Certiorari in the Federal Court and Other Matters: A Reply to the "Addendum"

I have read with some interest Mr Evans' *Addendum*[1] to my article[2] on conservatism in the Trial Division of the Federal Court which has appeared in your Journal. Contrary to what a reader might think upon a quick glance at the *Addendum,* Mr Evans and I are in agreement on a number of crucial points. For example, there is essentially no difference of opinion as to my thesis that the Trial Division has taken a rather cautious, conservative approach in carrying out its judicial review mandate. Indeed, it is perhaps significant that there could be found in the judgments I considered up to about mid-1975,[3] sufficient material indicating a propensity on the part of the Court, considered as a whole, to walk softly and blaze no new trails in its new area of jurisdiction. After considering some of the cases reported since that time, Mr Evans has also sensed that same lack of adventure on the part of the Trial Court. He concludes that "it is difficult to find in the jurisprudence of the Trial Division of the Federal Court a fertile source of principled doctrinal innovation".[4]

Mr Evans and I are also essentially in agreement on three major points raised in my article. First, the statutory power of judicial review as set out in the *Federal Court Act*[5] is not a good example of draftsmanship in that (a) it is generally confusing and ambiguous, and (b) it incorporates difficult and troublesome concepts from prior case law. Secondly, the granting of original jurisdiction to each of the two levels of the Federal Court in the area of judicial review leads to problems and, as Mr Evans suggests, may be unjustifiable. And thirdly, as they relate to administrative decisions

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[1] See *The Trial Division of the Federal Court: An Addendum* (1977) 23 McGill L.J. 132.

[2] See *Conservatism in the Supervision of Federal Tribunals: The Trial Division of the Federal Court Considered* (1976) 22 McGill L.J. 234 (hereinafter referred to as the Conservatism essay).

[3] That was the approximate date of writing. As both authors and readers are aware, even among the most proficient and competent journals there often arises a gap of several months to more than a year between the time of writing and the time of publication.

[4] *Supra,* note 1, 143.

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

made before June 1, 1971,[6] the full panoply of remedies (including *certiorari*) was available in the Trial Division of the Federal Court.

There are, however, in Mr Evans' *Addendum* statements that seem to inaccurately reflect what was written and documented in my Conservatism essay. With these I would like to take issue.

Does the Trial Division Have Certiorari Jurisdiction?

> Mr Fera's statement, that *certiorari has issued* from the Trial Division only against decisions made during the transitional period, requires some qualification.[7]

It is made clear at the outset of my Conservatism essay that the central thesis would be supported mainly by examining "the grounds on which the [extraordinary] remedies [had] so far *issued* from the Trial Court".[8] And later, in considering the writ of *certiorari,* I wrote that "certiorari, as it applies to decisions made after June 1, 1971, *may* not be available in the ... Trial Division. *So far,* that remedy *has issued* from the Trial Court only against decisions made before that date".[9] That was a totally accurate statement when written and significantly, notwithstanding a number of decisions since, *that still appears to be a correct assessment of the matter at the time of this writing.* All of that will be considered shortly in full detail.

However, I would like to first mention that even in my article I was able to point to some interesting possibilities for *certiorari* in the Trial Division that might eventually cast "doubt on the assertion that the certiorari jurisdiction of [that Court] is ... virtually defunct".[10] For instance, I noted that in *Millward*[11] Cattanach J. "was explicit in holding" that "the Trial Court... had jurisdiction to consider quashing the Board's ruling not to hold the inquiry *in camera* and not to grant adjournment".[12] But that case must be considered carefully and the reader cannot overlook the fact that the learned Judge, in his judgment, was not particularly clear as to the specific writ or remedy he had in mind when considering the court's jurisdiction as related to those determinations.[13] In the final

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[6] In his *Addendum* Mr Evans refers to that period as the transitional period.
[7] *Supra,* note 1, 137 (italics added).
[8] *Supra,* note 2, 236 (italics added).
[9] *Ibid.,* 238 (italics added).
[10] *Supra,* note 2, 238.
[11] *Millward* v. *Public Service Comm.* [1974] 2 F.C. 530.
[12] *Supra,* note 2, 245.
[13] *Millward, supra,* note 11, 531-32.

result, Mr Justice Cattanach found the rulings of the Board valid and dismissed the application for declaratory relief, along with the request for relief by way of *certiorari*, prohibition and *mandamus*.

More definitively, there is at the trial level the decision in *Union Gas Ltd* v. *Trans Canada Pipe Lines Ltd.*[14] In the Federal Court, Mahoney J. held that *certiorari* was inappropriate to review interim determinations such as those dealing with whether a board should receive further evidence or permit cross-examination of witnesses on broader subjects. Significantly, in the common law pre-dating the Federal Court, it is difficult to find judicial authority to justify the issuance of *certiorari* to quash determinations[15] similar to those in *Millward* and *Union Gas*. Indeed, the reasons for such judicial reluctance are compelling.[16] Chief Justice Jackett warned in *Danmor Shoe*[17] of the dangers inherent in allowing a party to challenge separately each and every position taken by a tribunal in the course of a long hearing. In that case the applicant was attempting to impugn a "declaration"[18] by the Tariff Board that it did not have jurisdiction to review the validity of certain "prescriptions" and also a "ruling"[19] of the Board not to receive certain evidence. Thus, the remarks of the Chief Justice as they relate to the possible frustration of the Board's decision-making process were in connection with an application to attack the type of procedural determination that arose both in *Millward* and *Union Gas*.

Nonetheless, Mr Evans warns against finding any inconsistency[20] between the views expressed in *Millward* at the trial level and *Danmor* heard in the Court of Appeal. He writes:

> For one thing, the grounds of review of decisions under section 28 are broader than under the common law remedies.[21]

That *may* be so. But as this point in time we cannot be sure. There is, of course, *dicta* to the effect that there is now "a heretofore

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[14] [1974] 2 F.C. 313.

[15] That point noted in *Union Gas, ibid.*, 324 and in *Re Toronto Newspaper Guild and Globe Printing Co.* [1950] O.R. 435.

[16] Discussed in some detail *supra*, note 2, 245-46 and 260-61.

[17] *In re Anti-dumping Act & In re Danmor Shoe Co.* [1974] 1 F.C. 22.

[18] That word used in *Danmor Shoe, ibid.*, 26.

[19] *Ibid.*

[20] That is essentially the phraseology Mr Evans uses. In my Conservatism essay, I suggest that the views expressed by Cattanach J. in *Millward* as they might refer to the use of *certiorari* in the Trial Division to quash interim determinations may not be particularly significant in light of the views of Jackett C.J. expressed in *Danmor* against review of such determinations.

[21] *Supra*, note 1, 140-41.

unknown and non-existent right of review"[22] and that it is, as Mr Evans puts it "analogous to an appeal". But that tells us very little. First, as is well known, the grounds of appeal are often quite narrow and even where a general right of appeal may be found, the courts have sometimes demonstrated a certain reluctance in spite of it.[23]

Furthermore, given the restrictions of the section 28 application (it must be a "decision or order" and a certain kind of administrative decision, ... if at all[24]) one might well wonder whether the statutory review is really broader.[25] The grounds of review themselves may add little to widening the review process. For example, section 28(1)(a) seems totally in line with prior principles, and while section 28(1)(c) may have some potential for broadening the scope of review, it is difficult at this time to find a case where it has been used other than in applying the no-evidence rule. There is, however, section 28(1)(b) which unambiguously provides for review on grounds not formerly permitted; it allows certain decisions or orders to be set aside if the tribunal in making them erred in law *whether or not the error appears on the face of the record.*

But, conventional wisdom aside, I am aware of no comprehensive study outlining the practical ramifications, if any, of review for error of law whether or not on the record as against review for such errors only if apparent on the face of such record. Indeed, it may merely appear to grant wider grounds for review which are in fact of little or no final practical consequence. In examining that hypothesis, a researcher would have to keep in mind, among other things,[26] the definition previously given by the courts to "the record",[27] the use of declaratory relief for all errors of law[28] and the

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[22] *Blais* v. *Basford* (1972) F.C. 151, 162.

[23] In that regard see *e.g., Union Gas Co.* v. *Sydenham Gas & Petroleum Co.* [1957] S.C.R. 185 or *Re Caswell & Alexandra Petroleums Ltd* (1972) 26 D.L.R. (3d) 289 (Alta C.A.).

[24] In that regard see the remarks of Laskin C.J. in *Puerto Rico* v. *Hernandez* [1975] 1 S.C.R. 228, 247.

[25] That is to say, broader from an intelligent reading of what has been enacted under section 28 of the Act. I am currently in the process of assessing the decisions based on that section and as a tentative conclusion at this time there is very little in the case law to suggest a broadening of the review process beyond that which has been traditionally accepted.

[26] I do not here wish to examine all the possible arguments for the postulate, but it is well known that the courts have shown much vacillation as to what is the record and what constitutes jurisdictional error. Indeed, often it is difficult to control the urge to say that the reasoning in the cases dealing with such matters is result-oriented.

[27] The record has sometimes been defined rather broadly. See Reid, *Administrative Law and Practice* 3d ed. (1971), 367.

[28] Discussed by Zamir, *The Declaratory Judgment* (1962), 157-66.

broad definition which has sometimes been given to "jurisdictional error" so as to make it difficult to envisage errors that might not be caught by that ground of review.[29] Further, if review for non-jurisdictional error, whether or not on the face, were to be restricted (as is error of law on the face[30]) only to errors affecting the practical result of the hearing, there would also arise as a result less scope for divergence between the "two" grounds of review.

But assuming that section 28(1)(b) does provide broader grounds of review, the question, equally relevant to Mr Evans' remarks, is whether such a broader ground would have much bearing in the review of interim determinations. An answer to that question is crucial if we accept Mr Evans' assertion that the remarks of the Chief Justice in *Danmor Shoe* have little or no relevance to what Cattanach J. may have intended in *Millward* because, among other reasons, the grounds of review under section 28 are broader than those available under the common law remedies and in the words of Mr Evans "should be used sparingly".[31]

Next, consideration will be given to the four cases Mr Evans puts forward to qualify the assertion that *certiorari* has issued from the Trial Division only against decisions made during the transitional period, *i.e.* prior to June 1, 1971 when the *Federal Court Act* was brought into force.[32] The primary case cited in his *Addendum* is *Re MacDonald*.[33] Upon first reading, one can readily be convinced that *certiorari* issued from the Trial Division; even the headnote says it did. But that is not so.

In *Re MacDonald* a declaratory judgment, so called,[34] was originally sought, *i.e.* "a declaration as to the proper statutes to be applied and the interpretation thereof, to the sentences being served".[35] But the applicant erred in commencing proceedings by way of an origin-

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[29] See *e.g.*, the scope Lord Reid would give to jurisdictional error in *Anisminic* [1969] 2 A.C. 147, 171. See also Reid, *supra*, note 27.

[30] See, *e.g.*, *Sturgeon Mun. Dist.* v. *Alta Assessment Appeal Board* [1971] 3 W.W.R. 185 or possibly *Mountain Pac. Pipelines Ltd* v. *Can Hydrocarbons Ltd* (1965) 54 W.W.R. 693 (Alta).

[31] *Supra*, note 1, 141.

[32] S.28(3) of that Act applies to oust the jurisdiction of the Trial Division of the Federal Court where the Court of Appeal has jurisdiction under s.28 with reference to certain types of decisions made after the *Federal Court Act* was proclaimed in force.

[33] [1975] F.C. 543 (T.D.).

[34] Those words may be important at that point to grasp fully the sequence of events in the case.

[35] Those words used in the original "originating notice of motion".

ating notice of motion under Rule 319 (and following) rather than by instituting an action under Rule 400. Caught in a procedural trap, the applicant with the consent of the respondent, amended the originating notice of motion and sought instead "an order *in the nature of certiorari*". The inspiration for that order[36] may have come from section 18(b) of the *Federal Court Act* which gives the Trial Division jurisdiction "to hear and determine any application or other proceeding for relief *in the nature of* relief contemplated by ... [18(a)]" which in turn gives the Trial Court jurisdiction to issue injunctive or declaratory relief, prohibition, *certiorari* and *mandamus*.

In the end, Mahoney J. made the "declaration" that was originally sought,[37] to the effect that the applicant was taken into custody on July 13, 1974. Significantly, in his judgment, there is no discussion of the grounds upon which *certiorari* issues and no question of whether it is available in the Trial Division. In fact, there is no issue of "review or quashing of any order or decision".[38]

In short, in *Re MacDonald, certiorari per se* was never sought and was never granted. In the words of the unanimous Court of Appeal:

> The claim, as amended... remained, in its true character, a claim for a declaration. And the judgment appealed from was a response to this claim.[39]

Also, on appeal, the parties disclaimed any reliance on procedural error at the trial level and united in a quest for judgment on the merits. The appeal was allowed and the Court "substitute[d] a *declaration* that Sept. 3, 1974 is the date upon which the respondent was committed to penitentiary ...".[40]

In the *Addendum*, Mr Evans next proceeds to point out cases which have come to his attention in which the Trial Division showed itself willing, if the grounds were established, to grant *certiorari*

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[36] In the notice of motion, s.18 was not qualified or restricted to s.18(a). Ryan J. in the Federal Court of Appeal notes that "the proceedings in the Trial Division were commenced by an originating notice of motion under section 18 of the Federal Court Act". See *National Parole Board* v. *MacDonald* [1976] 1 F.C. 532, 533 (C.A.).

[37] That is what was held by the Federal Court of Appeal in *MacDonald, ibid.*, 533. That ruling is obviously consistent with the nature of the order made by the Trial Division, namely, the enunciation of a date on which the applicant was supposedly incarcerated.

[38] *MacDonald* (C.A.), *supra*, note 36, 533.

[39] *Ibid.*

[40] *Ibid.*, 538 (italics added).

relief. For example, he submits that in *Royal American Shows Inc.* v. *M.N.R.*,[41] Gibson J. was prepared to accept the notion that *certiorari* might issue from the Trial Division to review the legality of a physical act, rather than a decision.

First, as Mr Evans recognizes in his *Addendum*, that novel proposition is unsupported by previous authority. But apart from that, in his judgment, did Mr Justice Gibson make or intend to make a distinction between the decision and the act? More importantly, did he see *certiorari* as the appropriate remedy in the Trial Division to attack one or the other? A careful consideration of his decision may indicate a negative response to both questions.

Royal American Shows applied to the Trial Division for prohibition, *certiorari* and an ancillary order,[42] as well as for a declaration. Shortly after, the respondent, the Minister of National Revenue, proceeded to the same Court for an order to dismiss the application on the following grounds:

(1) That neither the respondent (M.N.R.) nor the person effecting the seizure (Mr E.M. Swartzack) were a federal board, commission or other tribunal within the meaning of section 18 of the *Federal Court Act*.[43]

(2) That if the person effecting the seizure was such a tribunal, the Trial Division had no jurisdiction to hear the proceedings by reason of section 28 of the Act.[44]

(3) That the proceedings were against the wrong party.[45]

(4) That any proceedings against the respondent (M.N.R.) in the Trial Division must be instituted by way of an action.[46]

(5) And that the seizure of the subject matter here was an administrative act and therefore not subject to review under

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[41] [1976] 1 F.C. 269 (T.D.).

[42] That seems to have been a request for an order directing the respondent to deliver up to the applicant all the property seized. I have garnered that from a perusal of the actual file of the case in the Court Registry and from the remarks of Gibson J. in *Royal American Shows, ibid.*, 270.

[43] *Royal American Shows, ibid.*, 270.

[44] *Ibid.*, (c), In rejecting this ground for dismissal, here is the entire text of the Court on point: "Thirdly, I am also of the opinion that the Court of Appeal of the Federal Court has no jurisdiction in the first instance under section 28 of the *Federal Court Act* in relation to the subject proceedings. (*Cf. Attorney-General of Canada* v. *Cylien* [1973] F.C. 1166 and *Howarth* v. *The National Parole Board* [1973] F.C. 1018.)" (at p.272).

[45] *Ibid.*, 270 (d and e).

[46] *Royal American Shows, ibid.*, 270(f).

section 18 of the *Federal Court Act* or *any other provision of the Act.*[47]

The Court, for the most part, confined itself to the issues and dealt with them summarily in rejecting all grounds for dismissal. However, in reaching its conclusion on whether or not the matter was administrative in nature, the Court did offer two short paragraphs of explanation. And, indeed, in the latter, Gibson J. speaks of the "act of taking" or the "act of seizure" and whether it was "a pure administrative act". But it is still doubtful whether the learned Judge intended to draw a distinction between the act of taking and the decision. He writes:

> ...I am of the opinion that the act of seizure under that subsection [of the Income Tax Act] has some judicial element, and that this is so even though the subsection does not expressly or impliedly import a duty to afford a *hearing*, it being sufficient that the official *deciding and effecting* such a seizure is obliged in doing so *to decide* questions of law or fact affecting an individual's "rights" and thereby exercises a *"judicial discretion"*; and that a person purporting to exercise such a power of seizure is therefore under a duty to act fairly ("judicially") ... and that as a consequence any act done by a person purportedly under such authority is subject to review by the Trial Division ... .[48]

Thus, it is debatable from these remarks whether the Court really intended to separate the *decision* from the *act* and consider review of the latter only, but more importantly, it is clear that these remarks cannot be used exclusively to support or reject an argument on the availability of *certiorari* in either instance. Indeed, at no place in his reasons does Gibson J. speak of any one single remedy. Rather he confines his remarks to "review by the Trial Division".[49] Further, as suggested above, the Court was asked only to consider whether the original application for prohibition, *certiorari*, declaratory relief and another order should be dismissed because, *inter alia*, the seizure was a result of an administrative and not judicial act. There was no allegation by the respondent that one particular remedy was unavailable in the Trial Division and the Court itself did not proffer an opinion.

At the hearing of the application for review,[50] Heald J. in the Trial Court dismissed the motion. He found that the request for declaratory relief could not be granted because proceedings had not been properly commenced by way of an action and that in the

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[47] *Ibid.*, 269-70.

[48] *Ibid.*, 271 (italics added).

[49] *Ibid.*, 271(g).

[50] *Royal American Shows Inc.* v. *M.N.R.* T-2862-75 Judgment delivered Nov. 18, 1975.

circumstances there were no grounds for the issuance of either *certiorari* or prohibition. In the judgment, there is no discussion of the availability of *certiorari* in the Trial Division and there is no further consideration of the act of seizure as distinct from the decision.

As for the *Cathcart* case[51] which Mr Evans mentions, there is nothing in the judgment to indicate the Court's inclination towards considering *certiorari* appropriate in novel circumstances. Counsel for the applicant stated that his only purpose for applying for *certiorari* was to ensure production of certain material that had been supplied to the respondent, but since the material was eventually produced, Smith D.J. found it "not necessary to make a decision on this application".[52] And that is the total "consideration" which *certiorari* received in the entire case.

Finally, not much need be said about *Auger* v. *Canadian Penetentiary Service*.[53] Mr Evans himself writes:

> The judgment of Walsh J. is ... silent on the propriety of using *certiorari* [solely to get evidence before the court to support an application for another remedy] ... although *MacDonald* [at the Court of Appeal level] may cast doubts upon this form of proceeding.[54]

Thus, while various members of the Bar on behalf of their clients have suggested novel uses for *certiorari* in the Trial Division, it cannot be said that the Court itself, with reference to decisions made after June 1, 1971, has ever issed *certiorari per se*, or shown an inclination to do so either on traditional grounds or on innovative ones. Indeed, so far the Court has avoided meeting the issue head-on and has certainly not encouraged possible future developments.

Prohibition in the Trial Division

In the *Addendum*, Mr Evans says that I "state that the traditional grounds of review [as they relate to prohibition] have been broadened by Walsh J. in *Wardair*... ".[55]

That is certainly not the impression I wished to give. Indeed, the sole reference to the case (in either text or notes) was as follows:

> An even more comprehensive list of grounds, including error of law and bias, were acknowledged by the Trial Division in *Wardair Canada Ltd* v. *C.T.C.*[56]

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[51] *Cathcart* v. *Public Service Comm.* [1975] F.C. 407.
[52] *Ibid.*, 414.
[53] 1975 F.C. 330 (T.D.).
[54] *Supra*, note 1, 140.
[55] *Supra*, note 1, 142.
[56] *Supra*, note 2, 246.

I must concede, however, that the word "suggested" might have been more appropriate in that context than the word "acknowledged". In any event, I tend to agree with Mr Evans that, in his comment, Walsh J. may not have been making a "conscious and considered decision" on point.

Dealing with the issuance of prohibition, we now come to the decision of *Steve Dart Co.* v. *Board of Arbitration*,[57] perhaps one of the more significant cases decided by the Trial Division. It focuses attention on a point of law which no Canadian writer has fully considered, namely, whether prohibition is available to restrain usurpers.[57a] In my earlier article I considered the case rather briefly and concluded "that the *Dart* decision breaks little new ground, and that notwithstanding any statutory provision, the decision is logical, necessary and appropriate".[58] Indeed, as it related to my overall discussion of conservatism, the case could be viewed in any one of a number of ways without in any way requiring a qualification of my thesis.

Mr Evans' comment on my treatment of the case frankly puzzles me. However, I wish to emphasize that the proceedings in the Trial Division were not principally for the purpose of ascertaining the validity of the statute or regulations impugned.[59] The proceedings (an application for prohibition to restrain a board of arbitration from hearing a claim filed against the petitioner) questioned the lawful authorization of the Board. Let me refer the reader to the crucial part of the decision of Addy J. which I cited in my article and note here only the opening words of the second paragraph in the judgment:

> [Steve Dart Co.] is applying for a writ of prohibition to restrain the respondent Board from hearing a claim filed against [it] ... .[60]

I leave the reader to his own conclusions.

The Other Traditional Remedies

Contrary to what Mr Evans seems to imply in footnote 8 of his *Addendum*, there appears to be no case law to date suggesting that prohibition, injunctive or declaratory relief or *mandamus* are not fully available in the Trial Division because of section 28(3) of the

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[57] [1974] 2 F.C. 215 (T.D.).

[57a] My comment on this case will appear in the next issue of this Journal, Vol.23:4.

[58] *Supra*, note 2, 249.

[59] For a way in which that may be done see Reid, *supra*, note 27, 267-68.

[60] *Steve Dart*, *supra*, note 57, 215.

Federal Court Act (irrespective of when the decision was made). Mr Evans writes further:

> S.28(3) ... is not ... 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 [at p.257 in his Conservatism essay] he appears to accept this.[61]

That is correct. And while I have myself suggested in an earlier article[62] that, by virtue of section 28(3), even the Trial Division's declaratory relief may be limited, neither Mr Evans nor I seem aware of any judgment supporting such a view. Therefore, I am able to reiterate that current case law has placed no fetter on the issuance from the Trial Court[63] of the other common law remedies.

Concluding Remarks

In conclusion, while I have found Mr Evans' *Addendum* interesting, there is nothing in what so far has been brought to my attention that would necessitate any change or qualification in my main thesis as to conservatism in the Trial Division. Indeed, Mr Evans himself seems to say virtually that in his concluding remarks. Interestingly enough, his conclusion seems somewhat at variance with his earlier assertions that the Trial Division has shown itself willing to consider "novel" and "unusual" uses for *certiorari.*

As for the availibility of *certiorari* in the Trial Division, I have myself suggested possible uses in light of remarks made in the Supreme Court of Canada in *Puerto Rico* v. *Hernandez*[64] and I have made due note of *Millward.* But there appears to be nothing in the case law since to indicate a willingness on the part of the Federal Court to map out an area of review for the Trial Court that might appropriately fall under the *certiorari* jurisdiction that appears to be given to it by virtue of section 18 of the *Federal Court Act.*

Norman M. Fera*

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[61] *Supra,* note 1, 133, n.8.

[62] See *Judicial Review Under Sections 18 and 28 of the Federal Court Act* (1975) 21 McGill L.J. 255, 268.

[63] To similar effect, see *supra,* note 2, 237.

[64] [1975] 1 S.C.R. 228.

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