated that:

> For a writ of prohibition to lie there has to be an indication of lack of jurisdiction, bias, *error in law*, or a breach of natural justice in the finding of the tribunal against which prohibition is sought.[42]

I very much doubt that this statement reflects a conscious and considered decision by Walsh J. to extend the scope of review available on prohibition beyond that known in other common law jurisdictions. After finding that neither jurisdictional error nor bias[43] was alleged, and that there had been no denial of natural justice, Walsh J. did not enter into a separate inquiry to determine whether the tribunal's exercise of discretion to refuse an adjournment revealed a non-jurisdictional error of law. Moreover, after *Bell* v. *Ontario Human Rights Commission*[44] a court will have little difficulty in characterizing as jurisdictional, for this purpose, any "simple, short and neat question of law".[45]

Secondly, Mr Fera supports the decision in *Steve Dart Co.* v. *Board of Arbitration*[46] where the court ordered prohibition against a board allegedly established under regulations that were found to be unauthorized by the relevant federal statute. Since those purportedly regulated by the board might well have thought the board derived its power from federal legislation, the usurpation doctrine was quite correctly not applied.[47] It would have been very unsatisfactory to

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[41a] *Ibid.*, 247.

[42] [1973] F.C. 597, 602 (T.D.) (emphasis added). But *cf. supra*, note 40.

[43] That prohibition lies for breach of either of the rules of natural justice is, of course, well established: *Committee for Justice and Liberty Foundation* v. *National Energy Board* (1976) 68 D.L.R. (3d) 716 (S.C.C.), *Millward* v. *Public Service Commission, supra*, note 34; *Vapor Canada Ltd* v. *MacDonald et al.(No.2)* [1971] F.C. 465 (T.D.).

[44] (1971) 18 D.L.R. (3d) 1 (S.C.C.).

[45] The phrase of Lord Goddard C.J. in *R.* v. *Tottenham and District Rent Tribunal, ex p. Northfield (Highgate) Ltd* [1957] 1 Q.B. 103 (Div.Ct), adopted as the test in *Bell.*

[46] [1974] 2 F.C. 215.

[47] Compare the distinction drawn by Laskin J. in *Isaac* v. *Bédard* [1974] S.C.R. 1349, 1380 between an assumption of inherent power and a purported exercise of power under a federal statute. But see *Desjardins* v. *National Parole Board* [1976] 2 F.C. 539 (T.D.), where Walsh J. reviewed the procedural regularity of the deliberations of the Board which led it to recommend that a pardon be revoked. Although the Board was empowered by the *Criminal Records Act*, R.S.C. 1970 (1st Supp.), c.12, s.4 to make a recommendation that a pardon be granted, the Act did not grant similar powers in respect of the revocation of a pardon. Walsh J. appeared to find the necessary source of federal statutory power, upon which to rest jurisdiction, in the *Criminal*

draw a jurisdictional line that depended upon whether the challenge was made to the *vires* of regulations or to the *vires* of decisions purportedly made pursuant to them, particularly since a litigant might wish to seek review on both grounds. More difficult questions are raised by an allegation of the unconstitutionality of a federal statute purportedly empowering an agency. To allow the Federal Court to assume jurisdiction in these circumstances as well, would minimize the number of proceedings necessary to resolve the dispute.[48]

In conclusion, it is difficult to find in the jurisprudence of the Trial Division of the Federal Court a fertile source of principled doctrinal innovation. Mr Fera might well have included in his list of the Court's "indiscretions" the decision in *"B"* v. *Commission of Inquiry*,[49] in which Addy J. hoisted the unfortunate rule in *Hollinger Bus Lines*[50] into the jurisprudence of the Federal Court, and was unwilling to follow the flexibility of approach to the remedies of *certiorari* and prohibition recently shown by the Supreme Court of Canada in *Saulnier* v. *Quebec Police Commission*.[51] It is disappointing to find a court, the justification for whose existence rests, in part, upon its specialized expertise, fettering itself by the old forms of action, where the non-specialized courts in other jurisdictions have escaped them.[52]

Above and beyond a doctrinal critique of the decisions of the Federal Court, an evaluation of the impact of the decisions of the new court upon the work of the agencies that it is reviewing is now required. For even if the Act is amended so as to remove those jurisdictional, procedural and remedial difficulties that are already apparent, the costs of maintaining two distinct systems of courts, exercising wide areas of exclusive jurisdiction, need to be justified by arguments and evidence much more cogent than are apparent to, at least, this observer.

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Records Act, s.7(b), which impliedly authorized a delegation by the Governor in Council of the investigation necessary before a pardon was revoked.

For an analogous problem under the Ontario legislation, see *Re Raney and the Queen* (1974) 47 D.L.R. (3d) 533 (Ont.C.A.).

[48] *Denison Mines Ltd* v. *A.G. of Canada* [1973] 1 O.R. 797 (H.C.). Again, the problem would be particularly acute when the constitutional ground was one of several grounds of attack upon the agency's decision.

[49] *Supra*, note 17.

[50] *Hollinger Bus Lines Ltd* v. *Ontario Labour Relations Board* [1952] O.R. 316 (C.A.).

[51] (1976) 57 D.L.R. (3d) 545 (S.C.C.).

[52] See *e.g.*, the cases cited *supra*, note 12.

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