Conservatism in the Supervision of Federal Tribunals : The Trial Division of the Federal Court Considered

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Introduction

During the Second and Third Sessions of the Twenty-Eighth Parliament considerable concern was expressed both in Committee and in the House about the provisions in Bill C-172 [1] dealing, *inter alia,* with judicial review of federal boards and commissions. The Bill, however, without undergoing any significant alteration, received final approval in the House of Commons in October of 1970 and was brought into force by proclamation on June 1, 1971 as the *Federal Court Act.*[2]

Those interested in and concerned with administrative law have found a number of troublesome subsections in the Act. Indeed, what has been put forth as the "preliminary stages for a code of public administrative law in this country" [3] is, at best, minimally defined, poorly qualified and often confusingly ambiguous in significant places. Section 28(1), for example, reads:

> 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[4] a decision or order,[5] other than a decision or order of an administrative nature not required by law to be made on a judicial or

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[1] During the Second Session of that Parliament, the Bill was numbered C-192.

[2] S.C.1970-71-72, c.1.

[3] Words of the then Minister of Justice, the Honourable Mr John Turner in *Debates House of Commons Canada,* 3d Sess., 28th Parl., vol. I, October 28, 1970, 678.

[4] The term "set aside" is not defined in the Statute. In 1972, Mr N.A. Chalmers, Director of the Toronto Regional Office for the Department of Justice in a published article wrote: "Exactly what the legal position is when a decision has merely been set aside has not yet been clarified, but it is submitted that the position is the same as if the decision of a tribunal had been quashed on *certiorari* under the previous practice, *i.e.,* the government department or agency concerned is free to commence proceedings again on a proper basis"; see *The Federal Court as an Attempt to Solve Some Problems of Administrative Law in the Federal Area* (1972) 18 McGill L.J., 206, 215.

[5] The term "decision or order" is not defined in the Act.

quasi-judicial basis, made by or in the course of proceedings[6] before a federal board, commission or other tribunal,[7] 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.[8]

In contrast, section 18 — at least 18(a) — is, on the face, clear and to the point:

The Trial Division has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of mandamus or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.[9]

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[6] In the *Federal Court Act*, there is no clarification of the expression "in the course of proceedings". Jackett C.J. in *National Indian Brotherhood* v. *Juneau [No. 1]* [1971] F.C. 66, 78 suggests that judicial review under s.28 does not apply to the myriad of decisions or orders that a tribunal makes in the course of the decision-making process such as decisions as to adjournment or admissibility of evidence. In *Attorney-General of Canada* v. *Cylien* [1973] F.C. 1166, the Federal Court of Appeal held that the conclusion of a board as to the nature of its statutory duty is not a decision that may be reviewed under s.28. See also the ruling to the same effect in *B.C. Packers* v. *Canada Labour Relations Board* [1973] F.C. 1194.

[7] S.2(g) of the *Federal Court Act* says a "'federal board, commission or other tribunal' means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under s.96 of the *British North America Act, 1867*".

[8] To many, s.28(1)(c) is the most troublesome provision in the Act. It has been discussed briefly in another article I have written, see *Review of administrative decisions under the Federal Court Act (1970)* (1971) 14 Canadian Public Administration 580, 588-589.

[9] It might be argued that s.18(b) creates a new kind of proceeding in relation to decisions of adminstrative agencies not previously available in some courts. In *The Federal Court of Canada — A Manual of Practice*, Ottawa: Information Canada (1971), 18, the author, W.R. Jackett, says s.18(b) "does not seem to create a new kind of proceeding in relation to such matters; any such proceeding in the Trial Division under the *Federal Court Act* must, I should have thought, be a proceeding that would have been available in some court even if that Act had not come into force".

There is nothing in section 18 or in any other part of the statute which expressly requires the Trial Division to give the extraordinary remedies [10] a meaning previously given by any particular court. G.F. Henderson, Q.C., has noted:

> The Exchequer Court of Canada has not had any jurisdiction to fetter it in defining the scope of application of [the extraordinary remedies] ... against federal ... tribunals. There are no definitions limiting their scope. There is nothing in the [Federal Court] Act expressly requiring the Court to give these terms a meaning given by the courts in any other jurisdiction. The opportunity exists to give each of these writs and the grant of a declaratory order a wide meaning to ensure a realistic protection of the subject against the bureaucratic action of the state.[11]

As will be shown in this article, however, the Trial Division of the Federal Court of Canada has not been at all imaginative in this regard. It has continued to issue the remedies in accordance with well established principles, and in some instances, to prefer those precedents that lead to a conservative rather than a liberal approach.

Federal Court — Trial Division

As noted above, the Federal Court — Trial Division [12] has exclusive original jurisdiction to issue the writs of certiorari, prohibition, mandamus and quo warranto, and to grant injunctive and declaratory relief.[13] The question of when it is appropriate to approach the Trial Division and when to approach the Court of Appeal is a complicated one and stems largely from the effect section 28(3) has on the "exclusive original jurisdiction" [14] of the Trial Court to issue the various remedies. For the purpose of this article, however, it is not necessary to delve into all the niceties of that issue. It is sufficient to examine the grounds on which the remedies have so far issued from the Trial Court and to make the appropriate

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[10] As used in this article, the term will be a convenient way of referring to all the remedies enumerated in s.18(a) of the *Federal Court Act*.

[11] G. F. Henderson, "Federal Administrative Tribunals in Relation to the New Federal Court of Canada" in *Special Lectures of the Law Society of Upper Canada* (1971), 68.

[12] This is the full official name. See s.4 of the *Federal Court Act*. Henceforth in the text the Court will be referred to simply as "Trial Division" or "Trial Court".

[13] Historically, the writs of "certiorari, prohibition and mandamus were evolved by the courts of common law. The injunction [on the other hand] is an equitable remedy [while] the declaration is a nineteenth century interloper, akin to an equitable remedy but not fitting into any neat category". See S. A. de Smith, *Constitutional and Administrative Law* (1971), 577.

[14] *Federal Court Act, supra*, note 2, s.18(a).

comparisons. It might be useful, however, to note that certiorari, as it relates to decisions of administrative tribunals made after the *Federal Court Act* came into force, may no longer be available. While it is true that certiorari was available to quash improper decisions or orders made prior to June 1, 1971,[15] the combined effect of sections 61(1) and 28(3) of the *Federal Court Act* may be to destroy that jurisdiction with reference to decisions made after that date.[16] In *M.N.R. and The Queen* v. *Creative Shoes Ltd*,[17] the main issue raised was whether certiorari proceedings lay to remove into the Trial Division the record relating to the making of certain prescriptions by the Minister of National Revenue. Mr Justice Thurlow, delivering the judgment of the Court of Appeal, made it quite clear that

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

It should be emphasized, however, that authority to make a declaration[19] or to grant injunctive[20] or prohibitory relief[21] is definitely still with the Trial Division irrespective of when the decision was made.[22] Similarly with mandamus,[23] 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

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[15] See *Media-Data Inc.* v. *Attorney-General of Canada* [1972] F.C. 469, 496-497 *per* Walsh J.

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

[17] [1972] F.C. 993.

[18] *Ibid.*, 998.

[19] In general, a declaration lies to question the validity of a decision rendered by any administrative agency.

[20] In administrative law, injunctions are most frequently granted on the grounds that what the agency proposes or plans to do would be *ultra vires*.

[21] Prohibition is similar in scope to certiorari, but looks ahead instead of back at what the tribunal has already decided or done.

[22] In *Canadian Radio-Television Communications* v. *Teleprompter Cable Communications Corp.* [1972] F.C. 1265, esp. 1270. See also *Wardair Canada Ltd* v. *Canadian Transport Commission* [1973] F.C. 597 at 602 where Walsh J. expresses the view that the Trial Division has jurisdiction by way of prohibition or injunction. Now and then the Trial Court has tried to avoid the issue of whether it has jurisdiction to issue a remedy: See *e.g.*, *The Centre for Public Interest Law* v. *Canadian Transport Commission* [1974] F.C. 276, 290 *per* Kerr J.

[23] In general, mandamus is used to command an administrative body to carry out a public duty imposed on it by law.

Appeal by section 28 of the *Federal Court Act*. In passing, it might be noted that habeas corpus has not been transferred by any provision in the *Federal Court Act* to either the Trial or Appeal Division. Thus, as it applies to federal administrative agencies, it is still available in the provincial superior courts.[24]

Certiorari in the Trial Division

As noted above, certiorari, as it applies to decisions made after June 1, 1971, may not be available in the Federal Court — Trial Division. So far, that remedy has issued from the Trial Court only against decisions made before that date. It might therefore be argued that the few certiorari cases heard could be virtually ignored in an article of this scope. There are, however, several reasons for considering the certiorari decisions of the Trial Court. To begin with, there is at least one case[25] (discussed below) which casts some doubt on the assertion that the certiorari jurisdiction of the Trial Division is now virtually defunct. Furthermore, certiorari has traditionally been considered substantively similar to prohibition. By considering the decisions relating to the former proceeding some light may be shed on the applicability of the latter remedy. Equally important, in these early certiorari cases there is revealed the "temperament" and "approach" of the Court which is quite relevant to the thesis of this article. In these judgments, a cautious, conservative *stare decisis* approach becomes readily apparent.

Review dependent on type of decision

In *National Indian Brotherhood* v. *Juneau* [*No. 3*],[26] the Trial Court in an application to review the proceedings of the C.R.T.C.[27] found that the decision of the Executive Committee of that Commission not to hold a public hearing into a complaint was administrative in nature.[28] There is nothing in the holding to cause much concern, but an additional statement is somewhat disconcerting, that is, if it was intended as the expression of a general principle. Walsh J. said:

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[24] See *Armstrong* v. *State of Wisconsin and U.S.A.* [1972] F.C. 1228; *Ex parte Marcotte* (1974) 13 C.C.C. (2d) 114; *Cavanaugh* v. *Commissioner of Penitentiaries* [1974] F.C. 515, 522; and *Sadique* v. *Minister of Manpower and Immigration* [1974] 1 F.C. 719, 724 *per* Cowan D.J.

[25] *Millward* v. *Public Service Commission* [1974] 2 F.C. 531.

[26] *National Indian Brotherhood* v. *Juneau* [*No. 3*] [1971] F.C. 498.

[27] Canadian Radio-Television Commission.

[28] *Supra*, note 26, 516.

> This was an administrative decision and the right to make it has been conferred by Parliament on the Executive Committee ... . There is nothing to indicate that it was ever intended that it could or should be reviewed by the Court,[29] nor does the law relating to *prerogative writs*[30] permit judicial review of a decision of this nature.[31]

Mr Justice Walsh supported his view by reference to the decision of Thorson P. in *Pure Spring Co.* v. *M.N.R.*[32] which dealt with the discretionary powers of the Minister of National Revenue.[33] At the same time, however, he conceded that more recent jurisprudence, including the prior Supreme Court decision in the *Wrights'* case,[34] would extend the right of the Court to review the exercise of Ministerial discretion much further than did Thorson P.[35]

In a subsequent case, Mr Justice Walsh seemingly mollified his position. In *Creative Shoes Ltd* v. *M.N.R.*,[36] he made reference to *Ridge* v. *Baldwin*[37] and the rule that in making a "purely administrative decision affecting private rights"[38] a tribunal must not infringe on the rules of natural justice.[39] With reference to certiorari, he said in this case:

> Specifically in order for [that writ] to be applicable, the decision attached [sic] must be one which affects the *rights of subjects* and in which the error of law appears on the face of the proceedings.[40]

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

[30] Certiorari, prohibition, mandamus and quo warranto are among the prerogative writs.

[31] *Supra*, note 26, 517 (emphasis added).

[32] [1946] Ex. C.R. 471.

[33] See *National Indian Brotherhood* v. *Juneau* [*No. 3*], *supra*, note 26, 518.

[34] *Wrights' Canadian Ropes Ltd* v. *M.N.R.* [1946] S.C.R. 139.

[35] *Supra*, note 33.

[36] [1972] F.C. 115.

[37] [1964] A.C. 40.

[38] *Supra*, note 36, 138.

[39] For the person whose private rights or interests may be extinguished or modified, this includes a right to be heard and to be given a fair opportunity for correcting or contradicting what is alleged against him before an order is made: See *Randolph* v. *The Queen* [1966] Ex. C.R. 157.

[40] *Supra*, note 36, 143 (emphasis added). Walsh J. supported his view with reference to *R.* v. *London Committee of Adjustment Ex Parte Weinstein* [1960] O.R. 225 which approved of a statement made by Atkin L.J. in *Rex* v. *Electricity Commissioners* [1924] 1 K.B. 171, 204-205.

Giving reasons

In *Creative Shoes,* Walsh J. also expressed the view that a court, in certiorari proceedings, might inquire as to the *reasons*[41] for the decision of a tribunal or similar body given quasi-judicial discretionary powers to decide and "that unless such reasons are given then there is no means whereby the Court may know whether is was made on a proper judicial or quasi-judicial basis".[42] To support that last contention, Walsh J. cited the *Wrights'* decision[43] and *The King* v. *Noxzema Chemical Co. of Canada, Ltd.*[44]

In Britain, irrespective of the type of decision involved, there is no general rule which requires a tribunal to give reasons for its decisions.[45] Indeed, where a tribunal is not under a statutory obligation to give reasons and chooses not to do so, the court usually cannot infer on that ground alone that the (unstated) reasons of the tribunal are bad in law.[46] In Canada, however, apart from decisions rendered by the Federal Court (or the Exchequer Court before it), there is some authority for the view that where a tribunal fails to state the reasons for its decision — even where none are required by statute — the courts may make adverse inferences.[47] Even in Britain, where a *prima facie* case of misuse

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[41] It was the view of Walsh J. that such an inquiry would serve to determine if the figures in the instant case were arrived at after a proper judicial or quasi-judicial consideration of the evidence before the Minister at the time the determinations were made; *Creative Shoes Ltd* v. *M.N.R., supra,* note 36, 143.

[42] *Ibid.,* 138.

[43] *Supra,* note 34.

[44] [1942] S.C.R. 178. It should be noted that since the two cases cited involved *appeals* rather than applications for certiorari or the like, Mr Justice Walsh felt compelled to draw on *Nicholson Ltd* v. *M.N.R.* [1945] Ex. C.R. 191. In that case, Thorson J., then a Judge of the Exchequer Court, noted that where a Minister's quasi-judicial discretion is involved, the court owes a duty of supervision over the manner of its exercise and that the appellate jurisdiction of the court did not alter the nature of the principles to be applied in its duty of supervision as these were the same as those applied in certiorari and mandamus cases. Presumably, Walsh J. wished to point to the converse: Judicial supervision of quasi-judicial discretion by way of the writs is similar in scope to the statutory appeal jurisdiction given to the superior courts on like issues. Therefore, a rule enunciated in an appeal may often apply in certiorari proceedings.

[45] S.A. de Smith, *Judicial Review of Administrative Action* 3d ed. (1973) 128.

[46] *Ibid.,* 359.

[47] "Even where [reasons] are not statutorily required, a tribunal that fails to state them must be prepared to accept adverse inferences." R. F. Reid, *Administrative Law and Practice* 3d ed. (1971), 253. See *Re Ross and Board of Police Commissioners* [1953] O.R. 556; *Re Henry's Drive-In Ltd* [1960] O.W.N. 468 and *Re Commercial Taxi* v. *Highway Traffic Board* [1951] 1 D.L.R. 342, 348.

of power is established and the administrative agency chooses to be silent, the courts are now readier to draw the inference that the tribunal's reasons are legally wrong or that its purpose is legally inadmissible.[48] Moreover, in certain other situations, Professor de Smith notes:

> [T]here may be an implied duty to state the reasons or grounds for a decision. A person prejudicially affected by a decision must be adequately notified of the case he has to meet in order to exercise any right he may have to make further representations or to appeal.[49]

In *Creative Shoes*, Walsh J. expressed the view that the statutory authorization given the Minister to determine normal value or fair market value[50] did not give him a free hand to prescribe percentage figures without any explanation as to how they were arrived at. The plaintiffs, he felt, were entitled to an explanation as to how they were arrived at and should have been given an opportunity to dispute them before a decision was reached.[51] The Court therefore granted the plaintiffs' application for certiorari and prohibition against the Minister of National Revenue. Citing failure to provide reasons for the decision and a failure to observe a principle of natural justice, Walsh J. quashed the Minister's prescriptions.

Where appeal is available

In that same case — *Creative Shoes Ltd* v. *M.N.R.* — Walsh J. reestablished another common law principle, namely, that certiorari and prohibition may issue despite the fact that appropriate relief is also available by way of statutory appeal.[52] In Britain, it can now be said that the existence of a right of appeal from a tribunal's decision does not, in many instances, bar the aggrieved party from being granted prohibition or certiorari.[53] And in Canada, prior

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[48] de Smith, *supra*, note 45, 39 and 139.

[49] *Ibid.*, 129.

[50] See s.11 of the *Anti-dumping Act*, R.S.C. 1970, c.A-15 and s.40 of the *Customs Act*, R.S.C. 1970, c.C-40.

[51] *Supra*, note 36, 143.

[52] *Ibid.*, 137-138. In arriving at its decision, the Trial Court considered the fact that the statutes authorizing the appeal procedures did not specifically deny supervisory review under the extraordinary remedies. In Canada "[a]n accepted ground for the refusal to exercise the discretion [of the court to issue some forms of relief] is recognition of exclusive jurisdiction in another tribunal". See Reid, *supra*, note 47, 403.

[53] de Smith, *supra*, note 45, 375 and 374-376. Compare with J. F. Garner, *Administrative Law* (1970), 171.

to the creation of the Federal Court, there were a significant number of cases showing that the existence of a right of appeal was not in itself a bar to relief by way of the traditional remedies.[54]

Attorney-General may bring proceedings

A number of important issues arose in *In re Anti-dumping Tribunal*,[55] heard in the Trial Division. One of these had to do with whether the Attorney-General, under the provisions of section 18 of the *Federal Court Act*, is authorized to bring certiorari proceedings. Noting that at common law there is no question that an Attorney-General may institute proceedings by way of the prerogative writs, Cattanach J. made the same holding in the case at hand. He added:

> [I]t is well established by long standing authority that ... certiorari is granted as of course on application of the Attorney-General acting on behalf of the Crown ... [but] whether the order of the inferior court is quashed ... remains ... for the Court to decide on the merits ... .[56]

Bias

The central issue in that same case was whether or not there had been bias on the part of a member of the Anti-dumping Tribunal. The "objectivity" of the recently appointed Chairman of the Tribunal was in doubt with reference to a particular inquiry which had been made. For several years prior to his appointment, the Chairman, Mr W.W. Buchanan, had been employed as a consultant by two Canadian manufacturers of sheet glass.[57] In his consultative capacity, Mr Buchanan had made several representations to governmental authorities with regard to alleged dumping of imported sheet glass into Canada. On his appointment to the Tribunal, however, Mr Buchanan terminated his employment with the two companies. A few months later, the same firms brought a complaint before the Tribunal about the dumping of sheet glass on the Canadian market. At this point, Mr Buchanan reiterated his former association with the two firms and assigned the conduct of the hearing to the other members of the Tribunal. The two remaining members heard the case and decided that anti-dumping duties should be assessed against certain sheet glass that had been imported from East European countries. The Chairman

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[54] Reid, *supra*, note 47, 351. For a case example, see *R.* v. *Saskatchewan College of Physicians and Surgeons, ex parte Samuels* (1966) 58 D.L.R. (2d) 622.

[55] [1972] F.C. 1078.

[56] *Ibid.*, 1124.

[57] The two companies were Canadian Pittsburg Industries and Pilkington Brothers (Canada) Ltd.

then returned, read the decision, made three grammatical changes and signed the decision along with the other members. This was then forwarded to the Deputy Minister of Customs and Excise, and an unsigned copy of the order retained in the records of the tribunal. Aware of the possibility of bias on the part of the Chairman, the Attorney-General subsequently applied to the Federal Court for certiorari to quash the decision. Judgment was eventually rendered in August of 1972 by Mr Justice Cattanach. Citing several precedents,[58] the Trial Court held that the Chairman was indeed disqualified from participating in the decision-making because his prior relationship to the complainants gave rise to reasonable apprehension of bias.[59] The Court also held that by signing the Order of the Tribunal, the Chairman "presumably" [60] participated in making the decision. In arriving at that conclusion, Mr Justice Cattanach applied the *Hughes* case.[61]

However, despite such findings, the Court felt compelled to dismiss the application to quash the decision of the Anti-dumping Tribunal, the dismissal turning on a "technicality". Very simply, the copy of the Tribunal's order which was retained in its own records and subsequently removed into the Trial Court was unsigned. Cattanach J. stated:

> In my opinion *the preponderance of authority,*[62] *which I am compelled to follow,*[63] is that it is to the face of the record of the Tribunal that I must look to determine whether certiorari to quash should be granted. It has been established that the record of the Tribunal does not contain a decision that was signed by Mr Buchanan. That being so, it follows that he did not participate in making the decision.[64]

If one considers the fine points of reasoning, the judgment is generally coherent, but it does little to sustain the principle that justice should not only be done but appear to be done. Applying that rather broad principle, the courts have sometimes quashed

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[58] Among them were *R.* v. *Sussex Justices* [1924] 1 K.B. 256; *Ghirardosi* v. *Minister of Highways for British Columbia* [1966] S.C.R. 367; *McKay* v. *Campbell* 36 N.S.R. 522; *Sims* v. *Seller* [1927] 2 D.L.R. 251.

[59] The Court did not find *actual bias* on the part of the Chairman; *In re Anti-dumping Tribunal, supra,* note 55, 1103.

[60] A form of this word was used in a similar context by Verchere J. in *Hughes* v. *Seafarers' International Union* (1962) 31 D.L.R. (2d) 441, 446.

[61] *Ibid.*

[62] See, *e.g., R.* v. *Northumberland Compensation Appeal Tribunal* (1952) 1 K.B. 338 and *R.* v. *Northumberland Compensation Tribunal, Ex parte Shaw* (1951) 1 K.B. 711.

[63] This point is discussed above; the Trial Court does not appear to be compelled to follow precedents in any specific jurisdiction.

[64] *Supra,* note 55, 1131 (emphasis added).

administrative action on grounds far more effete than those apparent in *Re Anti-dumping Tribunal*.[65]

The words of Mr Justice Cattanach quoted above cause concern regarding some other issues as well. For one thing, they seem to point to a rather narrow conception of when certiorari should issue and what should form the record.[66] For another, apart from anything the "preponderance of authority" may suggest, as mentioned earlier, the Trial Division is not really "compelled" to follow any particular line of decisions. It is apparent, however, that it prefers to take rather conservative pathways.

Interim determination

In *Union Gas Ltd* v. *TransCanada Pipe Lines Ltd*[67] certiorari was found inappropriate to deal with an interim determination. In that case, the prerogative remedy was sought to quash a *ruling* of the National Energy Board *to limit the scope of its inquiry* to particular aspects and therefore not to receive further evidence or permit cross-examination of witnesses on broader subjects. It was the view of the Trial Court that the ruling in question was not a *decision* which the Board was authorized by statute to make but rather an interim determination which had to be made in the course of arriving at a final decision. Mahoney J. noted:

> No precedent for the granting of an order in the nature of *certiorari* in respect of such a ruling was cited to me. There are, of course, numerous instances such as the *Globe Printing* case, where a ruling made during the course of a hearing has been the basis for the quashing of the ultimate decision by *certiorari*.[68]

The *Millward* case,[69] however, heard in the Trial Division by Cattanach J. is not quite as clear on the same point. In that case the applicants sought an order (a) to quash the ruling of an Appeal Officer, made *during* the course of an inquiry, that the matter would be conducted in public, and (b) to quash the ruling made by the same Board refusing to grant an adjournment to the applicants so that they might proceed to the Federal Court for a determination on whether the Board was required to hold a closed hearing. It was the view of Cattanach J. that those two matters were within the jurisdiction of the Trial Division and not "orders or decisions"

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[65] See, *e.g.*, *R.* v. *Sussex JJ., ex p. McCarthy* [1924] 1 K.B. 256.

[66] For a brief discussion of a broad view of the *record* see Reid, *supra*, note 47, 372-377.

[67] [1974] 2 F.C. 313.

[68] *Ibid.*, 324.

[69] *Millward* v. *Public Service Commission* [1974] 2 F.C. 530.

within the jurisdiction of the Court of Appeal under section 28 of the *Federal Court Act*.[70] On the first issue, the Court held that the *Public Service Employment Act*,[71] by necessary implication, conferred on the Appeal Board in question a discretion with respect to holding the inquiry in public or in private.[72] On the adjournment question, the Court was of the view that while the Board's refusal to grant it for the purpose requested may not have been a wise one, the Appeal Board nevertheless had the discretion to so refuse.[73]

As noted above, the Trial Court was of the view that it had jurisdiction to consider quashing the Board's ruling not to hold the inquiry *in camera* and not to grant an adjournment.[74] While Cattanach J. was explicit in holding that the "two matters" indicated were within his jurisdiction, he was not quite as clear as to the specific writ or remedy he had in mind when considering those matters.[75] It would appear, however, that Cattanach J. holds these views:

(1) Where the inquiry is concluded,[76] quashing the proceedings is probably the proper subject of an application for review to the Court of Appeal under section 28 of the *Federal Court Act*.
(2) Where the inquiry is concluded but presumably before the Board has pronounced its decision,[77] *certiorari* is available in the Trial Division to quash any incorrect ruling made by a Board in the course of its proceedings.

If this is indeed the position Cattanach J. wishes to advance, it is unacceptable and not likely to persist. In this regard, it is necessary only to note the words of Jackett C.J. in the *Danmor Shoe* case:[78]

> [I]t must be recognized that the lack of a right to have the Court review the position taken by a tribunal as to its jurisdiction or *as to some procedural matter* at any early stage in a hearing, may well result, in some cases, in expensive hearings being abortive. On the other hand,

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[70] See the clear words of Cattanach J., *ibid.*, 532.

[71] R.S.C. 1970, c.P-32.

[72] *Supra*, note 69, 543.

[73] The Court did not elaborate on how this discretion arose, *i.e.*, what provision authorized the discretion; *ibid.*, 547.

[74] The applicants sought an order by way of certiorari to quash those rulings and also to quash the proceedings. On the last request, however, the Court was inclined to think that *quashing the proceedings* was properly the subject of an application for review to the Court of Appeal; *ibid.*, 531.

[75] *Ibid.*, 531-532.

[76] In *Millward* v. *Public Service Commission*, *supra*, note 69, 531, the Court notes that "the inquiry was concluded".

[77] As was the situation in *Millward* v. *Public Service Commission*, *ibid.*

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

> *a right vested in a party who is reluctant to have the tribunal finish its job, to have the Court review separately each position taken, or ruling made, by a tribunal in the course of a long hearing would, in effect, be a right vested in such a party to frustrate the work of the tribunal.*[79]

When speaking those words, the Chief Justice of the Federal Court obviously had in mind an "application to review" under section 28. However, it is also obvious that the aspect of frustration he points out would apply equally if interim determinations of a tribunal could be questioned in the Trial Division by way of certiorari.

Prohibition

Basic rules of issuance

Generally, certiorari and prohibition differ only in the time appropriate for their use.[80] Certiorari lies to quash something already done, while prohibition issues to prevent something from occurring. More precisely, "prohibition will not lie unless something remains to be done that a court can prohibit".[81] In the Trial Division, Cowan D.J. said in *Sadique* v. *Minister of Manpower and Immigration*: "Since the inquiry [in this case] has been concluded, a writ of prohibition is not appropriate".[82]

As far as prohibition is concerned, the most common ground of challenge has been excess or want of jurisdiction in more-or-less judicial proceedings.[83] In the Trial Division, Kerr J., citing a passage of Professor de Smith, noted that prohibition has also been granted for a denial of natural justice on the part of the tribunal.[84] 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.*[85]

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[79] *Ibid.*, 34 (emphasis added).

[80] In this regard, Professor de Smith has cautioned: "It is not... clear how far the rules relating to prohibition are applicable to certiorari". And elsewhere with the same two remedies in mind, he has said: "... there is something to be said against the extension of anomalous doctrines by analogy"; *supra*, note 45, 369-370. For discussion of resemblance between the two remedies see *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171.

[81] de Smith, *ibid.*, 337.

[82] [1974] 1 F.C. 719, 723.

[83] See *R.* v. *Electricity Commissioners, supra*, note 80.

[84] See *Center for Public Interest Law* v. *The Canadian Transport Commission* [1974] F.C. 276, 281. To support this proposition, Kerr J. referred to de Smith, *Judicial Review of Administrative Action* 2d ed. (1968).

[85] *Wardair Canada Ltd* v. *Canadian Transport Commission* [1973] F.C. 597, 602.

The Trial Division has also reiterated in another case,[86] the long standing rule that where the functions exercised are purely administrative in character, a superior court[87] cannot interfere by prohibition.[88] The well-recognized discretionary nature of prohibition was pointed to in the Trial Division by Collier J. in *Attorney-General of Canada* v. *Morrow J.*:

> Assuming there is a doubt [in this case] as to whether ... [the tribunal] is exceeding or acting without jurisdiction, I would, in the circumstances here, exercise my discretion against ... issuing ... prohibition.[89]

Prohibition to usurpers

The late Professor de Smith in the third edition of *Judicial Review of Administrative Action* wrote:

> [I]f a tribunal that is legally entitled to exercise a jurisdiction exceeds it, certiorari *will issue* to quash its decision even though the decision is void and can properly be disregarded or be impugned in collateral proceedings. It has been held [however] that the orders [such as certiorari and prohibition] will *not* issue to persons who take it upon themselves to exercise a jurisdiction without any colour of legal authority; the acts of usurpers are to be regarded as nugatory.[90]

If it has also been the practice of Canadian courts not to issue prohibition to restrain usurpers, then the decision in *Steve Dart Co.* v. *Board of Arbitration*,[91] heard in the Federal Trial Division, establishes a precedent.

In the *Dart* case, a licensed dealer in agricultural products applied for prohibition against a Board of Arbitration purporting to exercise jurisdiction under certain Regulations made pursuant to the *Canada Agricultural Products Standards Act*.[92] It was the petitioner's contention that the Regulations, in so far as they purported to create such a body to determine various issues of liability, were *ultra vires* in that they were not authorized by statute.

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[86] *Grauer Estate* v. *The Queen* [1973] F.C. 355.

[87] In *Puerto Rico* v. *Hernandez* [1975] 1 S.C.R. 228, 233 Pigeon J. noted that "the Federal Court is a superior court in the sense of a court having supervisory jurisdiction".

[88] *Supra*, note 86, 358. The Court supported its contention by referring to *F. F. Ayriss & Co.* v. *Board of Industrial Relations of Alberta* (1960) 23 D.L.R. (2d) 584; *Guay* v. *Lafleur* [1964] C.T.C. 350; and *R.* v. *Ontario Labour Relations Board* [1966] 57 D.L.R. (2d) 521.

[89] [1973] F.C. 889, 897.

[90] de Smith, *supra*, note 45, 377 and 341-42 (emphasis added).

[91] [1974] 2 F.C. 215.

[92] R.S.C. 1970, c.A-8.

Under sections 3, 5 and 6 of the Act, the Governor General in Council is authorized to issue regulations for certain specific purposes related to agricultural products, and under a general grant in section 8, is empowered to make rules to carry out the purpose and provisions of the Act. On the basis of the general grant, Regulations were issued establishing a board of arbitration consisting of three members — two of whom were to be appointed by outside bodies. It was the view of the Trial Court, however, that nowhere in the Act was there any *specific* provision for the setting up of any such board [93] or *specific* authorization to allow the Governor General in Council by regulation to delegate the appointment of any such persons to outside bodies.[94] Consequently, prohibition was allowed to issue to restrain the Board from hearing a claim filed against the petitioner. In the Court's own words:

> Since there is no statutory authority for the constitution of the respondent Board, prohibition should issue against it ... . As section 18 of the *Federal Court Act* gives this Court the power to issue a writ of prohibition against "any federal board, commission or other tribunal", I find no difficulty in coming to the conclusion that, *by necessary implication*, this Court has a power to grant such relief against a body which, although not legally constituted, purports to be and to act and exercise powers as a federal board or tribunal pursuant to federal regulations and a federal act. I do not find difficulty either in concluding that prohibition is a proper remedy in such a case.[95]

Addy J. cited no authority to support his decision to issue prohibition in the circumstances considered. The writer is thus left with the task of either conceding that in the issuance of prohibition there has been some statutory and/or judicial innovation or showing that the *Dart* decision is in keeping with traditional common law rules prior to the Federal Court. Succinctly, it is the writer's view that there is sufficient case law predating the *Federal Court Act*, to support the ruling in *Dart*.

To begin with, it might be noted that certiorari, substantially similar to prohibition, has been found appropriate to review any purported exercise of a jurisdiction not conferred.[96] That same remedy, in Britain, has been held to be appropriate against non-statutory boards of a public as opposed to purely private character.[97] Further-

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[93] *Supra*, note 91, 218.

[94] *Ibid.*, 219.

[95] *Ibid.*, 220 (emphasis added).

[96] *R.* v. *Institutional Head of Beaver Creek Correctional Camp, Ex parte MacCaud* (1969) 1 O.R. 373.

[97] *R.* v. *Criminal Injuries Compensation Board* [1967] 2 Q.B. 864.

more, with reference to prohibition itself, there is *dicta* that it should be available in cases other than those of *ultra vires*. That is, besides objections *ratione materiae*, prerogative writs should lie *ratione personae* where the person purporting to hear the matter is not duly appointed.[98] Furthermore, courts have noted that while prohibition is a discretionary remedy, it ought not to be withheld where justice and convenience might both be served by granting it.[99]

More precisely, the writ of prohibition *has issued* against a body not having competent authority to decide the matter in question or to make the decree attacked.[100] In Canada, it has issued to restrain tribunals created and empowered under a statute found to be *ultra vires*.[101] In more recent times, it has issued against an offence charged which did not exist at law,[102] and it has also been considered appropriate against a charge being laid under a provincial statute rendered inoperative by virtue of the Dominion occupying the field.[103] Canadian courts have also issued prohibition to restrain a court created and empowered under one statute from hearing an offence charged under a different enactment.[104] In 1971, the Supreme Court of Canada issued prohibition to restrain an administrative agency not authorized by statute to inquire into a particular complaint.[105]

Prohibition has obviously been seen as appropriate in a variety of circumstances. It should be emphasized that courts have not hesitated to issue the remedy where the ultimate decision of the body in question would have been nugatory because it was not lawfully authorized to act. It is the writer's conclusion, therefore, that if there is not in the Canadian experience a case directly on point to support the ruling in *Dart*, it is nevertheless safe to say from the cases reviewed above that the *Dart* decision breaks little new ground, and that notwithstanding any statutory provision, the decision is logical, necessary and appropriate.

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[98] *R.* v. *Deacon, Ex parte Collins* (1970) 1 O.R. 207 *per* Addy J. (Ont.H.C.).

[99] *R. v. Shenowski* (1932) 1 W.W.R. 192.

[100] *Rogers* v. *Wood* (1831) 2 B. & Ad. 243, 109 E.R. 1134.

[101] *Poulin* v. *The Corporation of Quebec* (1884) 9 S.C.R. 185.

[102] *Viger Co.* v. *Cloutier* [1947] B.R. 120.

[103] *R.* v. *Dodd* [1957] O.R. 5.

[104] *Ex Parte Grey* (1958) 123 C.C.C. 70.

[105] *Bell* v. *Ontario Human Rights Commission* [1971] S.C.R. 756, 18 D.L.R. (3d) 1.

Mandamus

In mandamus proceedings, too, it appears the Trial Division is well on its way to issuing the remedy along traditional grounds. In *National Indian Brotherhood* v. *Juneau* [*No. 1*],[106] for example, Walsh J. made it clear that the Court will continue to follow a long line of decisions [107] not to grant mandamus unless the applicant is someone who has a specific interest in the matter being complained of.[108] The long standing view that mandamus lies to secure only the performance of those public duties that are specifically required by law was accepted by Kerr J. in *Weatherby* v. *Minister of Public Works*.[109] In another Trial Division case,[110] Heald J. added the requirement that the applicant must show that he has demanded performance of the duty and that performance was refused by the authority obliged to discharge it.[111]

The discretionary nature of this traditional remedy was referred to by Walsh J. in *Rossi* v. *The Queen*, citing a passage from Professor de Smith:

> Even if all the conditions for the issue of a *mandamus* exist, it is a discretionary remedy and the Court will refuse to issue it if it is unnecessary or the object of which the application was made has already been obtained.[112]

The Trial Division has also recognized the practice of refusing to issue this remedy to compel the Crown to perform where it is expressly designated.[113]

Injunction

In *National Indian Brotherhood* v. *C.T.V. Television Network Ltd*,[114] the Trial Court was asked to issue an interim injunction to restrain the Television Network from broadcasting a film — "The

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[106] [1971] F.C. 66.

[107] See *Re Watson* v. *Town of Cobourg* (1924) 55 O.L.R. 531 and *R.* v. *The Guardians of the Lewisham Union* (1897) 1 Q.B. 498, for examples.

[108] The same point was made in another Trial Division case, *Kaps Transport Ltd* v. *Canadian Transport Commission* [1973] F.C. 739, 741.

[109] [1972] F.C. 952.

[110] *Commonwealth of Virginia* v. *Cohen* [1973] F.C. 622.

[111] This has been a traditional requirement. See the Royal Commission, *Inquiry Into Civil Rights* (1968), Report No.1, Vol.1, 226 (hereinafter referred to as the *McRuer Report*).

[112] [1974] 1 F.C. 531, 536.

[113] *Ibid.* See J. F. Garner, *Administrative Law* 3d ed. (1970), 270. Mandamus has issued where the duties have been clearly imposed upon a servant of the Crown: See the *McRuer Report, supra,* note 111, 265-266.

[114] [1971] F.C. 127.

Taming of the West" — which was allegedly racist and slanderous to Indians. Through such a restraining order, the Brotherhood hoped to maintain the *status quo* until a decision was handed down in an application for mandamus to direct the C.R.T.C. to hold a public inquiry into the broadcast of the film. Kerr J., however, refused to grant the application for injunction. He gave the following as one of his main reasons:

> [T]here has not, in my opinion, been a *prima facie* showing either that if the film is broadcast such broadcast will *violate some legal right or commit some legal wrong* that ought to be enjoined by an injunction, or that the film in fact slanders or libels any living person.[115]

While the decision of the Court not to grant an injunction against the broadcast of that particular film might be questioned, the general principles expressed about when the remedy might issue are based on past practice.

In a clearly set out judgment in *Kaps Transport Ltd* v. *Canadian Transport Commission*,[116] Heald J. applied another general rule concerning the injunction. Following *Mathew* v. *Guardian Assurance Co.*,[117] the Trial Division Judge refused to grant an interim injunction that would injuriously affect the rights of other parties not before the Court where no special circumstances were made out. He said:

> [T]hese other parties are vitally and directly interested in said hearings and, yet, they have not been added as parties to this originating motion nor have they received notice of same ... [nor has] [t]he applicant ... adduced ... evidence of any special circumstance justifying departure from the general rule.[118]

In another Trial Court case,[119] Pratte J. left considerable doubt as to whether or not he would allow an injunction to issue against a purely administrative decision. But since he was able to decide the case without really meeting that issue face-on, the views he expressed in that regard and the impression he left must be considered strictly *obiter*.[120] It might be noted, however, that the remedy has in fact issued against all types of administrative agencies irrespective of the nature of their function.[121]

The question of whether or not the extraordinary remedies, and in particular the injunction, may issue against the Crown *per se*

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[115] *Ibid.*, 130 (emphasis added).
[116] [1973] F.C. 739.
[117] (1919) 58 S.C.R. 47.
[118] *Supra*, note 116, 740.
[119] *Filion* v. *The Queen* [1972] F.C. 1202.
[120] *Ibid.*, 1204-05.
[121] Discussed in Garner, *supra*, note 113, 176.

was discussed in *Filion* v. *The Queen*.[122] But by permitting the applicant to amend his declaration and motion, Kerr J. did not have to confront fully that issue either. In Britain certainly, the practice has been not to grant

> ... an injunction against the Crown, nor against a Minister of the Crown when he is carrying out functions conferred on him by statute as a representative or as an officer of the Crown.[123]

In Canada, however, this rule has not always been followed. In *Carlic* v. *The Queen*,[124] for example, an injunction was "granted against Her Majesty enjoining action on an immigration order".[125]

Declaration

The scope of the declaration has been described by Professor I. Zamir:

> As a supervisory remedy the declaration ranges over statutory as well as non-statutory bodies; it is available against the Crown as much as against other authorities; and it is applicable to legislative, judicial and administrative acts alike. No other supervisory remedy is of such a wide scope. The scope of the prerogative orders in particular is circumscribed by ... technicalities .... The declaration, ... on the other hand, a comparatively new remedy, is not hampered by any similar rules.[126]

In Canada, the declaration has issued for "violation of natural justice, bias, bad faith and, more generally, for lack of jurisdiction".[127] A few cases heard in the Trial Court have restated those and other basic principles concerning declaratory relief.

In *Lingley* v. *Hickman*, Heald J. affirmed the jurisdiction of the Trial Division to grant the remedy and expressed the view that

> ... the doubt and uncertainty which surround the position on prerogative writs, does not ... similarly impede the Court's jurisdiction to grant declaratory relief... .[128]

In the same judgment, he made it reasonably clear that he would be prepared to issue a declaration even against bodies exercising

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[122] *Supra*, note 119.

[123] Garner, *supra*, note 113, 270.

[124] (1968) 65 D.L.R. (2d) 633 (Man. C.A.).

[125] Reid, *supra*, note 47, 410.

[126] *The Declaratory Judgment* (1962), 119.

[127] D. T. Warren, *The Declaratory Judgment: Reviewing Administrative Action* (1966) 44 Can.Bar Rev. 610, 631. It might be noted, however, that Canadian "courts have shown an impressive conservatism over the years in considering requests for declaration alone": See Reid, *supra*, note 47, 398-99.

[128] [1972] F.C. 171, 178.

functions of a purely administrative nature — for example where the function was simply informative or investigatory.[129]

In *Landreville* v. *The Queen*,[130] the Trial Court noted that it is common ground to grant declaratory relief in an action brought against the Crown or the Attorney-General.[131] In the same case, Pratte J. held that the Court has jurisdiction to make a declaration which, though devoid of any legal effect, would from a practical point of view, serve some useful purpose.[132] In holding this,[133] the Court followed *Merricks* v. *Nott Bower*.[134]

The issue of whether or not declaratory relief is available where the action might be attacked by some other writ or in some other forum under a statutory procedure has received some consideration in the Federal Court. In *Canadian Radio-Television Commission* v. *Teleprompter Cable Communications Corp.*, the Court of Appeal upheld the power of the Trial Division

> ... to grant declaratory relief [even] ... where [a] statute governing the particular matter provides a special procedure in another *court* in which the question involved might arise.[135]

In deciding that "preliminary point",[136] the Court of Appeal followed the decision of the House of Lords in *Ealing London Borough Council* v. *Race Relations Board*.[137] It was held in that case that the mere fact that a statute contained provisions governing the procedure for enforcement [138] of the Act did not oust the jurisdiction of the superior court to grant declaratory relief.

In *Cavanaugh* v. *Commissioner of Penitentiaries*,[139] the Trial Court was confronted with an application for declaratory relief, the

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[129] *Ibid.*, esp. 176 and 178.

[130] [1973] F.C. 1223.

[131] *Ibid.*, 1227-28. See also *Canadian Radio-Television Commission* v. *Teleprompter Cable Communications Corp.*, *supra*, note 22. Prior to the Federal Court, declaratory relief issued against the Attorney-General. See, *e.g.*, *Shawn* v. *Robertson* [1964] 2 O.R. 696.

[132] *Ibid.*, 1230.

[133] In Canada, declaratory relief has been refused where it would have no practical effect: See *Charleston* v. *MacGregor* (1958) 11 D.L.R. (2d) 78.

[134] [1964]1 All E.R. 717.

[135] [1972] F.C. 1265, 1267 (emphasis added).

[136] *Ibid.*, *per* Thurlow J.

[137] [1972] 2 W.L.R. 71.

[138] Civil proceedings in respect of any act alleged to be unlawful were authorized under s.19 of the Act and were to be brought by the Race Relations Board in a county court. In *Ealing*, however, the Borough Council sought a declaration in the High Court that one of their rules was not unlawful; *ibid.*

[139] [1974] F.C. 515.

substance of which, it was determined, was identical to that obtainable by a writ of habeas corpus.[140] Feeling bound by *In re Darby*,[141] Cattanach J. refused to grant the relief sought in the statement of claim.[142] A cursory reading of certain passages in the judgment of Mr Justice Cattanach might well leave the impression that the Court decided against granting a declaration because precedent dictated that where habeas corpus is equally suitable, declaratory relief will not be granted. That, however, is not quite a correct reading of the case. Firstly, *In re Darby* involved an application for habeas corpus and not declaratory relief. Habeas corpus was refused because the applicant was legally imprisoned pursuant to convictions made and sentences imposed by a court of competent jurisdiction and the certificate of conviction was found valid on its face.[143] Secondly, attention must be paid to the clear words of Cattanach J. in a subsequent judgment:

> Elsewhere I have expressed doubt that I have jurisdiction to determine a matter by way of declaratory relief which is also the proper subject matter of an application for a writ of habeas corpus which is within the inherent jurisdiction of the common law courts. *I still entertain that doubt but I do not purport to decide that question.*[144]

While in Canada there is the additional issue of the appropriate forum,[145] the words of E.M. Borchard have considerable merit:

> [I]t ought to make [no] difference to judges through which door the petitioner enters the judicial forum, provided he is lawfully there and the court is in a position to grant him relief.[146]

To that, one can add the words of Professor de Smith:

> To treat the action for a declaration as an unwelcome intruder which must be kept in place by pettifogging restrictions would be inimical to the healthy development of administrative law... .[147]

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[140] *Ibid.*, 521-22.

[141] [1964] S.C.R. 64.

[142] *Supra*, note 139, 522.

[143] Those circumstances were similar to the ones in *Cavanaugh* v. *Commissioner of Penitentiaries, ibid.*

[144] *Johns* v. *Commissioner of Penitentiaries* [1974] F.C. 545, 550 (emphasis added).

[145] In Canada, the provincial courts have habeas corpus jurisdiction; see text, *supra*. A statutory federal court has jurisdiction to issue declaratory relief as it relates to federal boards and tribunals.

[146] *Declaratory Judgments* 2d ed. (1941), 318. A similar view has been expressed by Riley J. in *Driver Salesmen* v. *Board of Industrial Relations* (1967) 61 W.W.R. 484.

[147] de Smith, *supra*, note 45, 460. In the same paragraph de Smith notes that in Britain "it is abundantly clear that the availability of an injunction does not preclude the court from awarding a declaration; and for most purposes the decision of statutory tribunals may be impugned by means of an action for a declaration even where certiorari would lie".

Some concluding remarks

Conservative approach

It appears that despite expectations to the contrary, the Trial Division has decided, in these early years of its existence, to tread softly in exercising its power of review. While the *Federal Court Act* itself does not attempt to limit the scope of the traditional remedies or compel the Trial Division to issue those remedies in accordance with "a meaning given by the courts in any other jurisdiction",[148] the Trial Court has nevertheless shown a definite predisposition to apply widely accepted general principles, and, on occasion, to prefer those which are outdated and conservative.[149] Perhaps that is to be expected from a court which has "suddenly" received jurisdiction to *review*[150] administrative action.

It is well known of course, that in the field of administrative law predating the Federal Court there may be found a whole series of decisions which indicate a limited pattern of judicial supervision, and another generally quite separate set of cases which support a broader review of the actions and decisions of inferior tribunals.[151] At another level, it may be said that some jurisdictions have adopted grounds of review which are generally broader than in others.[152] Indeed, here and there throughout the reams of reported judgments are a considerable number of examples in which the extraordinary remedies have provided a pattern of review which has sometimes been as broad as that available in an appeal on the merits.[153]

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148 G. F. Henderson, *supra*, note 11.

149 See, *e.g.*, *National Indian Brotherhood* v. *Juneau* [*No. 3*], *supra*, note 26, concerning the type of decision against which certiorari might issue; and *Filion* v. *The Queen*, *supra*, note 119, as to when an injunction might issue.

150 "Review" is used here in the narrow sense to refer to supervisory control by way of the extraordinary remedies.

151 Compare *R.* v. *Metro Police Commissioner, Ex parte Parker* [1953] 1 W.L.R. 1150 and *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66 (P.C.) with British and Canadian decisions where certiorari has issued to quash the decisions of license-granting authorities for failure to hold a hearing.

152 Compare *Kettenback Farms Ltd* v. *Henke* [1938] 1 D.L.R. 44 (Alta C.A.) with *Credit Foncier Franco-Canadien* v. *Board of Review* [1940] 1 D.L.R. 183 (Sask.) as to the issuance of declaratory relief.

153 Bora Laskin has written: "An examination of the cases discloses that the courts treat certiorari to labour boards as if they were sitting on appeal from the verdict of a jury"; in *Certiorari to Labour Boards* (1952) 30 Can.Bar Rev. 986, 994. We add the remarks of Professor Hogg: "In brief, the [Supreme] Court has used the jurisdictional fact doctrine to substitute its opinion for that of the agency on matters which ... were peculiarly within the competence of the agency. It has used the doctrine as a kind of underground appeal when

Moreover, this has occurred periodically in cases involving administrative acts.[154]

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

Background of judges

It is logical, however, that in the issuance of the extraordinary remedies in these first few years, the Trial Division should prefer well worn pathways to blazing a trail of its own. For the most part, the judges of the new Court are former members of the Exchequer Court of Canada. As members of that statutory court, they acquired an expertise in keeping with the particular area of law they were empowered to administer. And while it is true that the Exchequer Court was involved periodically in the administrative process through the statutory appeal route,[155] it was never involved in the supervision of federal administrative boards and tribunals by way of the extraordinary remedies.[156] Thus, like the wise man ploughing through unknown fields, the Trial Court has followed a cautious approach and generally adhered to well tried, widely accepted principles.

Effect of empowering statute

Indeed, even if there were among the justices a few more adventurous souls, it may be said that the *Federal Court Act* — the empowering statute — does little to encourage, or even guide and assure those seeking to innovate. Section 18(a) gives the Trial Division "exclusive original jurisdiction" to issue the various

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no appeal had been expressly provided"; P. W. Hogg, *The Supreme Court of Canada and Administrative Law* (1973) 11 Osgoode Hall L.J. 187, 205.

[154] See Hogg, *ibid.*, 207.

[155] For example, the *Excise Tax Act*, R.S.C. 1952, c.100, s.58 granted an appeal, strictly on questions of law, from decisions rendered by the Tariff Board; the *Trade Marks Act*, S.C. 1953, c.49, s.56 conferred on the Exchequer Court of Canada specific power to substitute its discretion for that of the tribunal created by the same statute.

[156] Henderson, *supra*, note 11, 58.

writs and remedies. No attempt is made in that section or in any other section either to instruct the new Court as to its jurisdiction in issuing those remedies or to define the scope of the terms. It could be said that failure to include that kind of provision has left the door open for considerable judicial discretion and innovation. On the other hand, the total lack of guidelines also presents a rather frightening prospect, especially to the judicial mind long accustomed to the *stare decisis* principle and only familiar in a general way with the new field in which it must adjudicate.

Furthermore, there are at least two other provisions in the Act which also seem to dampen any innovative aspirations on the part of the Trial Court — section 28(1) and section 27. Section 28(1) goes to some length in setting out the original supervisory jurisdiction of the Federal Court of Appeal with reference to a federal board, commission or other tribunal. Indeed, as stated at the beginning of section 28, the entire section applies "notwithstanding section 18 or the provisions of any other Act". Section 28(3) makes it clear that

> ... where the Court of Appeal has jurisdiction under [the] section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.[157]

It is obvious, therefore, that it was the intention of the draftsmen to put the lion's share of the supervisory power in the hands of the Appeal Court,[158] in itself a rather unique endeavour — the placement of original jurisdiction in a Court of Appeal. As one might expect, "an appeal lies to the Federal Court of Appeal from any (a) final judgment, (b) judgment on a question of law determined before trial, or (c) interlocutory judgments of the Trial Division".[159] The kind of structure and statutory framework just outlined does not encourage those in the Trial Division to be innovative. Indeed, it can be said that even the hardier "activists" might be deterred by the seeming futility of attempting to introduce substan-

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[157] It must be understood that in order for the Court of Appeal to acquire its supervisory power, the jurisdiction of the Trial Division with reference to the same boards, commissions and other tribunals must in some way be equal to or less than that available under the provisions in s.28(1). In this regard see Laskin C.J. in *Puerto Rico* v. *Hernandez* [1975] 1 S.C.R. 228, 247-48.

[158] Pigeon J. in *Puerto Rico* v. *Hernandez, ibid.*, 234: "... section 28 in effect provides that the supervisory jurisdiction of the Federal Court is generally to be exercised not by the Trial Division ... but by means of a new remedy [in the Court of Appeal]."

[159] *Federal Court Act, supra,* note 2, s.27(1).

tive (supervisory) innovations that may be appealed to the Court of Appeal, a Court which itself has original jurisdiction in somewhat the same area, but which does not acquire that jurisdiction unless its statutory power to review equals or exceeds that in the lower court.

The commendable aspects of the conservative approach

From another point of view, however, the practice adopted by the Trial Division to issue the traditional remedies along rather conservative lines has something to commend itself. For legal counsel long accustomed to arguing the merits of a case on application for one of the remedies in the provincial superior courts, the approach taken by the Trial Division is a blessing. While the name and place of the judicial forum have changed as have some of the procedural rules, on substantive matters the expertise acquired through long hours of precedent finding and analysis is still applicable and can be put to good use. Those who are fearful that a new court with "unqualified" jurisdiction to review might undermine the original purpose and function of administrative agencies, now have little to be concerned about — at least not from the Trial Division.

One also wonders if the Trial Court, by adopting a conservative approach, has not been at least partly responsible for helping to establish in the minds of lawyers and judges throughout the nation the idea that responsibility for supervision of federal administrative agencies now rests with a federal court.[160] Prior to 1971, judicial control of federal boards and tribunals — at least, under the extraordinary remedies — rested in the first instance with the provincial superior courts. Indeed, one of the main reasons given by the Dominion Government for granting supervisory jurisdiction to the new Federal Court was to wrest federal administrative agencies from the "diverse jurisdictions of the various provincial courts" [161] and to free them from the possibility of "multiple su-

[160] Some doubt has been raised as to whether the Dominion Parliament under the B.N.A. Act is empowered to oust the inherent jurisdiction of the provincial superior courts to supervise, by way of the traditional remedies, inferior tribunals created by Parliament. What is being considered by the writer, however, is the possible "psychological" effects of the approach taken by the Trial Division in exercising its supervisory powers. It is not being suggested, though, that the Court considered such effects or deliberately set out to produce them.

[161] Words used by the then Minister of Justice, the Honourable Mr John Turner, *Debates House of Commons Canada*, 2d Sess., 28th Parl., vol. V, March 25, 1970, 5470-1.

pervision" and harassment.[162] If the Trial Division had embarked on a novel course in exercising its review power, three distinct supervisory patterns might have been perceived: the traditional one in the provincial courts, another in the Trial Division of the Federal Court and a third in the Federal Court of Appeal. While the Trial Division has not settled any constitutional questions by embracing generally widely accepted supervisory principles, it has certainly facilitated the crystallization of a general "understanding" that the power of judicial supervision of federal agencies by way of the extraordinary remedies is now in a federal court.[163]

Accounting for the Court's few "indiscretions"

In examining the judgments of the Trial Court, the reader may have noticed once or twice among the cautious, traditional statements a rather bold phrase or holding. Some parts of the *Millward*[164] and *Dart*[165] decisions fall into this category. In the writer's view, however, these are not deliberate attempts designed to help establish new or obscure principles of review, but are little more than statements of busy, not yet fully experienced men,[166] trying to adjudicate in a remarkably confusing and complicated area of law. But let us not despair at this possibility. Constructive change has many sources, and is not always the result of well reasoned, rational planning. Indeed, to be totally honest, one might have to admit that the origin of a number of now cherished rules in administrative law can be traced to nothing more than the improper use of terms and a limited understanding of complicated concepts by men of limited capacity struggling to do their best in the adjudicative process.

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[162] Professor H. W. Arthurs discusses "two virtually identical actions" in different jurisdictions against the Restrictive Trade Practices Commission; *Comment on Administrative Law* (1962) 40 Can.Bar Rev. 505, 506.

[163] See *Ctiy of Hamilton* v. *Hamilton Harbour Commissioners* (1972) 27 D.L.R. (3d) 385 where the Ontario Court of Appeal held that Ontario courts no longer had any jurisdiction in a matter where declaratory relief was sought against a federal board. *The question of constitutionality was not raised.* See also *Ex parte Hinks* (1972) 27 D.L.R. (3d) 593; *Re Greene and Faquy* (1972) 28 D.L.R. (3d) 297; and *Puerto Rico* v. *Hernandez, supra,* note 157, 233 *per* Pigeon J. and 248 *per* Laskin C.J.

[164] *Supra,* note 69.

[165] *Supra,* note 91.

[166] That is, "inexperienced" in exercising a supervisory jurisdiction over federal administrative agencies by way of the extraordinary remedies.

Sounding a note of caution

Before concluding our remarks, a note or two of warning and caution should be sounded:

(1) The Millward decision

Once again, attention is drawn to the remarks made by Chief Justice Jackett in *Danmor*, pointing to the real possibility of a party, reluctant to have a tribunal render a final decision, frustrating the work of that tribunal by approaching the Court of Appeal to question each and every interim determination of the tribunal. Similarly, if interim rulings could be attacked by way of certiorari in the Trial Division — as the *Millward* case seems to suggest — there would arise some equally difficult problems and questions, for example:

(a) May all interim determinations be attacked by way of certiorari? Which ones may not?

(b) May an interim determination be quashed after a final decision is given? Or only before a final decision is rendered?

(c) Must a tribunal stay its proceedings while an interim determination is questioned in the Trial Division?

(d) Where a tribunal has a statutory discretion to refuse an adjournment (to permit a party to question an interim determination), and the inquiry is therefore concluded before the Court is able to issue an order quashing the interim ruling, can certiorari still issue? What would be the effect of such a court order?

The list of such questions is endless and each question itself begs supplemental ones. And there is perhaps an even more fundamental and broad question to be considered: namely, the impact that the practice of attacking interim rulings by way of certiorari in the Trial Division might have in curtailing the major role foreseen for the Court of Appeal in exercising a supervisory jurisdiction over federal boards and tribunals.

(2) Certiorari review or "application to review"?

The possibility of creating a situation whereby counsel for the plaintiff cannot easily determine which forum to approach for relief is also of concern.[167] It has been suggested by this writer in

[167] One wonders if the Federal Court may not have foreseen such a possibility and tried to mitigate some of its adverse effects by way of Rule 359. That Rule permits the "Chief Justice or another judge designated by him for the purpose ... if it appears just to do so, having due regard to the interests of all

another article[168] that while there is no definitive *ratio* on the point, it appears that certiorari as it applies to decisions of federal tribunals rendered after the *Federal Court Act* came into force is no longer available in the Trial Division.[169] The thesis is essentially this: The scope of review for an "application to review" under section 28(1) is so extensive[170] that there is no widely recognized common law principle not covered by section 28(1) that would permit the Trial Division to maintain at least some of its certiorari jurisdiction under section 18.[171] But we must remind ourselves that under section 28(1) the Court of Appeal does not have power to supervise a "decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis".[172]

Apart from the *Millward* case which seems to suggest some interesting possibilities for certiorari, there is also a remark by Chief Justice Laskin in *Puerto Rico* v. *Hernandez* that might be construed so as to help "restore" some of the certiorari jurisdiction of the Trial Division. In that case, Laskin C.J. noted that the Trial Division has supervisory jurisdiction over "federal administrative agencies, although without limitation to agencies of a judicial or quasi-judicial nature"[173] and that the Court of Appeal has jurisdiction only "over decisions of judicial or quasi-judicial federal boards, commissions or other tribunals".[174]

If section 28, then, applies to "decisions of judicial or quasi-judicial federal boards, commissions or tribunals", it might be

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the parties, order that a matter that has been commenced in one Division be transferred to the other Division, and [also] give incidental direction for the further conduct of the matter".

[168] *Judicial Review Under Sections 18 and 28 of the Federal Court Act, supra,* note 16.

[169] Refer again to the clear words of Thurlow J.A. in *Creative Shoes Ltd* v. *M.N.R., supra,* note 18.

[170] In *Puerto Rico* v. *Hernandez, supra,* note 157, 247, Laskin C.J. said: "Application for review under s.28(1) having regard to the wide grounds of review do not differ materially from appeals...". In the same case, Pigeon J. said: "While to a certain extent [section 28 review] is a substitute for previously existing remedies before other courts, it is obviously much broader in scope" (at 237).

[171] See again the opening words of s.28(1) and also s.28(3) which clearly "displace" the supervisory jurisdiction of the Federal Court where the Court of Appeal has jurisdiction.

[172] For a "rational interpretation" of that phrase see D. J. Mullan, *The Federal Court Act: A Misguided Attempt at Administrative Law Reform?* (1973) 23 U. of T. L.J. 14, 29, note 57.

[173] *Puerto Rico* v. *Hernandez, supra,* note 157, 248.

[174] *Ibid.,* 247.

successfully argued, if premises are not arbitrarily changed, that certiorari in the Trial Division (based on common law principles) is available against administrative [175] federal boards, commissions and tribunals whose decisions affect the rights of individuals. In that event, the jurisdiction of the Trial Division with reference to certiorari would not have been eroded and replaced to the extent that the writer has suggested elsewhere. Of course, all of this would depend on what understanding the courts have of an "administrative board". It might well be that a board exercising a function that would terminate in a decision affecting an individual's rights would always be classified as a judicial or quasi-judicial board. For the moment, of course, this is all speculation. The Supreme Court of Canada has not heard prepared argument nor fully applied its mind to the specific issue. It has been the writer's purpose, however, to note some of the difficulties involved in giving a broad interpretation [176] to the expression "decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis", in that the door might be left open for certiorari review, in a few instances at least, under the common law principles. And that in turn would place litigants and their counsel in the unfortunate position of having to decide which is the appropriate forum to approach for relief.[177]

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[175] For a brief comment on the terms "judicial" and "administrative" in the *Federal Court Act* see Mullan, *supra*, note 172, 30, note 57.

[176] If a broad interpretation were given to "administrative decision not required by law to be made on a judicial or quasi-judicial basis" then a larger number of decisions might not be reviewable in the Court of Appeal than if a narrow interpretation were given it. Of course, the larger the number of decisions not reviewable in the Court of Appeal, the greater the chances that at least some of those decisions might be reviewed under the previous common law rules and fall under the supervision of the Trial Division.

[177] Some of the problems associated with that type of a situation are dramatically illustrated in one of the first few cases before the new Court — *National Indian Brotherhood* v. *Juneau* [*No. 1*], *supra*, note 106. In that case the Brotherhood and some other interested parties applied to the Trial Division for writs of mandamus and certiorari to compel the C.R.T.C. to hold a public hearing into their complaint. Noting that the Brotherhood had also proceeded under s.28 to set aside the same decision, the Trial Court Judge refused to consider the merits of the application before him until the Appeal Court had rendered a decision as to its own jurisdiction in the matter.