COMMENTS
COMMENTAIRES

Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board[1]: Its Potential Impact on the Jurisdiction of the Trial Division of the Federal Court

Introduction

This controversial decision of the Supreme Court of Canada has already been dealt with in at least two Canadian legal periodicals.[2] My purpose in writing this piece is not to go over all of the same ground canvassed by Professors Price and Janisch, but rather to concentrate on an aspect of the decision which has potentially significant ramifications for the availability of judicial review from the Federal Court: is there any possibility of seeking judicial review on procedural fairness grounds in the Trial Division if the matter is not one over which the Federal Court of Appeal has exclusive, original judicial review jurisdiction?[3]

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[1] (1977) 14 N.R. 285 (S.C.C.).

[2] Price in *Doing Justice to Corrections? Prisoners, Parolees and the Canadian Courts* (1977) 3 Queen's L.J. 214, 267-76, discussed this case in terms of its ramifications for the law of corrections. Janisch in *What is "Law" — Directives of the Commissioner of Penitentiaries and Section 28 of the Federal Court Act — The Tip of the Iceberg of "Administrative Quasi-Legislation"* (1977) 55 Can. Bar Rev. 576, commented on the interpretation the Supreme Court gave to the words "required by law" as they appear in s.28(1) of the *Federal Court Act*, S.C. 1970-71-72, c.1.

[3] At this point, I should note that this issue is not overlooked in Professor Price's comprehensive article. See particularly, *supra*, note 2, 220, 228-29, 241-42, 248, 275-76, and 283-84. I should also note that in this comment. I am not concerned directly with the arguably more general question of whether *certiorari* is available from the Federal Court Trial Division. This matter is canvassed not only in the Evans-Fera debate in this Law Journal (see Fera, *Conservatism in the Supervision of Federal Tribunals: The Trial Division of the Federal Court Considered* (1976) 22 McGill L.J. 234; Evans, *The Trial Division of the Federal Court: An Addendum* (1977) 23 McGill L.J. 132; Fera, *Certiorari in the Federal Court and Other Matters: A Reply to the "Addendum"* (1977) 23 McGill L.J. 497) but also by Lemieux and Vallières, *La compétence de la Cour fédérale comme organisme bidivisionnel de contrôle judiciaire* (1976) 17 C.de D. 379, 423-25. This includes such issues as whether *certiorari* might be available with respect to non-final decisions and other interlocutory rulings which are not covered by the exclusive judicial review jurisdiction of the Court of

Basically, the problem amounts to this: the exclusive jurisdiction of the Court of Appeal as a court of first impression in judicial review matters is contingent upon a decision or order "other than [one] of an administrative nature not required by law to be made on a judicial or a quasi-judicial basis".[4] One view of the common law is that the courts will only engraft procedural requirements upon a statute if they consider the function to be one of a judicial or quasi-judicial character.[5] Against this background, the notion suggested by the *Federal Court Act* of an administrative function which has to be exercised in a judicial or quasi-judicial manner seems rather incongruous, the term "administrative" being seen as antithetical to "judicial" or "quasi-judicial". On this view of the law, a terminological difficulty is raised immediately by the *Federal*

Appeal under s.28. It also includes whether *certiorari* might be sought with respect to the decisions of bodies such as Cabinet which are excluded from original Federal Court of Appeal jurisdiction by virtue of s.28(6). (I understand that this issue is presently being litigated in the Trial Division of the Federal Court by Andrew J. Roman of the Public Interest Advocacy Centre on behalf of the Inuit Tapirasat of Canada and the National Anti-Poverty Organization. This is in the context of an allegation that the Cabinet is under a duty to act in a procedurally fair manner when hearing appeals from federal regulatory bodies.) It should also be remembered that the procedural fairness or natural justice arguments can also be made in the Trial Division with respect to bodies, otherwise subject to Court of Appeal review under s.28, in the context of prohibition applications, before a "decision or order" has been made.

[4] See the *Federal Court Act*, S.C. 1970-71-72, c.1, s.28(1) which states:

"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."

[5] This and the following four paragraphs summarize a lot of material that I have developed elsewhere and the points made are documented and footnoted there. See *The Federal Court Act: A Misguided Attempt at Administrative Law Reform?* (1973) 23 U.of T.L.J. 14, 29-31; *Fairness: The New Natural Justice?* (1975) 25 U.of T.L.J. 281, 293-96. See also the pioneering piece on the *Federal Court Act*: Nicholls, *Federal Proposals for Review of Tribunal Decisions* (1970) 18 Chitty's L.J. 254.

Court Act. In what sense is the word "administrative" being used? For example, does the Act suggest an extension of the categories of function with respect to which procedural requirements may apply? This inquiry is complicated further by the emergence in England about the same time as the enactment of the *Federal Court Act* in Canada of what has been seen as new law in relation to procedural fairness arguments. This notion, which has since gained some currency in Canada, is that all statutory decision-makers are obliged to act fairly and that for some, this will involve procedural requirements, irrespective of whether their functions are classified in traditional terms as administrative, quasi-judicial or judicial.[5a]

In some respects the foregoing account is oversimplified but it nevertheless indicates that difficult problems are involved in answering the question posed at the outset. Among the alternative resolutions are the following: 1. Despite the English developments, the law in Canada remains that, before procedural requirements can be imposed on a tribunal or other decision-maker, its function must be at least partially judicial or quasi-judicial in nature and, as section 28 covers all such functions, there is no possibility of the Trial Division having jurisdiction. Thus, the word "administrative" in section 28 may be viewed as being used, not in contradistinction to judicial or quasi-judicial, but in a more general sense, as in the term "Administrative Law". Another possibility is that the traditional law recognized that some administrative functions had to be exercised in a judicial or quasi-judicial manner. 2. The notion of an administrative decision being required to be "made" on a judicial or quasi-judicial basis developed in section 28(1) covers the potential area of the new English doctrine of procedural fairness irrespective of classification. Therefore that doctrine can only be argued for, if at all, at the Federal Court of Appeal level. 3. Given one or other of the interpretations of "administrative" described above and Canadian acceptance of the English fairness doctrine, the Court of Appeal's jurisdiction depends upon the function exercised being at least partially judicial or quasi-judicial in the traditional sense; this leaves room for the possible application of the English procedural fairness doctrine at the Trial Division level with respect to those functions that are neither judicial nor quasi-judicial nor

[5a] See, *e.g.*, *In re H.K. (an Infant)* [1967] 2 Q.B. 617 (C.A.); *Schmidt* v. *Secretary of State for Home Affairs* [1977] 2 Ch.149; *R.* v. *Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417 (C.A.). On the advent of this doctrine in Canada see generally, *Fairness: The New Natural Justice?*, *supra*, note 5, 288 *et seq.*; see also the recent decision of the Federal Court, Trial Division, in *Desjardins* v. *Bouchard* (1976) 71 D.L.R. (3d) 491.

purely administrative. 4. To "make" a decision or order on a judicial or quasi-judicial basis connotes a certain level of procedural fairness. However, there may be lesser degrees of procedural fairness for which the appropriate forum is the Trial Division.

The first and the third analyses focus on the "nature" of the function while the second and the fourth are concerned with how the decision-maker acts. Are they different? One view is that only decisions of a judicial or quasi-judicial "nature" have to be "made" on a judicial or quasi-judicial basis, subject to express statutory direction. In other words, you ask the same questions in determining the nature of the function as in determining the manner of its exercise. On another view, there is not this identity between the two questions and the manner of making a decision does not necessarily follow the classification of the nature of the function.

Another dimension is added to the problem by the language of section 28(1)(a) which talks about review for breach of the rules of natural justice. This is a part of the codification of the grounds of judicial review under section 28 and constitutes the only reference to procedural deficiencies. Is fairness simply an aspect of the rules of natural justice or is it separate from the rules of natural justice? If the fairness doctrine is accepted in Canada, and fairness is an aspect of natural justice, then analysis two has a stronger claim to recognition. On the other hand, if fairness and natural justice are different, then analyses three and four may be closer to the mark.

Putting it another way, deciding whether natural justice in section 28(1)(a) includes fairness probably says something about the meaning to be attributed to the earlier words in the 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". If making a decision on a judicial or quasi-judicial basis involves adhering to the rules of natural justice and natural justice is a separate concept from fairness, then the place for fairness arguments, if at all, is probably in the Trial Division. Conversely, if natural justice includes fairness then making a decision on "a judicial or quasi-judicial basis" may encompass some, if not all, of the situations in which procedural fairness is raised.

There is, of course, no compelling logical solution to these interpretative problems to be found in either the fairness or the pre-fairness cases or in the structure of section 28(1). They merely indicate extremely haphazard and at times incomprehensible development of the common law as well as the poor drafting of

section 28(1). What is in fact needed is a hard-nosed policy analysis of a number of basic questions. First, should the fairness doctrine be accepted in Canada and what should be its limits? Secondly, assuming some acceptance of the fairness doctrine, should section 28 of the *Federal Court Act* be interpreted in such a way as to make the Court of Appeal the body with exclusive, original jurisdiction where any question of procedural fairness is raised or is a narrower interpretation more appropriate, leaving room for Trial Division jurisdiction in some areas of procedure?

Suffice it to say that despite much argument by counsel on this matter and several passing references in judgments, no court had really come to grips with these difficulties before the decision of the Supreme Court of Canada in *Martineau and Butters.* Indeed, it is fair to say that no explicit answer is provided by that decision either. However, the principal matter which will be discussed below is whether the judgment in *Martineau and Butters*, when read together with other relevant Supreme Court of Canada decisions, does tell us anything about this problem of both substantive and remedial significance, despite the complicating factor that in that case the meaning of the additional words in section 28, "by law", came up for judicial scrutiny for the first time.

Facts and decision

Martineau and Butters were inmates of the Matsqui Institution. They were charged with having committed a "flagrant and serious disciplinary offence".[6] Of this they were found guilty by the Institution's Inmate Disciplinary Board and sentenced to fifteen days in the Special Corrections Unit. This involved such punishments as a restricted diet and loss of privileges. Following this decision, the two inmates commenced proceedings in the Federal Court of Appeal to have it set aside under section 28. Among their allegations was one of a failure by the Disciplinary Board to give them a fair hearing. In a majority decision, the Federal Court of Appeal held that the matter did not come within its jurisdiction under section 28[7]

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[6] (1976) 12 N.R. 150, 153 (Fed.C.A.).

[7] *Ibid.* The majority judgment of Jackett C.J. and Sheppard D.J. was delivered by the Chief Justice. Ryan J. dissented. He held that the Directives were crucial in adding a quasi-judicial element to what would otherwise be an administrative function. He did note, however, that if the function were purely administrative, the Board would still be obliged to act fairly, though with no mention of whether this had procedural content (*ibid.*, 174-75).

and this was upheld by the Supreme Court of Canada by a majority of five to four.[8]

The main basis of the judgment of four members of the majority of the Supreme Court of Canada, as revealed in the judgment of Pigeon J., was simply that the Commissioner's Directives[8a] issued under the authority of the *Penitentiary Act*[9] and providing for a hearing in relation to "flagrant and serious disciplinary offences" were not "law" in terms of section 28(1) and therefore it could not be said that the disciplinary decision was one that was "required *by law* to be made on a judicial or quasi-judicial basis".[10] Laskin C.J.C. wrote the dissenting judgment[11] in which he described this as "much too nihilistic a view of law"[12] and accepted that the command to hold a hearing contained in the Directives clearly brought this decision-making process within the ambit of section 28(1).[13]

Of course, even if the Court was correct that the Directives are not of themselves "law", this did not mean the end of the case. It was then necessary to consider whether "law" in some other sense required the decision to be made on a judicial or quasi-judicial basis. Here, of course, the rôle of the Court is to consider whether the *common law* justifies drawing an implication from the nature of the power and the consequences of its exercise that the body is obliged to act in a judicial or a quasi-judicial manner. While Pigeon J. is not explicit on this point, he seems to deal with the argument in the latter part of his judgment when he says such things as:

> At the risk of repetition, I will stress that this does not mean that whenever the decision affects the right of the applicant, there is a duty to act judicially.[14]

and

> I think Jackett C.J., correctly disagreed [in the Court of Appeal] with the view ... that the possibility of reduction of statutory remission by disciplinary decisions would imply a duty to act judicially.[15]

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[8] *Supra*, note 1. Pigeon J. delivered the judgment of himself, Ritchie, Beetz and de Grandpré JJ. dismissing the appeal. Judson J. agreed with the reasons of Jackett C.J. in the Federal Court of Appeal. Laskin C.J.C. delivered the dissenting judgment of himself, Martland, Spence and Dickson JJ.

[8a] Commissioner's Directive no.242, issued Dec. 18, 1973.

[9] R.S.C. 1970, c.P-6, s.29.

[10] *Supra*, note 1, 296-97.

[11] While Janisch, *supra*, note 2, 578-79 favoured this judgment he would have preferred a closer examination of the issues by the minority.

[12] *Supra*, note 1, 290.

[13] *Ibid.*, 291-92. The judgment contains nothing directly on the issue which is the focus of this comment.

[14] *Ibid.*, 300.

[15] *Ibid.*, 298.

This also emerges more clearly from the judgment of Jackett C.J. in the Court of Appeal[16] with which the fifth member of the majority in *Martineau and Butters*, Judson J., simply agreed.[17] In particular, the following lengthy extract from Jackett C.J.'s judgment would appear to be pertinent, particularly as it also bears upon whether the Trial Division has any jurisdiction to intervene on procedural grounds in such cases:

> In my view, disciplinary decisions in the course of managing organized units of people such as armies or police forces or in the course of managing institutions such as penal institutions are, whether or not such decisions are of a routine or penal nature, an integral part of the management operation. As a matter of sound administration, as such decisions touch in an intimate way the life and dignity of the individuals concerned, they must be, and must appear to be, as *fair* and *just* as possible. For that reason, as I conceive it, there has grown up, where such decisions are of a penal nature, a practice of surrounding them with the phraseology and trappings of criminal law procedure. Nevertheless, in my view, disciplinary decisions are essentially different in kind from the class of administrative decisions that are impliedly required, in the absence of express indication to the contrary, to be made on a judicial or quasi-judicial basis in such a way that they can be supervised by judicial process. In my view, that is the principle underlying *Howarth* v. *National Parole Board* (1974), 3 N.R. 391; 50 D.L.R. (3d) 349, *The Queen and Archer* v. *White*, [1956] S.C.R. 154, *Regina* v. *Metropolitan Police Commissioner Ex p. Parker*, [1953] 1 W.L.R. 1150, and *Ex p. Fry*, [1954] 1 W.L.R. 730. ... For that reason, I conclude that the disciplinary decisions here in question, even though of a penal nature and even though they are required by administrative rules to be made fairly and justly, are not decisions that are required to be made on a judicial or quasi-judicial basis within the meaning of those words in section 28 of the *Federal Court Act*.[18]

The thrust of this statement seems to be that, even though the rules or Directives provide for certain procedural protections, this does not mean that the decision is automatically required to be made on a judicial or a quasi-judicial basis in terms of section 28. In other words, although section 28 appears to focus on the *type* of procedures to be followed as the touchstone for its applicability, in Jackett C.J.'s view, it is really the nature of the function that governs. In so far as it opens the possibility of section 28 not applying even in cases where detailed procedures are mandated this view is simply contrary to the language of the section.[19] How-

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[16] *Supra*, note 6, 170-72.

[17] *Supra*, note 1, 292.

[18] *Supra*, note 6, 170-71.

[19] My reading of Jackett C.J.'s judgment in *Martineau and Butters, supra*, note 6, is that he did not deal with the issue of whether the Directive was "law" for the purposes of section 28 and this view is also expressed by

ever, for present purposes, perhaps the more important thing is that Jackett C.J. talks about the obligation to follow the requirements of fairness laid down by the rules. This suggests the possibility of review in some other court if those rules are not followed or, more generally, if fairness in a procedural sense is not accorded in certain situations. It is also significant that the possibility is not rejected by Pigeon J.; in the relevant part of his judgment he asks simply whether a duty to act judicially is present.[19a] Nowhere does he say that the duty to act in a procedurally fair manner is equivalent to, or is defeated by the absence of, a "duty to act judicially".

On the other hand, it also has to be acknowledged that Pigeon J. says nothing explicit to indicate acceptance of the view that there can be procedural requirements imposed on decision-makers who are not obliged to act judicially and who do not come within section 28. Indeed, his analysis[20] of the earlier decision of the Supreme Court of Canada in *Saulnier* v. *Quebec Police Commission*[21] appears to suggest the contrary. That case did not involve relief sought under section 28 of the *Federal Court Act*, but rather a straightforward claim for procedural fairness from the provincial Police Commission. In this light, Pigeon J.'s statement that "[j]udicial review was granted because, not only was there a duty to act judicially but the decision affected the rights of the applicant"[22] might be seen as suggesting that the duty to act judicially is indeed a prerequisite before a court can consider implying procedural protections.[23]

Mahoney J. in *Martineau* v. *Inmate Disciplinary Board, Matsqui Institution (No. 2)* (1977) 37 C.C.C. (2d) 58, 61-2, n.1 (F.C.T.D.). If accurate, then this means that only four members of the nine person Supreme Court of Canada decided that the Directives were not "law" and that therefore that is still an open issue. This view is shared by Janisch, *supra*, note 2, 578, n.4. However, Collier J., in delivering judgment in *Magrath* v. *The Queen* (1977) 38 C.C.C. (2d) 67 (F.C.T.D.), argues that when Jackett C.J.'s judgment is read together with the dissenting judgment of Ryan J. "the inference (as Laskin, C.J.C., suggests), must be that the majority decision in the Federal Court of Appeal did not consider the directive to be 'law'." (*Ibid.*, 80, n.4). Indeed, it is perhaps only by drawing this inference that Jackett C.J.'s seeming failure to consider the language of s.28 referred to in the text can be explained. Laskin C.J.C., by the way, does not in fact really say anything about Jackett C.J.'s judgment in the course of his dissenting judgment in *Martineau and Butters*.

[19a] *Supra*, note 1, 298-300.

[20] *Ibid.*, 299-300.

[21] (1975) 57 D.L.R. (3d) 545 (S.C.C.). See the discussion of this decision by Jones, (1975) 53 Can.Bar Rev. 802, 808-10.

[22] *Supra*, note 1, 300.

[23] This statement is reminiscent of the much-maligued judgment of the Judicial Committee of the Privy Council in *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66 (Ceylon) and the support of Lord Radcliffe for the proposition that

In a similar vein, the latter parts of the judgment of Jackett C.J. in the Court of Appeal in *Martineau and Butters* can be viewed as making the whole issue much more uncertain. Noting that the Directives spell out a requirement of fairness, if not a duty to act judicially, he goes on to discuss the necessity that such decisions be taken in a *"bona fide"* manner.[24] Does this suggest that all he means by fairness is the obligation to act in good faith in a substantive rather than a procedural sense? Moreover, in the final paragraph of his judgment, he talks about the result achieved by legal analysis as "accord[ing] with the realities of the situation",[25] namely, that judicial review of such decisions would not improve matters. Once again, this is indicative of a view that the decision to deny relief here is not confined to section 28 but also forecloses the possibility of judicial review on procedural grounds in any other forum.[26]

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in considering whether *certiorari* is available, the court must determine not only that the rights of a subject are affected but that there is as well the "super-added" duty to act judicially (*ibid.*, 78, citing Lord Hewart C.J. in *The King* v. *Legislative Committee of the Church Assembly* [1928] 1 K.B. 411, 415). The only difference is that he has reversed the order. *Quaere*, whether by so doing he is saying that where otherwise there might be a duty to follow fair procedures or act judicially, that will be defeated if rights are not affected.

[24] *Supra*, note 6, 171.

[25] *Ibid.*, 172.

[26] For a further indication of Jackett C.J.'s views, see *Marcotte, Turner and Whelan* v. *Commissioner of Penitentiaries* (1976) 13 N.R. 490 (Fed.C.A.) (discussed by Price, *supra*, note 2, 281-84). This was not a s.28 matter but an appeal from a refusal by a Trial Division judge to strike out a Statement of Claim. In reversing the refusal, Jackett C.J. indicated that he saw his judgment in *Martineau and Butters* as precluding an argument for "pre-decision procedural steps" before a prisoner was transferred from one institution to another. At 284, Price notes that this may mean that the Court is either saying something general about the possibility of making procedural fairness arguments in the Trial Division or specifically about the availability of procedural fairness arguments in an institutional context. Which one it is, is by no means clear! Price also discusses the decision of the Ontario Court of Appeal in *Re Anaskan and The Queen* (1977) 15 O.R. (2d) 515. See Price, *supra*, note 2, 284-87. Here, the judgment seems clear that no procedural protections attach to the transfer process. This is confirmed by *Magrath* v. *The Queen*, *supra*, note 19, discussed in the text, *infra*, p.108. However, it is signifiant that the judge in *Magrath* saw no impediment resulting from this to his finding of a duty to act fairly in another context, namely, internal prison discipline. This indicates that decisions about transfer decisions may be able to be confined to their own facts and do not preclude argument for fairness in other contexts. It is, of course, difficult to see any real distinction in practical terms between transfer as a punishment and dissociation as a punishment.

On balance therefore, it must be said that *Martineau and Butters* is equivocal on the availability of procedural fairness arguments in situations where the decision-maker in question does not come within the ambit of section 28 and the exclusive original review jurisdiction of the Federal Court of Appeal. Do any of the other recent Supreme Court of Canada decisions tell us very much about that question?

Other relevant Supreme Court decisions

In writing about the duty to act fairly this writer has noted[27] that the earlier judgment of Pigeon J. in *Howarth* v. *National Parole Board*[28] may have left open the possibility of procedural fairness arguments being made in the Trial Division with respect to bodies not covered by section 28. The key statement in that case is the following:

> The reason that I am stressing this point is that in argument, counsel for the appellant relied mainly on cases dealing with the duty of fairness lying upon all administrative agencies, in the context of various common law remedies. These are, in my view, completely irrelevant in the present case because a s.28 application is an exception to s.18 and leaves intact all the common law remedies in the cases in which it is without application. The Federal Court of Appeal did not consider, in quashing the application, whether the Parole Board order could be questioned in proceedings before the Trial Division.[29]

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[27] *Fairness: The New Natural Justice?, supra,* note 5, 294-96, and, particularly, n.72, where I refer to earlier Supreme Court of Canada hints at a willingness to accept the English notion of a duty to act fairly. This point is also taken up by Jones in *Howarth* v. *National Parole Board: A Comment* (1975) 21 McGill L.J., 434 and Price, *supra,* note 2, 241. Brun is not so optimistic. See *La "discrétion administrative" à la vie dure* (1975) 16 C.de D. 723, 726, n.19. In his comment on *Howarth,* Jones, *ibid.,* 440, refers to Rule 359 of the *General Rules and Orders of the Federal Court* by which the Chief Justice or his designate may transfer proceedings commenced in the wrong division of the Court. Interestingly, in neither *Howarth* nor *Martineau and Butters* was this broached as a possibility by either the Supreme Court of Canada or the Federal Court of Appeal. Can this be taken as any indication that there was seen to be no possibility of procedural fairness argnments in the Trial Division?

[28] (1974) 50 D.L.R. (3d) 349 (S.C.C.). In *Howarth,* Dickson J. delivered a dissenting judgment with which Laskin C.J.C. and Spence J. concurred. After noting that functions which are administrative in nature may require some adherence to the rules of natural justice or acting judicially (*ibid.,* 357), he spent the rest of the judgment identifying judicial elements in the decision to revoke parole. It is not helpful on the matter under discussion here.

[29] *Ibid.,* 352.

Subsequently, in *Mitchell* v. *The Queen*,[30] the Supreme Court once again rejected an argument for procedural protections in relation to the process of suspension and revocation of parole. *Mitchell* was not a section 28 matter but rather involved the seeking of *habeas corpus* with *certiorari* in aid from a provincial superior court. Of course, *certiorari* as a remedy has commonly been seen as depending upon the function under challenge being of a judicial or quasi-judicial nature.[31] In that context a denial of the remedy is not necessarily relevant to the availability of procedural fairness arguments with respect to bodies which are not judicial or quasi-judicial. Indeed, in *Mitchell*, the matter was further complicated by the fact that four members of the five person majority, in a judgment delivered by Ritchie J., held that even in proceedings where *certiorari* is sought in aid of *habeas corpus*, the reviewing court may go no further than to consider the sufficiency of the warrant of committal.[32] Ritchie J. also held that, after the *Federal Court Act*, *certiorari* was not available in support of *habeas corpus* for the reason that section 18(1) confers exclusive, original jurisdiction on the Trial Division of the Federal Court to grant relief in the nature

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[30] (1975) 61 D.L.R. (3d) 77 (S.C.C.). See the article on this case by Wright, *Judicial Review of Parole Suspension and Revocation* (1975-76) 18 Crim.L.Q. 435, 441, 461-63 and 467. See also Price, *supra*, note 2, 243-49, where he not only discusses *Mitchell* but also the subsequent natural justice cases in this area and that of mandatory supervision.

[31] See, however, *R.* v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd* [1974] Q.B. 720, 728 (Div.Ct) *per* Lord Widgery C.J. This decision found approval in the dissenting judgment of Laskin C.J.C. in *Mitchell*, *supra*, note 30, 83. This will also presumably be a consequence of any finding that *certiorari* is available to quash a final decision or order on procedural fairness grounds in the Trial Division (unless, of course, the body is one excluded from original Court of Appeal jurisdiction by s.28(6); discussed, *supra*, note 3). See *Martineau* (*No.2*), *supra*, note 19, discussed in text, *infra*, p.108. In this respect a recent English decision is worth noting. In *R.* v. *Board of Visitors of Hull Prison, Ex parte St. Germain, The Times*, 7 Dec. 1977, the Divisional Court was asked to quash certain disciplinary decisions of the respondents. After apparently holding that the Visitors were performing judicial acts, Lord Widgery C.J. then said that *certiorari* was not available with respect to the disciplinary procedures of a disciplined body such as a prison. What this seems to say about the English law is that *certiorari* is sometimes available with respect to purely administrative functions but on other occasions will not be appropriate with respect to clearly judicial functions. Not only is this quite a dramatic change from the traditional position but also it will undoubtedly lead to incredible confusion.

[32] *Supra*, note 30, 90-04, *per* Ritchie J. delivering the judgment of himself, Judson, Pigeon and Beetz JJ.

of *certiorari*.[33] Given the technical nature of this judgment in *Mitchell* and the resulting narrowness of the review inquiry, its value to the present discussion is accordingly limited.

Nevertheless, scattered throughout Ritchie J.'s judgment are reaffirmations of the decision in *Howarth*,[34] though without any reference to the possibility raised by Pigeon J. of procedural fairness arguments being made in the Trial Division. The other member of the majority, Martland J., seemingly dealt with the matter as if it were an application for *habeas corpus* with *certiorari* in aid and also looked at the affidavits as well as the face of the warrant. In so doing, he also reaffirmed *Howarth*[35] and described parole as a matter within the "absolute discretion" of the Board[36] and, quoting an earlier decision,[37] "not in any way a judicial determination".[38] This language is much stronger than any employed by Pigeon J. in *Howarth* and certainly may be seen as carrying the implication that, irrespective of the remedy being sought, no procedural protections at all attach to the parole suspension and revocation process. Interestingly, Ritchie J., while not endorsing the specific language, stated at the end of his judgment that he would have reached the same decision as Martland J. had he felt able to engage in the same kind of broad inquiry.[39] The following statement of Ritchie J. might also be seen as indicative of a rejection of procedural fairness in parole, whatever the review forum:

> The very nature of the task entrusted to this Board, involving as it does the assessment of the character and qualities of prisoners and the decision of the very difficult question as to whether or not a particular prisoner is likely to benefit from reintroduction into society on a supervised basis,

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[33] *Ibid.*, 94-95. Both this and the previous matter in fact continue to give difficulties, not only because of the fact that they are not supported by a clear majority of the Supreme Court of Canada, but also because of possible variations as between the various provinces as to the availability of *habeas corpus* with *certiorari* in aid. See Wright, *supra*, note 30, 452-66 and Price, *supra*, note 2, 270. Also, see Cromwell, *Habeas Corpus and Correctional Law — An Introduction* (1977) 3 Queen's L.J. 295, 316-29.

[34] *Supra*, note 30, 91, 93 and 95.

[35] *Ibid.*, 89.

[36] *Ibid.*

[37] *Ex parte McCaud* [1965] 1 C.C.C. 168, 169 (S.C.C.).

[38] *Supra*, note 30, 90.

[39] *Ibid.*, 95. In *Mitchell*, Laskin C.J.C. (with whom Dickson J. concurred) and Spence J. delivered dissenting judgments. Laskin C.J.C. described *Howarth* as a case concerned with s.28 of the *Federal Court Act* and then stated that fair procedures could apply to bodies other than those of a judicial or quasi-judicial nature (*ibid.*, 83). This would seem to amount to an acceptance of analysis three outlined above.

> all make it necessary that such a Board be clothed with as wide a discretion as possible and that its decision should not be open to question on appeal or otherwise be subject to the same procedures as those which accompany the review of decision of a judicial or *quasi*-judicial tribunal.[40]

Of course, the mere fact that no procedural protections of any kind may attach to the decision-making process in issue in *Mitchell* does not foreclose the possibility of making procedural fairness arguments in other situations where the decision is not of a judicial or quasi-judicial nature or is not within section 28 of the *Federal Court Act*. It seems clear that the English procedural fairness doctrine does not impose procedural decencies upon *all* statutory decision-makers.[41]

The only other relevant Supreme Court of Canada decision since *Howarth* is *Hardayal* v. *Minister of Manpower and Immigration*,[42] judgment in which was delivered just over two months after *Martineau and Butters*.[43] This was another decision in which the substance of the claim for procedural protections and the procedural section 28 argument became inextricably intermingled with the result that the key passage in the judgment is not easily susceptible of interpretation. In delivering the judgment of a unanimous nine person Court, Spence J. had the following to say:

> Having regard for the detailed directions as to permitting entry of immigrants and as to the refusal to permit entry, or the deportation of those who have entered Canada, set out in the many provisions of the *Immigration Act*, I am strongly of the view that the Minister's power under s.8 of the *Immigration Act* to grant, to extend, or cancel a permit with no direction as to the method which is to be used in the exercise of the power and, for the present purposes, no limitation on the persons who may be the subject of such permits, was intended to be purely administrative and not to be carried out in any judicial or quasi-judicial manner, and that, in fact, to require such permit to be granted, extended or cancelled only in the exercise of a judicial or quasi-judicial function would defeat Parliament's purpose in granting the power to the Minister. As I have said, the evidence indicates that the power is only used in exceptional circumstances and chiefly for humanitarian purposes. Such power was, in the opinion of Parliament, necessary to give flexibility to the administration of the immigration policy, and I cannot conclude that Parliament intended that the exercise of the power be subject to any such right of a fair hearing as was advanced by the respondent in this case. It is true that in exercising what, in my view, is an administrative power, the Minister is required to act fairly and for a proper motive and his failure to

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[40] *Ibid.*, 93. See also, *ibid.*, 91.

[41] See *Fairness: The New Natural Justice?*, *supra*, note 5, 285, n.19, and 288.

[42] (1977) 15 N.R. 396 (S.C.C.).

[43] *Martineau and Butters* was delivered on March 8, 1977 and *Hardayal* on May 17, 1977.

> do so might well give rise to a right of the person affected to take proceedings under s.18(a) of the *Federal Court Act* but, for the reasons which I have outlined, I am of the opinion that the decision does not fall within those subject to review under s.28 of the said *Federal Court Act*.[44]

At one point in this statement, there seems to be a clear contrast drawn between judicial or quasi-judicial functions, to which procedural protections attach and administrative functions, to which no such protections attach.[45] Moreover, the subsequent comment that the Minister must act fairly has to be read subject to the complete rejection of the arguments for a hearing in this case. The applicant was simply seeking notice and the opportunity to respond. Thus, when Spence J. says that there is no right to "a fair hearing as was advanced by the respondent in this case", the Court in fact is rejecting completely the possibility of *any* procedural protections in this decision-making process. Given this, to say the Minister has nevertheless a duty to act fairly must mean no more than a duty to act in good faith. On the other hand, the same might be said of this case as was said of *Howarth* and *Mitchell*. The antithesis between judicial and quasi-judicial functions and administrative functions may only have been for section 28 purposes and the rejection of any procedural fairness arguments may have been intended to apply to this decision-making process alone, and not to amount to a rejection of procedural fairness arguments in relation to all federal statutory decision-makers not coming within section 28 of the *Federal Court Act*.[46]

In the last analysis, the most that can be said after all these decisions is that the Supreme Court of Canada has not rejected categorically the English fairness doctrine as a possible basis on which to apply procedural protections to bodies that are neither judicial nor quasi-judicial. Similarly, the possibility remains that the Federal Court Trial Division may be able to require fair procedures of decision-makers not within the exclusive original jurisdiction of the Court of Appeal. However, there are just enough hints in the recent decisions, including *Martineau and Butters*, to suggest that the prospects of ultimately being successful in this area are not great. Furthermore, even if the theory is accepted that such

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[44] *Supra*, note 42, 404.

[45] At the same time he seems to acknowledge that certain administrative functions may have to be exercised in a judicial or quasi-judicial manner, *i.e.*, those which are not "purely" administrative. This, of course, is consistent with one interpretation of s.28.

[46] In other words, analyses three or four may be possible in other contexts.

review is possible, the chance also exists that, as in *Hardayal*, and possibly *Mitchell*, the Supreme Court of Canada will hold that the *particular* situation does not involve any procedural protections.

Subsequent Trial Division decisions

Since the Supreme Court of Canada decision in *Martineau and Butters*, this issue has arisen at least twice before judges of the Trial Division in relation to disciplinary offences in penitentiaries and, on each occasion, the possibility of review on the basis of procedural deficiencies has been upheld.

In fact, the first of these cases involved the unsuccessful Martineau trying for a second time, on this occasion for an order in the nature of *certiorari* from the Trial Division.[47] The matter came before Mahoney J. under Rule 474 of the *General Rules and Orders of the Federal Court* for a preliminary determination of the issue of whether "in the circumstances"[48] the Trial Division had jurisdiction to grant relief by way of *certiorari*. For Mahoney J. this involved deciding whether the Disciplinary Board was obliged to act in a procedurally fair manner in considering whether a "flagrant or serious" disciplinary offence had been committed and to impose punishment.[49] He did not rule on whether or not the procedures had in fact been fair.[50]

The process by which Mahoney J. concluded that the Board was obliged to act in a procedurally fair manner is rather difficult to follow. Obviously the judgment of Pigeon J. in *Howarth* is his basis for asserting the possibility of Trial Division scrutiny of the decision on the grounds of procedural fairness in situations where the Court of Appeal has held itself to have no jurisdiction. He cites a lengthy extract from that judgment, including the part reproduced earlier in this comment.[51] The confusing part is how he sees fairness as involving procedural content in this particular context.

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[47] *Martineau (No.2)*, *supra*, note 19. Note that, besides the cases discussed in this comment, there have been other decisions of the Trial Division and Court of Appeal which bear to a greater or lesser extent on the issue. Most are discussed by Price, *supra*, note 2. See, in addition: *Sherman* v. *Commissioner of Patents* (1974) 14 C.P.R. (2d) 177 (T.D.); *"B"* v. *Department of Manpower and Immigration* [1975] F.C. 602 (T.D.).

[48] *Supra*, note 19, 60.

[49] *Ibid.*

[50] *Ibid.*, 64. "I am not, of course, deciding whether the remedy should be granted but merely whether it could be granted...".

[51] *Ibid.*, 63-64. See also text, *supra*, p.101.

He starts off by stating that his jurisdiction to award *certiorari* depends upon whether "some right of the applicant has been abridged or denied".[52] This he contrasts with a mere "loss of privileges". Given that procedural fairness in the English sense has not generally been seen to depend necessarily upon "rights" rather than "privileges" being affected,[53] Mahoney J. seems to have built a considerable and unnecessary obstacle for himself at the outset. This is particularly so given that the Ontario Court of Appeal in *R.* v. *Institutional Head of Beaver Creek Correctional Camp, Ex parte McCaud*[54] had decided that decisions such as the ones taken here did not give rise to a duty to act judicially because they affected only the applicant's status as inmate, without interfering with his civil *rights* as a person or any special statutory *right* given to him as an inmate. Indeed, as acknowledged by Mahoney J.,[55] the Federal Court of Appeal[56] and the Supreme Court of Canada in *Martineau and Butters*[57] had held that *Beaver Creek* itself went too far in suggesting that the loss of statutory remission gave rise to a duty to act judicially although such a loss arguably affected both an inmate's civil rights as a person and his special statutory rights as an inmate.

Mahoney J., however, simply refused to follow *Beaver Creek*[58] and held that, though the decision did not affect any special statutory rights of Martineau as an inmate, it did, for reasons that are not clearly articulated, affect his civil rights as a person and, therefore, gave rise to a requirement of procedural fairness. What Mahoney J. seems to be saying is that if at any time punishment is contemplated for an offence other than the one for which imprisonment was imposed in the first place, the process affects the prisoner's civil rights as a person.[59] In arguing this he emphasised the fact that the source of both the offence and the punishment was "law" in the sense of being found in the Act[59a] and the Regula-

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[52] *Supra*, note 19, 61.

[53] It has, admittedly, been used as the touchstone in some cases. See *Fairness: The New Natural Justice?*, *supra*, note 5, 285, n.19.

[54] [1969] 1 O.R. 373, 378-80 (C.A.).

[55] *Supra*, note 19, 62.

[56] *Supra*, note 6, 176, n.3.

[57] *Supra*, note 1, 298.

[58] *Supra*, note 19, 62-63.

[59] After quoting *Beaver Creek*, he then seems to place his disagreement with it on this basis. *Ibid.*, 63.

[59a] *Penitentiary Act*, R.S.C. 1970, c.P-6.

tions[59b] as opposed to the Directives.[60] Presumably, the purpose of this emphasis was to circumvent the argument accepted in *Beaver Creek* that the control of prisoners within an institution was a purely discretionary matter within the control of the Director.[61] In contrast, according to Mahoney J., the statutory source of the authority seemed to indicate parameters within which the discretion was to operate and therefore to give the prisoner "rights" to their observance; this also defeated, at least in part, the argument in *Beaver Creek* that in terms of his placement within the prison system the prisoner is temporarily without "civil rights".[62]

As indicated at the outset, it was arguably unnecessary in terms of the English cases for Mahoney J. to search for a "right" that was affected by the decision. It is also unfortunate that the rights/privileges dichotomy has surfaced in the field of procedural fairness since the avoidance of this ever-troublesome classification process is one of the significant advantages of espousing the "duty to act fairly" as the touchstone for procedural fairness arguments. What remains to be seen is whether higher courts will agree both with Mahoney J.'s acceptance that a gap for Trial Division jurisdiction has been left by *Howarth* and *Martineau and Butters* and, if so, that the gap exists in this particular context.[63]

The second Trial Division decision is that of Collier J. in *Magrath* v. *The Queen*.[64] This was not a decision on a preliminary matter but rather an action for a declaration of invalidity. Collier J. relied principally on the earlier-quoted statements of Spence J. in *Hardayal*[65] as well as *Martineau (No.2)*[66] as the bases for holding that the Board had to act in a procedurally fair manner. He also made reference to the procedural Directive in discussing the content of the duty in this case. While feeling bound to accept the Supreme Court of Canada's decision that this was not "law",[67] he nevertheless thought that it provided

> ... a guide to this Court in determining whether the manner in which the disciplinary board came to its decision was carried out fairly.[68]

[59b] *Penitentiary Service Regulations*, SOR/62-90, ss.2.28, 2.29 (am. SOR/72-398).

[60] *Supra*, note 19, 63.

[61] *Supra*, note 54, 377.

[62] *Ibid.*

[63] *Martineau (No.2)* is in fact on appeal.

[64] *Supra*, note 19.

[65] *Ibid.*, 79-80.

[66] *Ibid.*, 78-79.

[67] *Ibid.*, 18.

[68] *Ibid.*, 80.

Two comments on the reasoning will suffice. First, as noted earlier, it is difficult to read the reference to a "duty to act fairly" in the judgment of Spence J. in *Hardayal* as involving fairness in any procedural sense. Secondly, while approving Mahoney J.'s judgment in *Martineau (No.2)*, Collier J. himself does not engage in any discussion at this point about the necessity for a prisoner's "rights" to be affected before the duty to act fairly arises. However, a second allegation in this case raised the lack of fair procedures in a decision to transfer Magrath from one institution to another.[69] Here, the judge quoted at length[70] from the judgment of the Ontario Court of Appeal in *Re Anaskan and The Queen*[71] where the argument for a hearing was rejected in a transfer case because the prisoner had no "right" to be in a particular institution.[72] He then said:

> I do not say an inmate may never have a right to question, on grounds of lack of fairness, a decision to transfer him. Some circumstances may point to such a right. My opinion is confined to the matter of notice and the right to a hearing of some kind.[73]

The most likely interpretation of this is that the only possible allegation in such cases is lack of substantive, as opposed to procedural, fairness. However, it might possibly mean that fairness in either sense may be applicable in some transfer cases but that in this particular case, which was confined to allegations of procedural unfairness, no procedural duties arose. The latter interpretation would of course mean that whether rights were affected would be relevant to, but not determinative of, issues of procedural fairness.

Conclusion

In at least three decisions the Supreme Court of Canada has had an opportunity to articulate clearly the relationship between sections 18 and 28 of the *Federal Court Act*, particularly as that relationship gives rise to arguments about the appropriate forum for arguments about fair procedures. The three cases, *Howarth, Martineau and Butters*, and *Hardayal*, plus *Mitchell* and perhaps others, have also given the Court an opportunity to say something about the possible application in Canada of the English theory of procedural fairness. These opportunities have all been eschewed except for

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[69] *Ibid.*, 81-87.
[70] *Ibid.*, 85-86.
[71] *Supra*, note 26.
[72] *Ibid.*, 524-26.
[73] *Supra*, note 19, 86.

some statements of a most cryptic kind. In another article, I have developed at length arguments in favour of the English fairness approach.[74] However, the acceptance or rejection of those arguments should not affect one's concern with the failure of the highest court in the land to deal more openly with this and the intimately related matter of the Trial Division's jurisdiction. Certainly, in the three jurisdictional decisions, it can be argued that the Court was only seised of the jurisdictional argument. Nevertheless the Court had the benefit in each of these cases of arguments based on the legitimacy of the applicants' claims for some degree of procedural protection. It would not seem improper for the Court to have at least given a clearer indication as to whether its judgment precluded all procedural arguments in relation to the decision-maker in issue or whether in fact the Trial Division had scope for engrafting some form of procedural requirements on the relevant statute, and if so, what those requirements were. To do any less is arguably inappropriate in that it penalizes those seeking relief for what is a poorly drafted, confusing and much criticized provision dividing jurisdiction between the Trial Division and Court of Appeal. The forms of action have defeated a proper consideration of the merits of the matters in issue. Disappointed applicants, should they want relief, are forced to start again in a different court but with little or no indication of what the chances of ultimate victory are.

Hopefully, reform of this aspect of the *Federal Court Act* is not too far distant, particularly given the recent tentative recommendations of the Law Reform Commission of Canada.[75] In the mean-

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[74] *Fairness: The New Natural Justice?, supra,* note 5.

[75] See Law Reform Commission of Canada, Working Paper 18, *Federal Court — Judicial Review* (Ottawa: Supply and Services Canada, 1976). See particularly Ch.III, where it is recommended that all judicial review of federal administrative authorities should originate in the Trial Division. The Working Paper also makes some recommendations on the substantive issue of the applicability of the rules of natural justice. See Ch.V. Here the principal suggestion is:

"4.3 Future legislation providing for judicial review should avoid express use of the judicial/administrative classification of statutory powers to encourage the courts to avoid the tortuous rigours of this classification. Consideration should be given to legislation requiring or empowering the court to review administrative, as well as judicial and quasi-judicial decisions for conformity with natural justice unless the public interest that decisions conform with natural justice is outweighed by another public interest, such as efficiency in government, national security, confidentiality, etc."

If ever adopted, this may mean a relitigation of many of the situations in which the courts have denied the application of procedural protections

time, despite *Martineau and Butters,* as well as *Howarth , Hardayal* and *Mitchell,* the English procedural fairness doctrine and the ability of the Trial Division of the Federal Court to review decisions on procedural fairness ground remain possibilities, at least in some contexts.[76]

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in federal statutory decision-making. *Quaere* however whether the suggested provision with its exemptions would lead to any different results.

[76] After the submission of this comment, the Federal Court of Appeal reversed the decision of Mahoney J. in *Martineau (No.2)* (unreported judgment, delivered March 17, 1978, No.A-500-77). The narrow basis on which the Court (Jackett C.J., Heald and Kelly JJ.) reversed was that the prerogative remedy of *certiorari* was only available with respect to decisions "either judicial in character or ... required by law to be made on a judicial or a quasi- judicial basis" (Memorandum judgment, 2, *per* Jackett C.J.). *Royco Homes* (*supra,* note 31) was somehow distinguished (*ibid.,* 3, n.1) and the statement made that s.28 covered off "every method of reaching a decision or order that would support an application by way of *certiorari*" (*ibid.*). Of itself this says nothing about the merits of the procedural fairness argument and it represents another glaring example of the intricacies of the *Federal Court Act* preventing a proper consideration of the allegations made. However, Jackett C.J. also added a quite confusing Appendix to his judgment, which on one interpretation may possibly say that the case could also have been lost on the merits. However, it is certainly not clear and the writer understands a further appeal to the Supreme Court of Canada is being considered. Of somewhat less significance to the main thrust of this article is the fact that the proceedings brought by Andrew Roman, referred to in footnote 3, have been struck out. See *Inuit Tapirasat of Canada* v. *Leger,* unreported decision of Marceau J. of the F.C.T.D., delivered March 9, 1978, No.T-4668-77. It was held that *certiorari* did not lie against the Governor in Council under s.18 of the *Federal Court Act* because the Governor in Council was the Crown (Memorandum judgment, 5) and that a declaratory action was not appropriate because the Governor in Council was not obliged to give any kind of hearing when hearing an appeal under s.64(1) of the *National Transportation Act,* R.C.S. 1970, c.N-17 from a rate decision of the C.R.T.C. (*ibid.,* 7). The procedural fairness argument was raised and rejected as having no application in this context. Indeed, it was seen as being a "question of terminology rather than a question of substance" (*ibid., 9*). Once again it is understood that an appeal is being contemplated.

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