Law Reform Commission of Canada
Commission de réforme du droit du Canada



# REPORT

# judicial review and the federal court



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# JUDICIAL REVIEW AND THE FEDERAL COURT

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Law Reform Commission of Canada | Commission de réforme du droit du Canada

March, 1980

The Honourable Jean Chrétien, P.C., M.P.,
Minister of Justice,
and Attorney General of Canada,
Ottawa, Canada.

Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith the report with our recommendations on the studies undertaken by the Commission on Judicial Review and the Federal Court.

At the time of approval of the text of this report, Mr. Baudouin was still Vice-Chairman of the Commission.

Yours respectfully,

Francis C. Muldoon, Q.C.
Chairman

Jean-Louis Baudouin, Q.C.
Vice-Chairman

Judge Edward James Houston
Commissioner

J.c.s.

Mr. Justice Jacques Ducros
Commissioner

# REPORT
# ON
# JUDICIAL REVIEW
# AND THE
# FEDERAL COURT

# Commission

Francis C. Muldoon, Q.C., Chairman
Jean-Louis Baudouin, Q.C., Vice-Chairman
Judge Edward James Houston, Commissioner
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# Foreword

For the past several years, the Law Reform Commission of Canada has, pursuant to its research program, been engaged in a study of the broader problems associated with procedures before administrative tribunals. Unlike most other Canadian studies dealing with the legal aspects of administrative procedure, the Commission's approach has not focussed primarily on judicial review. Rather the Commission's Administrative Law Project has taken the position that the solution to many of the problems of administrative procedure lies at the agency level. Its many studies of particular agencies have borne out the value of this approach.[1] The agencies studied have adopted many of the suggestions and recommendations made by the researchers in the course of their studies. The Commission, itself, has also taken on the task of making particularized recommendations in specific areas. The Commission's Working Papers and Reports on *Expropriation* and on the *Inquiries Act* deal in some detail with particularized aspects of the administrative process.

This is not to say that there is no room or necessity to generalize. Indeed the agency studies were primarily aimed at revealing the broader problems associated with administrative procedures in context, so that an informal assessment of these problems could be made and realistic approaches to reform could be suggested. The recently issued study paper on *Access to Information* is an example of this kind of work.[2] More recently still, the Commission itself has, in its Working Paper on *Independent Administrative Agencies*, attempted to give an overview of the legal and structural problems relating to independent administrative agencies and made a significant number of tentative recommendations to deal with them.

Nor is the Commission unmindful of the need for review and control of the administrative process. The Working Paper on

*Independent Administrative Agencies* sets forth numerous proposals regarding political and administrative controls, and we plan during the next year to report to Parliament on political control and to issue a Working Paper on guidelines for administrative controls.

In particular, a Commission constituted as we are could not ignore the question of the appropriate role of the courts in reviewing decisions of administrative bodies. In fact, the Commission entered into this field earlier than it had planned because of the sometimes heated debate which had developed in the profession respecting the jurisdiction of the Federal Court. As a contribution to this debate, the Commission had an in-depth study of the administrative work of the court prepared[3] and issued Working Paper 18 on the *Federal Court* dealing with the court's powers of judicial review. Following its issue, an internal study of the special appeals to the court and the Supreme Court of Canada was also undertaken.[4]

In preparing its Working Paper, the Commission had the benefit of consultations with numerous scholars and practitioners, in particular a special consultative committee on administrative law of the Canadian Bar Association with a membership from all regions of Canada. Following its publication, further comments were received from interested individuals. Not all of these, of course, agreed with the Commission's views, but it is fair to say that the general tone of the comments indicated that the Commission was basically on the right track. In particular, we were gratified that a Commission on the Federal Court established by the Canadian Bar Association agreed with most of the recommendations in the Working Paper. The Report of that Commission, which studied the matter over a period of two years, was later approved by the Canadian Bar Association at its annual meeting of August, 1978.

Under these circumstances, it is hardly surprising that the recommendations in this Report follow closely the tentative views expressed in Working Paper 18, *Federal Court — Judicial Review*. These recommendations and their rationale are set forth in this Report and the Working Paper as briefly and succinctly as possible; more detailed work appears in the study papers to which reference has already been made.

# I

# Judicial Review and the Federal Court

## Judicial Review Generally

In our society, the courts have traditionally been looked upon as a buttress against illegal or arbitrary action by those who exercise government power. Consequently while many of the questions regarding judicial review are framed in difficult and technical terms, it should never be overlooked that the real issue at stake is the desirable balance that should exist between the courts and government.

From an early period, the English superior courts intervened to review the actions of inferior tribunals and other state organs by means of a variety of legal remedies. The writ of *habeas corpus*, under which the legality of a person's detention in custody may be challenged, is the best known of these remedies. However, other prerogative writs and other remedies are more frequently used in the judicial review of administrative actions, namely, *certiorari* (to quash orders made without jurisdiction, or in defiance of natural justice); prohibition (to prohibit the making of such orders); *mandamus* (to compel the performance of a legal duty); *quo warranto* — now seldom used because an injunction is more effective — (to restrain a person from acting in an office to which he is not entitled); injunctions (to restrain illegal acts); and more recently declaratory judgments (declarations of right).

The most basic ground for judicial intervention is that of legality: whether a body has exceeded or abused its statutory powers, or again, where, though acting within its jurisdiction, it fails to comply with the procedure laid down in a statute. In such cases, the courts are not concerned with the merits of that body's decision, but with its legality.

Review of administrative action by the courts is not, however, limited to legality in this narrow sense. Over the years, the courts have developed certain minimal standards of fairness, the so-called "rules of natural justice". These include the following: a person has a right to an unbiased judge (or other decision-maker); each side must be heard — a person must be advised of the case he has to meet. The courts will strike down administrative decisions for failure to conform with these elementary principles of fair and reasonable decision-making. But to call these principles "rules" is somewhat misleading. They are not fixed and rigid; they are flexible standards which must be applied according to the circumstances. Certainly they have never imported a requirement that those who exercise statutory discretion must all act more or less like courts.

The courts cannot, of course, intervene in all administrative decisions. They would be overloaded and the administrative process would be seriously impeded if they tried to do so. Restraint is therefore necessary in exercising judicial review. Perhaps as a technique for exercising restraint the courts developed a distinction between "judicial" and "administrative" decisions. They had jurisdiction to intervene, they held, where a decision was judicial or quasi-judicial, but not if it was administrative. This distinction was by no means clear and led to confusion and difficulty, made more acute in the case of the Federal Court because this terminology was used in granting it power to review judicially federal administrative bodies even on the basis of legality.

In 1979, the Supreme Court of Canada, in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police,*[5] has acted to remove the self-made fetters implicit in the distinction between judicial and administrative decisions. It held, following recent English precedents, that courts could strike down even an "administrative" decision of an administrative authority if in making the decision the authority did not follow procedures conforming to minimal standards of fairness. Though it is not entirely clear, the court seems to have extended (or what is probably more accurate, reinstated) the application of natural justice to administrative decisions. But while the field of intervention is now wider, it must be remembered that procedural requirements will be

more or less stringent depending on the kind of statutory power exercised and the interests at stake. However, the decision has freed the courts of a confusing and encumbering limitation and thereby made the law more flexible. This is underlined by the most recent decision of the Supreme Court of Canada in this field: *Martineau v. Matsqui Institution Disciplinary Board.*[6] Unfortunately, it could not overcome the problems flowing from the express words in the *Federal Court Act* making a distinction between judicial and administrative decisions. This question and the issue of natural justice generally are considered later in this Report.

## Alternatives to Judicial Review

In the Working Paper on the *Federal Court*, this Commission was primarily interested in proposing reforms to the institutional framework within which judicial review operates at the federal level. It, therefore, dealt with a number of pressing problems raised by the legal profession regarding the machinery of judicial review. It did not attempt to question the whole basis of judicial review; it assumed its importance in confining state power, to ensure that administrative authorities do not act illegally or with manifest injustice. That being so, it was essential that the machinery of judicial review operate effectively and efficiently.

The Commission did, however, set forth its basic postulate regarding judicial review in these terms:

> In a society committed to government under law, the role of the courts as a check on illegal or arbitrary action is crucial. Upon them fall the responsibility of reviewing the actions of state organs to ensure that they do not stray beyond the limits of the law. Nor are the courts restricted to the mere letter of the law. Under the rubric of natural justice, they also review state action from the standpoint of fundamental fairness. This role is vital to the political organization of our society. Otherwise it would be government that would determine what is and what is not within the limits of the law. And state organs would determine what is or what is not fair in executing the law. It is, therefore, of critical importance that the machinery of judicial review of state action — which at the federal level is the Federal Court — be efficient and effective.

From the comments we have received, we believe this view is widely held. The Commission did, however, receive some com-

ments which questioned the underlying basis of judicial review and suggested that administrative law reforms should rather be pursued at the administrative level itself. We do not deny the importance of reform at the administrative level; in fact, as we note in the Foreword, much of our work has been directed to that end. But the fact that most of the practical steps must be taken at that level does not take away from the symbolic value of judicial review and the important educational and leadership roles the courts can play in ensuring government under law and the prevention of arbitrary state action. Still less does it mean that the machinery of this traditional safeguard should be ignored while the larger issue is debated.

We cannot within the confines of this Report attempt to do justice to the broad philosophical issue which divides those who favour judicial review and those who are sceptical of its value. We address a few words on the issue in our Working Paper on *Independent Administrative Agencies*. We now add a few words here.

Much of the criticism of judicial review is in terms of an administrative authority's greater competence in, and understanding of matters assigned to it than any generalist court can have. Whatever merit this argument may have, the Federal Court — with which this Report is concerned — is not just a generalist court; it has a wide and deep knowledge of the federal administrative process. In any event, like other courts, it is expert on questions of legality and fair procedure by reason of the many cases it has decided on these issues. This is an expertise which is rather different from the sort of specific competence administrators have in their particular areas of specialization. Without power in the courts to override the competence of the authority on the basis of the courts' expert views on what is legal and fair, society runs the risk of such competent authorities being judges in their own causes. This is particularly true given the current lack of alternative review mechanisms.

Again, some of the criticism of judicial review is applicable only to particular areas of administration, and is often coloured by an attitude more warranted by past events than the present. Certainly there was a time when administrative authorities needed to get on with the job of solving social problems without the type of

harassment they received from advocates of the *status quo* among the judiciary. This was particularly true in such areas as labour relations where new techniques for resolving disputes, involving not only adjudication but conciliation, arbitration and other procedures were being introduced.

This situation, however, is not so acute as in the past. In any event, the very size of government and administrative authorities and, for most people, their impersonality and anonymity now demand that trusted bodies like the courts have the final say on what is legal and what is fair procedure. Though we concede that there may be cases where courts will fail to exercise adequate restraint, we very much doubt that this will lead to what opponents of judicial review fear: an unwarranted intrusion into narrow, complex areas of specialization. The Supreme Court of Canada has emphasized the need for restraint in exercising judicial review even as it was confirming its broader scope of application.[7] Moreover, the evidence clearly indicates the increasing reticence of the courts to enter into such questions. Their reluctance to abandon the judicial/administrative dichotomy, even in the face of manifestly unfair procedures, is clear evidence of the courts' understanding of the need not to intervene unduly. This view is further supported by the fact that in England, where the courts have for a longer period exercised the power to intervene in "administrative" decisions violating the doctrine of fairness, there are still very few cases in which they have actually done so.

If some would restrict judicial review, others would extend it. Some, for example, would favour review of decisions of administrative authorities by the courts on their merits. While, in our view, a court is best able in the final resort to decide upon the question of legality and the basic fairness of procedures, no single court — unless it were very large and divided into panels — can have the necessary specialized knowledge to review on their merits all the questions which arise in the many areas of the federal administrative process. Our tentative approach to this question, as we noted in our Working Paper on *Independent Administrative Agencies,* is to create adequate administrative review structures in particular areas. These could be consolidated over time into a number of specialized tribunals. The Commission has not yet fully explored this idea or its ultimate relationship to judicial review

generally. It is possible that ultimately some scheme for a single body to review on their merits the decisions of all or most federal administrative authorities may be recommended. However, we suspect that experimentation in particular areas, for example by establishing a single appeal tribunal for federal social security schemes, may be the most fruitful course at this time.

## The Federal Court

Until the establishment of the Federal Court in 1971, the supervisory function of courts over federal administrative authorities was exercised in a variety of ways. There existed a number of statutory appeals to the Supreme Court and to the Exchequer Court of Canada, and the superior courts in the provinces exercised jurisdiction under the prerogative writs. The *Federal Court Act* consolidated in the Federal Court most of the jurisdiction formerly exercised by the provincial courts. Section 18 of the Act vests exclusively in the Trial Division of the court all supervisory jurisdiction over federal administrative authorities by means of the prerogative writs and other extraordinary remedies (apart from *habeas corpus*). The effect of this section was to denude the provincial courts of most of their former jurisdiction over federal administrative authorities. However, the supervisory jurisdiction of the Trial Division is not so extensive as one would judge at first sight. Indeed, its jurisdiction can be exercised only if the Federal Court of Appeal has no jurisdiction, and by section 28 of the Act the Court of Appeal is given extensive power to review federal administrative decisions on the basis of any error in law, abuse of natural justice or capricious finding of fact.

This consolidation of judicial review functions in the Federal Court effected several important reforms. Several jurisdictional problems were removed. Before 1971, more than one provincial court could, in some circumstances, exercise jurisdiction simultaneously over the same subject matter, and there could be different interpretations by different courts respecting the powers of an administrative authority. In addition to effecting a cure to these jurisdictional problems, there was a marked increase in judicial review in areas of administration which in practice had not

been subjected to judicial scrutiny. The heavy load of administrative law cases carried by the court would have put a heavy strain on the provincial superior courts. Finally, the Act went a considerable way to ensure that federal administrative law cases are heard by judges who are familiar both with this area of law and with the administrative structure to which it applies. In view of this the Commission sees no reason to depart from the conclusion in the Working Paper that the Federal Court should continue to be exclusively charged with judicial review over federal administrative authorities, and so recommends. We note that the Canadian Bar Association's Commission on the Federal Court, which devoted two years to the study of the court, arrived at the same conclusion.

But if the establishment of the Federal Court brought an end to a number of jurisdictional problems between provincial courts, the manner in which the court's jurisdiction was assigned gave rise to other types of jurisdictional problems. There were complaints that the court's jurisdiction stretched into areas which could more appropriately be dealt with by the courts in the provinces. The manner in which supervisory jurisdiction over administrative authorities was divided between the Court of Appeal and the Trial Division led to a vast number of cases to define the line of demarcation. And the court fell heir to arcane remedies in the form of prerogative writs and to the impossible task of distinguishing between "judicial" and "administrative" decisions. Considerable debate ensued among both the academic legal community and the practising Bar about the role of the court. There were even some who called for the restoration of the situation existing before 1971. The Canadian Bar established a Commission to study the matter, and the government began to give it active consideration.

This was the climate in which our Working Paper 18 was prepared. In that paper, we gave our tentative views for the solution of the following problems:

- problems respecting the court's interaction with the provincial superior courts;
- problems relating to the allocation of jurisdiction between the Trial Division and the Federal Court of Appeal;
- problems relating to the grounds of, and the means of redress available on, judicial review;

- problems respecting the administrative action subject to judicial review;
- miscellaneous questions of lesser importance.

In the following chapters, the Commission will set forth its recommendations on each of these as well as the reasons leading to these recommendations.

*Recommendation*

*1.1* **The exclusive jurisdiction of the Federal Court to exercise judicial review over federal boards, commissions and tribunals should be continued.**

# II

# Interaction with Provincial Courts

As noted in the last chapter, there have been considerable complaints from many quarters respecting the interrelationship of the Federal Court and the provincial courts. One of the principal sources of irritation relates to situations where the Federal Court, either at the trial or appeal level, exercises judicial review over the actions of judges of provincial superior courts. The *Federal Court Act* had anticipated this problem to some extent by excluding judges of provincial superior, county and district courts from the definition of the federal boards, commissions or tribunals over which the Federal Court may exercise judicial review. This exclusion does not, however, extend to situations where those judges are acting, not in their capacity as judges appointed under section 96 of the *British North America Act*, but as persons (*personae designatae*) assigned to perform specific functions.

The problem is particularly acute in the context of cases respecting the surrender to other countries of persons who have been accused or convicted of crimes there. Under the *Extradition Act*, provincial superior and county court judges are empowered to have a person whose extradition is sought by a foreign country apprehended and to determine at a hearing similar to a preliminary hearing whether there is sufficient evidence to warrant that person's committal for surrender. Before 1971 virtually the only means of review was by *habeas corpus* before a provincial superior court judge. But the Supreme Court of Canada has held that a judge at an extradition hearing is not acting in his capacity as a section 96 judge but as a *persona designata*.[8] Consequently, the judge is there acting as a "federal board, commission or other tribunal" and, as such, his decision is subject to judicial review by the Federal Court of Appeal or, in cases where section 18 of the Federal Court applies, by a single judge of the Trial Division. The

same considerations apply to the surrender, under the *Fugitive Offenders Act*, of persons accused or convicted of crimes in Commonwealth countries.

This complaint, as the Working Paper noted, is fully justified. In dealing with a case under the *Extradition Act* or the *Fugitive Offenders Act*, a judge must evince the same types of skill and knowledge as are exercised in ordinary criminal cases. It seems anomalous, therefore, to have a case heard by a judge experienced in criminal matters reviewed by judges who are normally occupied with civil and administrative matters. The obvious remedy is to revert to the pre-existing situation under which review was almost exclusively by means of *habeas corpus* before a provincial superior court judge. This would have the advantage of getting rid of the multiplicity of review procedures now existing. It is now possible in some circumstances to have an extradition case reviewed by the Federal Court of Appeal under section 28 of the *Federal Court Act*, by a judge of the Trial Division by means of one of the prerogative writs, and by a judge of a provincial superior court on *habeas corpus*. Review by the Federal Court has, of course, the advantage of consistency, but that can equally be achieved, as in other criminal matters, by permitting appeals from proceedings on *habeas corpus* to the provincial court of appeal, and thence, with leave, to the Supreme Court of Canada. This would, however, require repeal of section 40 of the *Supreme Court Act* which prohibits such appeals in extradition matters.

The government of the day had obviously accepted this argument in principle in introducing a new *Fugitive Offenders Act*.[9] Clause 5 of that Bill would authorize provincial superior and county court judges to preside at hearings under the proposed Act, but in doing so a judge would not be considered to be a "federal board, commission or other tribunal" within the meaning of the *Federal Court Act*. And clause 25 would re-enact section 9 of the *Extradition Act* to achieve the same purpose.

In its Working Paper, however, the Commission would have gone further. It suggested that any other criminal proceedings subject to review by the Federal Court should be removed, leaving such review to be dealt with by the provincial superior courts. This tentative suggestion has now been reinforced by the Canadian Bar Association's Commission on the Federal Court, which studied

this aspect of the question more extensively and arrived at the same conclusion.

As we noted in our Working Paper, however, we regard the Parole Board as more closely related, for the purposes of this Report, to the federal administrative process than to the criminal justice process. The considerations applicable to the administrative proceedings of other federal administrative bodies are generally relevant to it. It is in a word an integral part of the federal administrative process, which should not lightly be fragmented at the level of judicial review. If, however, the Board were ever reconstituted along the lines recommended in the Commission's Report on *Dispositions and Sentencing* — under which judges of the provincial courts would, along with the reconstituted Board, have a measure of supervision of prisoners — the matter might require reconsideration.

Germane to this question is the recommendation by the Canadian Bar Association's Commission on the Federal Court that judicial review of disciplinary proceedings in federal correctional institutions should be dealt with by provincial superior courts or by federal boards subject to review by the provincial superior courts. We have some qualms about this proposal. The Bar Commission itself noted the difficulty which might arise from different standards being imposed by ten provincial superior courts. Moreover, it must be kept in mind that these correctional decisions are part and parcel of the larger penal process. We realize that the present situation can lead to several avenues of review being taken from decisions in federal correctional institutions — to the Federal Court of Appeal, the Trial Division and the provincial superior courts by way of *certiorari* — as occurred in the *Martineau* case,[10] the steps in which are related in the Bar Commission's report. But this type of situation is not likely to arise too often and is not, by itself, adequate reason for moving judicial review in those matters to the provincial courts. The Bar Commission asserts that the courts which daily try and sentence people should deal with the issues arising out of their confinement where those issues require resort to the courts. That we think might constitute sound ground if the criminal justice and penal systems were more closely integrated, but we doubt its validity under existing circumstances. Moreover, an accused who

is convicted and sentenced by a criminal court in one province may well be subsequently lodged in a federal correctional institution in another province, and beyond the original court's jurisdiction.

On the other hand, we are inclined to agree with the Bar Commission that provincial superior courts, rather than the Federal Court, should have power to examine the legality of a decision of a board established pursuant to subsection 547 (1) of the *Criminal Code* to review the incarceration in a mental institution of accused persons or those in provincial institutions found to be insane. The issues here seem more germane to matters of provincial concern (as is evident from the fact that the power to establish these Boards is vested in the provincial Lieutenant-Governors in Council) and to those that ordinarily arise in provincial courts.

Similar problems can arise in non-criminal matters, but they do not appear to be acute. In the Working Paper, the Commission adopted the pragmatic solution that the court (whether the Federal Court or the provincial superior courts) having the most competence in the particular area should exercise judicial review, and surmised that in federal matters that would in most cases be the Federal Court. However, the Bar Commission strongly recommended that "under no circumstances should the decisions of judges appointed under section 96 of the *British North America Act*, whether acting as *personae designatae* or not, be subject to judicial review by the Federal Court...". The Commission has not made an examination of all the instances where a provincial superior or county court judge may act as *persona designata*. On the whole, we suspect the situations where a section 96 judge acts as a *persona designata* are unlikely to affect the federal administrative process in a significant way and may well be perceived to be primarily of local import. Accordingly, we accede to the view put forward by the Bar Commission. We therefore recommend that provincial section 96 judges should not be subject to judicial review by the Federal Court unless there are very strong overriding reasons to depart from this principle.

The Law Reform Commission sees no reason, however, for departing from its previous view regarding provincial officials who are assigned duties under federal statutes. The court which is better suited to review a particular matter should be assigned that

function. In some cases, the better course may be to name a federal official. This, we realize, may involve difficult choices. For example, in a related question the Bar Commission took the view that federal expropriation matters should, for reasons of some cogency, be heard by judges of provincial courts, but this Commission, for reasons which seemed more compelling, recommended that these matters be vested in the Federal Court.

We referred earlier to the protracted proceedings which can arise in situations where it is possible both to have a decision reviewed by the Federal Court and by the provincial courts on an application for *habeas corpus*. Most of these difficulties would disappear if our recommendation that the Federal Court be stripped of jurisdiction in criminal matters were adopted. And a recommendation we make later would further remove the dual initial access to the Trial Division and the Federal Court of Appeal which now exists.

There would, it is true, remain some situations where review jurisdiction in both the Federal Court and the provincial courts could occur, for instance, as already mentioned, in relation to disciplinary proceedings in federal correctional institutions; it could also arise in relation to immigration. As we noted, these matters are directly concerned with the federal administrative process and should, therefore, remain within the supervisory jurisdiction of the Federal Court. Another possible solution would be to transfer *habeas corpus* jurisdiction in this type of matter from the provincial superior courts to the Federal Court. But, as the Commission noted in its Working Paper, it is better to have duplication of jurisdiction than to limit the access of an individual to the courts to test the legality of his detention.

It would, of course, be possible to give concurrent *habeas corpus* jurisdiction to the Trial Division of the Federal Court, along with the provincial courts, in matters arising before federal administrative authorities, but limiting a person to one application for the writ. But as was stated in the Working Paper:

> On balance, however, we are hesitant to recommend either of these courses; the field of operation seems small, the provincial courts have wide experience in *habeas corpus* applications and the profession at large is more familiar with practice in the provincial courts. On matters involving the liberty of the subject, these considerations cannot be ignored.

One further point may be mentioned. The ability of the provincial superior courts to examine into the legality of a person's acts may have been inadvertently weakened by granting exclusive *certiorari* jurisdiction to the Federal Court in matters arising before federal administrative authorities since in one province at least *certiorari* is often used in aid of *habeas corpus*. This result, it is true, would apply to a very limited field if the recommendations we have made respecting judicial review in criminal matters were accepted. Still, any such impediment to the effective use of *habeas corpus* should be removed. We therefore recommend that it should be made clear that provisions of the *Federal Court Act* respecting judicial review do not affect the availability of *certiorari* in aid of *habeas corpus*.

*Recommendations*

*2.1* **No criminal proceeding should be subject to judicial review by the Federal Court.**

*2.2* **The review of proceedings of the Parole Board and disciplinary proceedings in federal correctional institutions should be vested in the Federal Court.**

*2.3* **Provincial superior and county court judges, whether acting as such or as *personae designatae*, should not in principle be subject to judicial review by the Federal Court.**

*2.4* **The Federal Court should continue to exercise judicial review over provincial officials acting as *personae designatae* under Federal statutes. Exceptions could be made where provincial superior court judges can, because of their experience or the subject matter, more appropriately exercise review jurisdiction. Thus the provincial superior courts, rather than the Federal Court, should have power to review the legality of a decision of a Board established by a provincial Lieutenant Governor under subsection 547(1) of the *Criminal Code* to review the incarceration in a mental institution of accused persons or those in provincial institutions found to be insane.**

*2.5* **The *Federal Court Act* should be so worded as to make clear that it is not intended to prevent the use of *certiorari* in aid of *habeas corpus* in the provincial superior courts.**

# III

# Court of Appeal and Trial Division Jurisdiction

## The Problems

The division of authority between the Trial Division and the Federal Court of Appeal to review administrative decisions is notoriously unclear and has led to no end of litigation. The Canadian Bar Association's Commission on the Federal Court categorized it as a "legal rat's nest" and asserted that there was "almost unanimous condemnation of this" among practitioners.[11] Finally, in the most recent Supreme Court of Canada case on the subject, reference is made to "the difficult and uncertain language" of the relevant provisions.[12]

Section 18 of the *Federal Court Act*, we noted, gives the Trial Division exclusive original jurisdiction to issue the prerogative writs (other than *habeas corpus*) and injunctions and to grant declaratory relief from federal boards, Commissions and tribunals. This, taken by itself, gives the Trial Division very broad powers of judicial review over decisions of federal administrative authorities, but these powers are seriously abridged by section 28 of the Act which provides that the Trial Division has no jurisdiction where the Federal Court of Appeal has the power (which is extensive) to review such decisions. The Trial Division is thus left to exercise the jurisdiction over federal administrative authorities formerly exercised by the provincial superior courts by means of the extraordinary remedies (other than *habeas corpus*) only in situations which are not within the review jurisdiction of the Federal Court of Appeal.

The Federal Court of Appeal is by subsection 28(1) given jurisdiction to review decisions and orders made in the course of proceedings before federal administrative authorities if in making such a decision or order an administrative authority

(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.

The major problems in determining whether the Federal Court of Appeal or the Trial Division has jurisdiction to review the actions of federal administrative authorities have come about from the difficulty to determine whether a decision or order comes within section 28. One point now seems reasonably clear. The Court of Appeal has tended to interpret "decision or order" as being a final decision or order except where a statute specifically provides for a preliminary decision. So the Trial Division generally exercises jurisdiction over preliminary or interlocutory matters by means of the extraordinary remedies.

The most acute problems arise, however, because of the express exclusion from subsection 28(1) of certain decisions and orders, *i.e.* "those of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". The vague and unsatisfactory distinction between "administrative" decisions and "judicial or quasi-judicial" decisions, which had been used as a common law standard to determine whether the courts would review decisions on the basis of natural justice, was thus frozen into statutory command as the test of Federal Court of Appeal judicial review jurisdiction and, in consequence, as the line of division between its jurisdiction and that of the Trial Division. That this rigid conceptual dichotomy generates severe problems in litigation under the *Federal Court Act* has been made abundantly clear in the actions brought separately before the Trial Division and the Court of Appeal in the case of *Martineau v. Matsqui Institution Inmate Disciplinary Board.*[13]

Another point merits comment. The nature of the relief which can be given by the Federal Court under section 28 is limited to setting aside a decision or referring it back for determination with appropriate directions. It cannot, as the Trial Division can (and as the provincial courts could formerly do), issue a *mandamus* to compel performance of a legal duty, or issue prohibition or an injunction to prohibit a federal administrative authority from taking certain actions.

Further jurisdictional problems can arise from the retention of a number of specific appeals from certain administrative authorities to the Supreme Court and the Exchequer Court (the latter now being vested in the Federal Court). Where the grounds of these specific appeals do not fully occupy the area covered by sections 18 and 28, redress may also be available under these sections. Some rationalization has, it is true, been effected by the practice of the court of permitting both types of proceedings to be heard together, but the matter requires legislative attention.

Finally, both the Court of Appeal and the Trial Division are burdened with what appears to us to be inappropriate work. The Court of Appeal hears a large number of immigration cases, many of which are of a routine character. For its part, as the Bar Commission noted, the Trial Division hears many appeals from citizenship judges, and the judges of the Trial Division must further act as umpires in a large number (478, in 1978) of unemployment insurance cases.

The burden on the Court of Appeal is especially troubling. Our Background Paper described the court's administrative law docket as "in many senses staggering". To its credit, as the Bar Commission has noted, the court (both the Court of Appeal and the Trial Division) "has been noted for the efficiency and dispatch with which it has performed its work". Still the Court of Appeal must, in fairness, be given the necessary time for reflection and the writing of judgments to ensure its maximum effectiveness. As the Working Paper put it:

> The court must be able to function under conditions that permit it to give wise and consistent guidance regarding the just and fair operation of administrative tribunals. To do this it must have time for reflection; it must function collegially; and it must have the time to write judgments that the

Trial Division and the tribunals can look to for guidance that goes well beyond the particular facts of the case.

## Our Proposed Solutions

The Working Paper proposed that the best way to resolve the jurisdictional problems between the Federal Court of Appeal and the Trial Division would be to provide a single route for the judicial review of decisions of federal administrative authorities. This would originate in the Trial Division. Several reasons were given for assigning original jurisdiction to the Trial Division. One was that many of the matters now going before the Federal Court of Appeal could more effectively and economically be heard and disposed of by a single judge. If the volume of work increases, providing for the extra burden by appointing new judges to the Trial Division poses fewer problems than appointments to the Federal Court of Appeal. After all, cases in the Trial Division are heard by single judges, and there is not the same danger of making that division unmanageable as exists at the appeal level if the court becomes large. Again, assigning judicial review jurisdiction over both interlocutory and final decisions to the same court also has advantages. The court can probably more clearly determine whether to deal with an interlocutory matter or wait until it is brought up for final decision. All the more so, as we propose later, if the court exercising final decision has at its disposition all the techniques for affording relief now vested solely in the Trial Division. Moreover, the proposal would help to create the conditions necessary for the Court of Appeal to have adequate opportunity for reflection, to function collegially and to write on a consistent basis the full judgments needed to guide administrative action on questions of legality and basic procedural fairness.

The Commission remains convinced that these reasons are sound. In this it is supported by the Bar Commission which, with some variations to be discussed later, adopted our conclusion that judicial review should originate in the Trial Division. Con-

comitantly with this recommendation, the Working Paper also proposed that the useful procedure in subsection 28(4) of the *Federal Court Act*, under which an administrative authority may at any stage refer certain matters to the Court of Appeal, should in future be referred to the Trial Division.

One further matter should be added. To ensure that the Trial Division functions well in administrative law matters, certain judges should be specifically assigned by the court to the task. These judges can thus develop and maintain the necessary knowledge in the field and in the federal administrative process generally.

The solution we propose would rid the Court of Appeal of the inappropriate task of hearing immigration appeals by vesting them originally in the Trial Division, and the Working Paper asserted that this change should at a minimum be effected, whether the general scheme we proposed were accepted or not. We remain convinced that this would constitute a real improvement, but we are persuaded by the Bar Commission report that it would be even better if this function were performed by a specialized administrative tribunal. That is true as well of citizenship appeals. Both functions indeed might well be assigned to the same tribunal, possibly the Immigration Appeal Board. Similarly judges of the Trial Division should be relieved of the task of acting as unemployment insurance umpires. This function could also, as was suggested in the study paper on *Unemployment Insurance Benefits*, more appropriately be assigned to an administrative tribunal.

Another possible solution would be to assign judicial review over both final and interlocutory decisions of the major administrative agencies to the Federal Court of Appeal, and that over other federal administrative authorities to the Trial Division. This alternative, like our proposal, would do away with the conflicts of jurisdiction between the two levels of the court and would as well ensure review from these agencies by a court of three judges. It found favour with the Bar Commission on the ground that it would be more convenient and expeditious, but on the whole we think the reasons set forth in the Working Paper for rejecting this alternative still predominate. Assuming an adequate determination can be made of what agencies are sufficiently impor-

tant to warrant direct access to the Court of Appeal (the Bar Commission proposes the *ad hoc* solution that those that now have direct appeals to that court should be selected), it by no means follows that a question raised before a lesser body is any less important or difficult than one raised before a major agency. Moreover, the proposed alternative could lead to an undesirable bifurcation of federal administrative law, even though appeals would have a unifying tendency. And finally, as we mentioned, we want to encourage the conditions which ensure the effective functioning of the Court of Appeal as a court of appeal.

So far as convenience and expeditiousness are concerned, the scheme proposed in the Working Paper involved provisions for giving the Federal Court original jurisdiction over important or urgent matters which would, in any event, probably be appealed. There would be little point in many such cases to impose the expense and delay of an original hearing and an appeal. The Working Paper proposed, and we now recommend, that the trial judge have a discretion to transfer a case directly to the Court of Appeal (a proposal adopted by the Bar Commission in respect of an application which, under their scheme, would arise in the Trial Division). Such discretion might be exercised either on application by a party or on the judge's own initiative. Clearly, this discretion ought to be exercised early in the proceedings, if exercised at all. The judge of the Trial Division, then, ought not to effect such transfer after the date set for the commencement of the hearing. This would afford an opportunity, if necessary, to hear counsel on the question and if the transfer had not been earlier effected. The Working Paper had also considered the possibility of empowering the Court of Appeal to issue guidelines for the exercise of this discretion, but we are not sufficiently certain that this would prove useful to make a firm recommendation on the point.

Consistent with the view that there should be a single route for judicial review, we have come to the conclusion that specific appeals from a number of agencies on questions of law[15] or (a distinction, we are told, without a difference)[16] questions of law or jurisdiction[17] should be abolished. A study we have commissioned since the publication of our Working Paper clearly demonstrates that such appeals "merely duplicate" the review jurisdiction we propose, and that the procedural and substantive improvements

which would occur in the law relating to judicial review by having a single uniform method for attacking the legality of a federal administrative authority far outweigh any of the theoretical benefits which such a specific appeal may provide an aggrieved individual.[18] This would be particularly true, as the study points out, if the broad forms of relief discussed in the next chapter were available to the court.

We do not at present intend to consider at any length the broader forms of appeals not limited to questions of law or jurisdiction, but involving questions of fact as well, for example, patent appeals.[19] This Report is confined to judicial review and we wish to guard ourselves against any definitive expression of opinion regarding the forms and techniques for reviewing decisions on their merits. Our present inclination is that different techniques will probably have to be devised for particular situations. Our sole recommendation at this time is that special appeals to the court involving review on the merits should be broadened to include questions ordinarily subject to judicial review. This would, in these cases, avoid recourse to general provisions for judicial review.

From the Trial Division there should be an appeal to the Court of Appeal. Such appeal should, however, be taken only with leave either of the judge appealed from or of the Court of Appeal. This proposal was also concurred in by the Bar Commission. The Court of Appeal, a body of experts in administrative law, should be given ample opportunity to develop its own approach. Accordingly, appeals to the Supreme Court of Canada should, as in other cases, lie by leave only and be limited to cases which the Court of Appeal considers apt for consideration by the Supreme Court; or, whether or not such leave is refused, cases which the Supreme Court, by its leave, considers of such public importance or as raising sufficiently important legal issues or of otherwise being of such significance as to warrant decision by it.

### *Recommendations*

***3.1*** **Judicial review of all federal administrative authorities should originate in the Trial Division.**

*3.2* **Federal administrative authorities should have a right (along the lines of subsection 28(4) of the Federal Court Act) to refer any question of law, jurisdiction, practice or procedure to the Trial Division.**

*3.3* **In regard to cases which are important in their own right or raise important legal issues, Trial Division judges should have the discretion, on application or *proprio motu*, and not later than the date fixed for the hearing, to transfer such cases to the Court of Appeal.**

*3.4* **The Trial Division should assign specific judges to hear cases involving judicial review of administrative authorities to ensure that the cases are heard by judges familiar with administrative law and the federal administrative structure.**

*3.5* **Special appeals on questions of law or of law or jurisdiction should be abolished; special appeals involving review on the merits should be enlarged to include questions normally subject to judicial review, thus avoiding resort to general provisions for judicial review.**

*3.6* **Immigration appeals and appeals from citizenship court judges should be transferred to a specialized administrative tribunal, and consideration should be given to consolidating the two functions.**

*3.7* **The task of the judges of the Trial Division to act as unemployment insurance umpires should be transferred to a specialized administrative tribunal.**

*3.8* **Appeals from the Trial Division to the Court of Appeal should be by leave of the judge appealed from or the Court of Appeal.**

*3.9* **Appeals from the Federal Court of Appeal to the Supreme Court of Canada should continue as in other cases to lie with leave and should as at present lie only when the Federal Court of Appeal considers it appropriate or the Supreme Court of Canada deems a question of sufficient importance or otherwise of such a nature and importance as to warrant a decision by it.**

# IV

# Grounds and Procedures for Review

In the previous chapter, we recommended the consolidation of the judicial review proceedings in the Federal Court, so that these would all originate in the Trial Division. This, of course, also requires consolidating the grounds of review, a task which cannot be performed by a mere mechanical consolidation of sections 18 and 28 of the *Federal Court Act* since one speaks of grounds of review and the other of remedies and there is considerable overlap.

One could, of course, attempt to capture in different terms the existing situation by providing for judicial review of final decisions in the Federal Court of Appeal, leaving preliminary or interlocutory matters to be dealt with by the Trial Division by means of the extraordinary remedies now set forth in section 18. But, apart from being highly artificial, there are gaps in the section 28 grounds which should be filled, and the kinds of relief available under that section are insufficient; mandatory and prohibitory orders are not available under that section. This possibility amounts to mere tinkering, which is made all the less desirable because the remedies available by means of the prerogative writs are themselves ripe for reform.

In some jurisdictions — Ontario and British Columbia — some procedural reform of the system of judicial review by means of the prerogative writs and other extraordinary remedies has been effected by combining all these remedies. Only one application needs to be made for judicial review. This has the procedural benefit for a person who chooses the wrong writ or other remedy but can still be given the redress which might have been obtained if the right one had been chosen. However, this solution has clear drawbacks. By retaining the mysteries and intricacies of the prerogative writs, the law is inaccessible since it is difficult to find

or understand both for the lawyer and the layman. And, as we have frequently noted, the law should as much as possible be accessible to all in comprehensible form.

What is even more important is that the many substantive legal deficiencies buried in the writs would remain, and in a form which is difficult to reform. The difficulty with the writs is not only that one must choose the proper remedy. The precise limits of each remedy are difficult, if not impossible, to define with precision — a particular remedy, though covering an appropriate ground for review, may not afford the relief required, or the reverse may be true. The defects in the extraordinary remedies were perhaps best summed up in the Victoria Statute Law Revision Committee's 1968 Report on Appeals from Administrative Decisions:

> There is general agreement that the system surrounding the writs is immersed in technical procedural snares which delay, and in some instances prevent, proper review by the courts. It is not uncommon that, after lengthy legal argument, the court will hold that a particular writ is not available, and because the boundaries of each remedy are undefined (and perhaps undefinable) there are many cases which never proceed further.... In terms of the individual seeking a just solution to his problem, the ramifications of judicial review by these methods are at best frustrating. The salient feature of interest to him in these proceedings — the legality of the administrative act or decision at issue — appears to be subordinate to seemingly endless legal argument as to the propriety of the method of review employed.

The cure for the situation, as K. C. Davis, the highly respected American authority has told us, is easy: "Establish a single, simple form of proceeding for all review of administration." Canada took an important step in that direction by enacting section 28 of the *Federal Court Act;* that section goes a considerable way towards putting the grounds of review in an understandable form. What is needed now is to build upon section 28 by adding the further grounds of review and forms of relief now available under the prerogative writs. The prerogative writs themselves with their multifarious complexities, should be abolished.

Fortunately, much work along these lines has been done in Australia by the Commonwealth Administrative Review Committee (the Kerr Committee) and the Report of the Committee of Review — Prerogative Writ Procedures (the Ellicott Committee), work which has now been translated into legislation.[20] Following

the lead of the proposers of section 28 and of these committees, the Working Paper made the following proposal respecting the grounds of judicial review:

> The court should be enabled to review federal administrative authorities for action contrary to law, including without limiting the generality of the foregoing:
>
> - denial of natural justice
> - failure to observe prescribed procedures
> - *ultra vires* action
> - error in law
> - fraud
> - failure to reach a decision or to take action where there is a duty to do so
> - unreasonable delay in reaching a decision or performing a duty
> - lack of evidence to support a decision.

These grounds are largely taken from the extraordinary remedies and many are already covered in other words by section 28. The introductory words were intended to express the grounds in a somewhat open-ended manner, to permit the kind of judicial development now possible under the traditional remedies.

In the light of developments since the Working Paper, we should now underline a number of matters. One has to do with natural justice. At the time the Working Paper was issued, the courts had generally confined the application of that doctrine to decisions of a "judicial" or "quasi-judicial" character, and, of course, in relation to matters arising under section 28, the words of the section expressly excluded review of any "decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis".

The Working Paper deplored the judicial approach which limited the courts to reviewing decisions on grounds of fairness to those of a "judicial" character. And it further criticized the enshrinement of the distinction in section 28 of the *Federal Court Act*. In our view, decisions based on such broad criteria provide little guidance and are immune from critical appraisal because they are based on unknown and unknowable criteria. All governmental power should be subject to minimum standards of fairness, albeit standards flexibly applied to the circumstances.

Among the considerations needing to be considered in determining whether courts should intervene are efficiency, security, confidentiality and the inability of courts to cope adequately with unstructured decisions or decisions which are best left to the political process. We have little doubt that such considerations have played a large role in determining whether particular decisions are "judicial" or "administrative" but the sometimes mechanical application of these criteria has made some decisions immune from judicial scrutiny even though reached in accordance with manifestly unfair procedures. This we think is inappropriate for decisions made under statutory powers.

The Working Paper even considered the possibility of legislation requiring or empowering the courts to review administrative, as well as judicial or quasi-judicial decisions, although it recognized that this would require some qualifications in the interests of efficiency, national security, confidentiality and so on.

The Commission hesitated to make any recommendation, however, because as the Working Paper put it: "Reformulation of the law could best be shaped by judicial policy...". The Commission, therefore, welcomed the majority decision of the Supreme Court of Canada in *Nicholson v. Haldimand — Norfolk Regional Board of Commissioners of Police*[21] which extended the supervisory jurisdiction of the courts to decisions of administrative authorities even when these decisions are purely administrative in terms of the traditional dichotomy between "judicial" and "administrative" decisions. Not that the Supreme Court's decision calls for the full application of all the principles of natural justice to administrative decisions; indeed the demands of the doctrine of natural justice have always varied with the circumstances. In fact, the court spoke, as the English courts had before it, of a general duty of procedural fairness in administrative decisions. This duty to act fairly is, of course, flexible. It permits the courts to intervene to ensure that those who exercise administrative power conform with what the Working Paper described as "at least minimum standards of fairness, a minimum that itself varies with the circumstances". In deciding whether and under what circumstances it should intervene, a court can take into account the matters already mentioned: efficiency, national security, the appropriateness of

court interventions in informal procedures and the political nature of the issue.

Nor, as we read the judgment, is there a hard and fast distinction between the judicial or quasi-judicial sphere where the rules of natural justice run, and the administrative sphere where the general duty of procedural fairness applies. The Supreme Court seems rather to indicate that the duty of fairness and natural justice are really the same notion applied to different kinds of statutory powers. At some stage, it may be useful to speak of "judicial" or "quasi-judicial" to underline that more stringent procedural requirements are required. We think, therefore, the expression "denial of natural justice" in the proposal is adequate, but to allay doubt it may be wise to alter it to make certain that "failure to observe natural justice" includes failure to comply with the duty to act fairly. It will be observed that the proposal avoids use of the dichotomy between "judicial and quasi-judicial", and "administrative" decisions.

The dichotomy (now enshrined in section 28) should be avoided in any reformulation of the law. As matters now stand, the common law duty of fairness first enunciated in the *Nicholson* case has now been applied by the Supreme Court to an administrative decision coming before the Trial Division of the Federal Court for review under section 18 of the *Federal Court Act* in the case of *Martineau v. Matsqui Institution Disciplinary Board.* Nevertheless, the terms of section 28 of the Act have prevented that duty from being accepted for application in cases of judicial review in the Federal Court of Appeal.

We would add a few comments on some of the expressions used in the Working Paper. The rubric "ultra vires action", we think, is adequately covered by the expression "error in law" and does not need to be repeated. This would include lack of jurisdiction, a wrongful failure to exercise jurisdiction and abuse of discretion. Again, the reference to a lack of evidence to support a decision obviously refers to a lack of *any* evidence. It is intended to permit review of what section 28 of the *Federal Court Act* refers to as erroneous findings of fact made by an administrative authority "in a perverse or capricious manner or without regard for the material before it".

As we noted earlier, the court should be given power to give all forms of relief now possible under the existing remedies. The proposal, in the Working Paper, read as follows:

> The court should be able to grant relief by way of:
>
> - an order quashing or setting aside a decision (which should include a report or recommendation);
> - an order restraining proceedings without jurisdiction or any breach of natural justice or any breach of procedural requirements prescribed by statute or regulation;
> - an order compelling the exercise of jurisdiction or observance of natural justice or statutory or regulatory procedures;
> - an order referring the matter back for further consideration;
> - a mandatory order compelling action unlawfully withheld or unreasonably delayed;
> - an order declaratory of the rights of the parties;
> - such other order as may be necessary to do justice between the parties.

This approach (as well as the need for the articulation of the grounds for judicial review) was later endorsed by the Commission on the Federal Court established by the Canadian Bar Association.

Certain matters require clarification. In speaking of decisions, we do not mean to confine ourselves to final decisions but to include preliminary and interlocutory decisions (and, as will be seen in the next chapter, certain recommendations as well). In view of the fact that the expression "decision or order" in section 28 of the *Federal Court Act* was interpreted as being confined to final decisions or orders, this may require legislative clarification, although it must be remembered that interpretation was arrived at in the context of a section empowering the Trial Division to review non-final decisions by means of the prerogative writs. The recommendation is, of course, not confined to administrative decisions but applies to other types of administrative action as well. In this context we would expressly add the power of the court to make an order to restrain unlawful administrative action. Finally, of course, consequential changes are required to take account of the general doctrine of procedural fairness.

It should be noted that our proposal does not permit review "as of right"; it would merely enable the court to review. As is evident throughout this Report, we think the court should have a broad discretion to review or not to review administrative decisions without being fettered by artificial distinctions. At the same time, we think the power should be exercised with restraint. As already mentioned, the court would become overloaded and would unduly interfere with the administrative process if it adopted too activist a role. We are confident, however, that the court will exercise the discretion wisely. The exercise of this judicial discretion ought itself to be reviewable to ensure a measure of consistency in its exercise.

The court should, we think, be empowered to dismiss an application for judicial review summarily at any time, this power to be used in accordance with judicial discretion. Such dismissal should take place, for example, where the grounds are trivial or non-existent, where an order would be futile, where the proceedings are vexatious or would cause delay, or in the case of an interlocutory matter, where the issues could more conveniently be dealt with following a final decision of the tribunal. We think the court would, in the exercise of its discretion, make the appropriate distinction between interlocutory and final decisions. But if it is desired further to strengthen the court's power to resist applications for review of interlocutory matters, provision could be made that applications for review before a final decision would be subject to leave of the court.

In our view, the courts should attempt to articulate the policy grounds on which they decide to review or not to review without relying on almost meaningless rubrics like "administrative" and "judicial" or "quasi-judicial". These, we noted, have sometimes served as a cloak for quite adequate reasons for not reviewing, such as efficiency in government, adequacy of consideration within the administrative process, national security, the political nature of the question, and so on. These and other reasons afford good ground for judicial restraint, but not for the artificial, archaic and sometimes inflexible distinction between administrative and judicial decisions.

*Recommendations*

*4.1* **Judicial review should be initiated by a single application for review, whatever form of relief may be desired.**

*4.2* **The grounds of review and the forms of relief should be expressly articulated in legislation; the extraordinary remedies should be abolished.**

*4.3* **The court should be enabled to review federal administrative authorities for action contrary to law, including without limiting the generality of the foregoing:**

- **failure of procedures to conform to natural justice or basic procedural fairness including bias and reasonable apprehension thereof;**
- **failure to observe prescribed procedures;**
- **error in law, including lack of jurisdiction, a wrongful failure to exercise jurisdiction, and abuse of discretion;**
- **fraud;**
- **failure to reach a decision or to take action where there is a duty to do so;**
- **unreasonable delay in reaching a decision or performing a duty;**
- **lack of any evidence to support a decision.**

*4.4* **The court should be able to grant relief by way of:**

- **an order quashing or setting aside a decision;**
- **an order to restrain proceedings commenced or about to be commenced without jurisdiction or in breach of natural justice or of the duty to act fairly, or in breach of procedural requirements prescribed by statute or regulation;**
- **an order compelling the exercise of jurisdiction or observance of natural justice or basic fairness or statutory or regulatory procedures;**
- **an order referring the matter back for further consideration;**

- a mandatory order compelling action unlawfully withheld or unreasonably delayed;
- an order to restrain unlawful administrative action;
- a declaration of the rights of the parties;
- such other order as may be necessary to do justice between the parties.

*4.5* A decision should, for purposes of review, include a failure by an administrative authority to make a decision, and preliminary and interlocutory decisions.

*4.6* The court should in the exercise of a judicial discretion have the power to dismiss an application for review at any time. This judicial discretion could be exercised when, for example, proceedings are vexatious, the grounds are trivial or non-existent, an order would be futile, or in the case of interlocutory matters, the issues could more conveniently be dealt with following a final decision of the tribunal.

# V

# The Ambit of Judicial Review

## Who Should be Subject to Review?

The vast and increasing number of decisions delegated to administrative authorities at every level of government militates in favour of a broad scope of application for judicial review to protect the individual against arbitrary action. The courts have sensed this and have moved into new areas of administrative action, including administrative decisions by Ministers and even the Cabinet in order to ensure that governmental decisions conform to basic, if flexible, standards of fairness.

The language of the *Federal Court Act* invites this approach and the court has responded to the invitation. The expression "board, commission or other tribunal" has been broadly construed to include a Minister and the Cabinet acting under statutory authority. And the Trial Division is no longer hampered by the artificial distinction between judicial and administrative decisions. Judicial review should extend to all administrative authorities to ensure their compliance with the demands of procedural fairness.

Subsection 28(6) of the *Federal Court Act* excludes certain decisions from review by the Federal Court of Appeal under section 28, namely decisions or orders of the Governor in Council, Treasury Board, a superior court or the Pension Appeals Board, and proceedings for service offences under the *National Defence Act*. It must be remembered, however, that these decisions are not necessarily immune from review. Thus in the *Inuit Tapirisat* case,[22] the Federal Court of Appeal held that a Cabinet decision on a statutory appeal from a decision of the CRTC was subject to

review by the Trial Division to determine whether the procedure adopted by Cabinet conformed to the duty to act with basic fairness. Again, an affected person who believed Cabinet had acted beyond its power might seek relief by way of a declaratory action. If the single route we propose for judicial review is adopted, care will have to be taken not to block these modes of review inadvertently.

In the Working Paper it was suggested that the Cabinet be exempted from judicial review except on the ground of legality. We remain convinced that the Cabinet should be exempt from judicial review when acting in its general political capacity or, as in the case of other bodies, when exercising powers of a legislative character. However, on considering the various points raised in the *Inuit Tapirisat* case, we have come to the conclusion that when the Cabinet acts as an administrative authority under a statutory power, it should, like other administrative authorities, be required to conform with the basic standards of fairness required under the circumstances.

The Commission has not examined the underlying reasons for the other exceptions in subsection 28(6) (other than in the case of superior courts where the proper means of review is an appeal). As was noted in the Working Paper, however, exceptions to judicial review should be kept to a minimum and the opportunity afforded by the reopening of the Act should be utilized to consider whether these exceptions are still justified.

## Recommendations and Reports

Judicial review in this country (unlike the situation in England) is not yet obtainable in respect of a recommendation. Still some recommendations, as the Kerr Committee in Australia commented, "often are, in effect, preliminary decisions" and the courts in England, unlike Canadian courts, have begun to review recommendations of this kind. A common example is a recommendation by a commission of inquiry. An appropriate wording to cover the various types of recommendations is difficult to formulate, but we believe that in the case of reports and recommendations which have a reasonable chance of being acted upon by the

ultimate decision-maker, "there should", as the Kerr Committee put it, "be on grounds of fairness a possibility of review in appropriate cases at the recommending stage". This may well be the best time to assess the fairness of procedures on which the ultimate decision is based. We think that if the courts were given power to exercise judicial review over recommendations and reports, they would exercise the power with appropriate restraint. Courts, after all, created the doctrine that these "preliminary decisions" are not reviewable. It is doubtful that they would often overstep the mark if given the discretion to review such decisions.

## Privative Clauses

Earlier, we expressed the view that exceptions from the court's power of judicial review of decisions of administrative authorities should be kept to a minimum. This, of course, applies to the so-called privative clauses under which the decisions of certain administrative authorities are exempted either wholly or partially from judicial review. Section 28 of the *Federal Court Act* now has effect notwithstanding any other statute, so that judicial review may take place despite a privative clause.

Some commentators, we noted early in this Report, oppose judicial review generally, so it is entirely consistent that they would favour privative clauses. But many, even among those who strongly favour judicial review, would argue that there is a place for privative clauses. And recently (1978) the *Canada Labour Code* was amended to restrict judicial review, except in accordance with paragraph 28(1)(*a*) of the *Federal Court Act*. The effect of this amendment is, first of all, to restrict judicial review to final decisions (*i.e.* to oust the jurisdiction of the Trial Division) and to narrow the grounds of attack against a decision to cases where the board "failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction". We think this precedent should be followed with caution. It may well be that courts should exercise restraint in intervening at a preliminary or interlocutory stage, particularly in the case of some administrative authorities. And such restraint, we think, will be encouraged by establishing a single route for judicial review. But there are cases

where judicial intervention is desirable at an early stage, and the court should continue to have the power to do so. Nor can we agree with restrictions on the grounds of judicial review, although it must be said, given the shadowy distinction between excess of jurisdiction and mistake of law and the limited scope of paragraph 28(1)(*c*) of the *Federal Court Act* (regarding "an erroneous finding of fact"), that the grounds of review of the Canada Labour Relations Board by the Court of Appeal may not be so restricted by the amendment as might at first sight be assumed.

### *Recommendations*

*5.1* **Judicial review, whether for illegality or unfair procedure, should continue to extend to all federal administrative authorities, whether they be Ministers, government officials or administrative bodies.**

*5.2* **The Cabinet should continue to be subject to review on the ground of illegality and, when acting as an administrative authority and not in the exercise of its general political function, on the ground of failing to conform to natural justice or basic procedural fairness. The appropriate mode of review of superior courts is by way of appeal, but the other exceptions from judicial review in subsection 28(6) of the *Federal Court Act* should be reconsidered to determine whether they continue to be necessary.**

*5.3* **Recommendations by commissions of inquiry and other such "preliminary decisions" should be subject to review, in the discretion of the court, like other decisions of administrative authorities.**

*5.4* **Judicial review should not be restricted by privative clauses.**

# VI

# Miscellaneous

There are several other matters respecting judicial review on which we now briefly set forth our views:

## Standing

In our view, the standing now accorded by section 28 of the *Federal Court Act* to "any party directly affected" should be broadened in accordance with what seems to be the current position at Common Law. In a word, standing should be given to a party aggrieved and, in the discretion of the court, to any person it concludes may have a legitimate interest in the matter.

## Stay of Proceedings

An application for judicial review should not be permitted to delay proceedings before an administrative authority. Consequently the proceedings should continue unless stayed by the authority or the court. At present, the court does not have a power to stay, but we think it is desirable. It should, however, be sparingly used, but cases where the court's decision could be overtaken by events, or where a person's rights might be seriously affected by the continuance of proceedings, are examples of situations where the court could properly stay proceedings.

## Reasons for Decisions

Since the effectiveness, and even the possibility of review depends to a considerable extent on the reasons given by an administrative authority,[23] we think these authorities should give candid and adequate reasons for decisions, indicating at least the general nature of the information relied upon. The desirability of giving reasons for decisions is, of course, supportable on other grounds as well. Satisfying the party that a decision was not taken arbitrarily, and ensuring that the deciding body has satisfied itself that it has dealt with all the issues, may be mentioned.[24] These reasons are germane to the issue of statutory guidelines for administrative authorities and will be taken up again in that context.

## Time to Apply for Application and to Proceed

The time to apply for, and to proceed with applications should not be too long. Otherwise administrative proceedings may be unduly delayed. But to prevent possible difficulties, the court should retain the power to extend the time for applying for, or proceeding with an application.

## Interim Injunctions Against the Crown

In Chapter V, we mentioned in passing the use of declaratory orders as a means of obtaining judicial review of Crown action. In due course, the Commission hopes to embark upon the questions surrounding the citizen's relief against the Crown, at which time the appropriateness and effectiveness of existing modes of judicial relief against the Crown will be considered. This would include consideration being given to the question of permitting the court to join an action for damages against the Crown or an administrative authority where such an action might be brought under another section of the Act, if all the facts relevant to the issue were before the court on an application for judicial review.

For the moment, we merely note that since the Crown invariably respects declaratory orders, they generally provide an adequate mode of recourse. But there is one respect at least in which a declaratory order does not provide adequate relief which could be immediately corrected. There are situations where a person's rights may be affected before they can be fully determined by the courts. In common with the English Law Commission, we think that interim injunctions should be available against the Crown.

### *Recommendations*

*6.1* ***Standing:*** **All parties aggrieved should have standing in proceedings for judicial review, and the court should in addition have a discretion to grant standing to any person who it concludes has a legitimate interest.**

*6.2* ***Stay of Proceedings:*** **Proceedings before an administrative authority should continue following an application for judicial review, unless stayed by the authority or the court.**

*6.3* ***Reasons for Decisions:*** **Administrative authorities should give candid reasons for decisions, indicating at least the general nature of the information relied on, and withholding information only when absolutely necessary.**

*6.4* ***Time to Apply and to Proceed:*** **The periods for applying for, and proceeding with judicial review should be fairly short.**

*6.5* ***Interim Injunctions:*** **The court should be empowered to issue interim injunctions against the Crown.**

# VII

# Summary of Recommendations

## I JUDICIAL REVIEW AND THE FEDERAL COURT

1.1 The exclusive jurisdiction of the Federal Court to exercise judicial review over federal boards, commissions and tribunals should be continued.

## II INTERACTION WITH PROVINCIAL COURTS

2.1 No criminal proceeding should be subject to judicial review by the Federal Court.

2.2 The review of proceedings of the Parole Board and disciplinary proceedings in federal correctional institutions should be vested in the Federal Court.

2.3 Provincial superior and county court judges, whether acting as such or as *personae designatae*, should not in principle be subject to judicial review by the Federal Court.

2.4 The Federal Court should continue to exercise judicial review over provincial officials acting as *personae designatae* under federal statutes. Exceptions could be made where provincial superior court judges can, because of their experience or the subject matter, more appropriately exercise review jurisdiction. Thus the provincial superior courts, rather than the Federal Court, should have power to review the legality of a decision of a Board established by a provincial Lieutenant Governor under subsection 547(1) of the *Criminal Code* to review the incarceration in a mental institution of accused persons or those in provincial institutions found to be insane.

2.5 *The Federal Court Act* should be so worded as to make clear that it is not intended to prevent the use of *certiorari* in aid of *habeas corpus*, in the provincial superior courts.

## III COURT OF APPEAL AND TRIAL DIVISION JURISDICTION

3.1 Judicial review of all federal administrative authorities should originate in the Trial Division.

3.2 Federal administrative authorities should have a right (along the lines of subsection 28(4) of the *Federal Court Act*) to refer any question of law, jurisdiction, practice or procedure to the Trial Division.

3.3 In regard to cases which are important in their own right or raise important legal issues, Trial Division judges should have the discretion, on application or *proprio motu*, and not later than the date fixed for the hearing, to transfer such cases to the Court of Appeal.

3.4 The Trial Division should assign specific judges to hear cases involving judicial review of administrative authorities to ensure that the cases are heard by judges familiar with administrative law and the federal administrative structure.

3.5 Special appeals on questions of law or of law or jurisdiction should be abolished; special appeals involving review on the merits should be enlarged to include questions normally subject to judicial review, thus avoiding resort to general provisions for judicial review.

3.6 Immigration appeals and appeals from citizenship court judges should be transferred to a specialized administrative tribunal, and consideration should be given to consolidating the two functions.

3.7 The task of the judges of the Trial Division to act as unemployment insurance umpires should be transferred to a specialized administrative tribunal.

3.8 Appeals from the Trial Division to the Court of Appeal should be by leave of the judge appealed from or the Court of Appeal.

3.9 Appeals from the Federal Court of Appeal to the Supreme Court of Canada should continue as in other cases to lie with leave and should as at present lie only when the Federal Court of Appeal considers it appropriate or the Supreme Court of Canada deems a question of sufficient importance or otherwise of such a nature and importance as to warrant a decision by it.

## IV GROUNDS AND PROCEDURES FOR REVIEW

4.1 Judicial review should be initiated by a single application for review, whatever form of relief may be desired.

4.2 The grounds of review and the forms of relief should be expressly articulated in legislation; the extraordinary remedies should be abolished.

4.3 The court should be enabled to review federal administrative authorities for action contrary to law, including without limiting the generality of the foregoing:
- failure of procedures to conform to natural justice or basic procedural fairness including bias and reasonable apprehension thereof.
- failure to observe prescribed procedures.
- error in law, including lack of jurisdiction, a wrongful failure to exercise jurisdiction, and abuse of discretion.
- fraud.
- failure to reach a decision or take action where there is a duty to do so.
- unreasonable delay in reaching a decision or performing a duty.
- lack of any evidence to support a decision.

4.4 The court should be able to grant relief by way of:
- an order quashing or setting aside a decision.
- an order to restrain proceedings commenced or about to be commenced without jurisdiction or in breach of natural justice or of the duty to act fairly, or in breach of procedural requirements prescribed by statute or regulation.
- an order compelling the exercise of jurisdiction or observance of natural justice or basic fairness or statutory or regulatory procedures.

— an order referring the matter back for further consideration.
— a mandatory order compelling action unlawfully withheld or unreasonably delayed.
— an order to restrain unlawful administrative action.
— a declaration of the rights of the parties.
— such other order as may be necessary to do justice between the parties.

4.5 A decision should, for purposes of review, include a failure by an administrative authority to make a decision, and preliminary and interlocutory decisions.

4.6 The court should in the exercise of a judicial discretion have the power to dismiss an application for review at any time. This judicial discretion should be exercised when, for example, proceedings are vexatious, the grounds are trivial or non-existent, an order would be futile, or in the case of interlocutory matters, the issues could more conveniently be dealt with following a final decision of the tribunal.

## V THE AMBIT OF JUDICIAL REVIEW

5.1 Judicial review, whether for illegality or unfair procedure, should continue to extend to all federal administrative authorities, whether they be Ministers, government officials or administrative bodies.

5.2 The Cabinet should continue to be subject to review on the ground of illegality and, when acting as an administrative authority and not in the exercise of its general political function, on the ground of failing to conform to natural justice or basic procedural fairness. The appropriate mode of review of superior courts is by way of appeal, but the other exceptions from judicial review in subsection 28(6) of the *Federal Court Act* should be reconsidered to determine whether they continue to be necessary.

5.3 Recommendations by commissions of inquiry and other such "preliminary decisions" should be subject to review, in the discretion of the court, like other decisions of administrative authorities.

5.4 Judicial review should not be restricted by privative clauses.

## VI MISCELLANEOUS

6.1 *Standing:* All parties aggrieved should have standing in proceedings for judicial review, and the court should in addition have a discretion to grant standing to any person who it concludes has a legitimate interest.

6.2 *Stay of Proceedings:* Proceedings before an administrative authority should continue following an application for judicial review, unless stayed by the authority or the court.

6.3 *Reasons for Decisions:* Administrative authorities should give candid reasons for decisions, indicating at least the general nature of the information relied on, and withholding information only when absolutely necessary.

6.4 *Time to Apply and to Proceed:* The periods for applying for, and proceeding with judicial review should be fairly short.

6.5 *Interim Injunctions:* The Court should be empowered to issue interim injunctions against the Crown.

# APPENDIX A

# Relevant Statutory Provisions

## *Federal Court Act*

Definitions "federal board, commission or other tribunal" "office, . . ."

**2.** In this Act

"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 section 96 of *The British North America Act, 1867;*

Extraordinary remedies

**18.** 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.

Review of decisions of federal board, commission or other tribunal

**28.** (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal

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

(*b*) erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(*c*) based its decision or order on a erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

When application may be made

(2) Any such application may be made by the Attorney General of Canada or any party directly affected by the decision or order by filing a notice of the application in the Court within ten days of the time the decision or order was first communicated to the office of the Deputy Attorney General of Canada or to that party by the board, commission or other tribunal, or within such further time as the court of Appeal or a judge thereof may, either before or after the expiry of those ten days, fix or allow.

Trial Division deprived of jurisdiction

(3) Where the Court of Appeal has jurisdiction under this 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.

Reference to Court of Appeal

(4) A federal board, commission or other tribunal to which subsection (1) applies may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination.

Hearing in summary way

(5) An application or reference to the court of Appeal made under this section shall be heard and determined without delay and in a summary way.

Limitation on proceedings against certain decisions or orders

(6) Notwithstanding subsection (1), no proceeding shall be taken thereunder in respect of a decision or order of the Governor in Council, the Treasury Board, a superior court or the Pension Appeals Board or in respect of a proceeding for a service offence under the *National Defence Act*.

Where decision not to be restrained

**29.** Notwithstanding sections 18 and 28, where provision is expressly made by an Act of the Parliament of Canada for an appeal as such to the court, to the Supreme Court, to the Governor in Council or to the Treasury Board from a decision or order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except to the extent and in the manner provided for in that Act.

Appeals under other Acts

**30.** (1) The Court of Appeal has exclusive original jurisdiction to hear and determine all appeals that, under any Act of the Parliament of Canada except the *Income Tax Act*, the *Estate Tax Act* and the *Canadian Citizenship Act*, may be taken to the Federal Court.

Transfer of jurisdiction to Trial Division

(2) Notwithstanding subsection (1), the Rules may transfer original jurisdiction to hear and determine a particular class of appeal from the Court of Appeal to the Trial Division.

Appeal with leave of Court of Appeal

**31.** (2) An appeal to the Supreme Court lies with leave of the Federal Court of Appeal from a final or other judgment or determination of that Court where, in the opinion of the Court of Appeal, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision.

Appeal with leave of Supreme Court

(3) An appeal lies to the Supreme Court from a final or other judgment or determination of the Federal Court of Appeal, whether or not leave to appeal to the Supreme Court has been refused by the Federal Court of Appeal, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from such judgment or determination is accordingly granted by the Supreme Court.

Exceptions

**40.** No appeal to the Supreme Court lies under section 38 or 39 from a judgment in a criminal cause, in proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge, or in proceedings for or upon a writ of *habeas corpus* arising out of a claim for extradition made under a treaty.

# APPENDIX B

# Endnotes

1. The agency studies already undertaken for the Commission are the following:

   — Ian Hunter and Ian Kelly, *The Immigration Appeal Board* (Ottawa, 1976).

   — Pierre Carrière and Sam Silverstone, *The Parole Process* (Ottawa, 1976).

   — G. Bruce Doern, *The Atomic Energy Control Board* (Ottawa, 1977).

   — Pierre Issalys and Gaylord Watkins, *Unemployment Insurance Benefits* (Ottawa, 1977).

   — Alastair R. Lucas and Trevor Bell, *The National Energy Board* (Ottawa, 1977).

   — H. N. Janisch, *The Regulatory Process of the Canadian Transport Commission* (Ottawa, 1978).

   — Philip Slayton, *The Anti-dumping Tribunal* (Ottawa, 1979).

   — Pierre Issalys, *The Pension Appeals Board* (Ottawa, 1979).

   — Stephen Kelleher, *The Canada Labour Relations Board* (in publication).

   — C. C. Johnston, *Canadian Radio-Television and Communications Commission* (in publication).

   — Philip Slayton and John Quinn, *The Tariff Board* (in publication).

2. The general studies on broader problems associated with procedures before administrative tribunals are the following:

   — Pamela Picher, *Courts of Record* (1976), available at the Law Reform Commission Library.

   — Caroline Andrew and Réjean Pelletier, *The Composition of Federal Administrative Agencies* (1976), available at the Law Reform Commission Library.

   — Robert Franson, *Access to Information* (Ottawa, 1979).

— Lucinda Vandervort, *Political Control of Independent Administrative Agencies* (in publication).

— David Fox, *Public Participation in the Administrative Process* (in publication).

— Frans Slatter, *Relation of Agencies to Parliament* (1979), available at the Law Reform Commission Library.

3. David J. Mullan, *The Federal Court Act*, Law Reform Commission (Ottawa, 1977).

4. Alan Leadbeater, *Appeals from Federal Administrative Authorities to the Federal Court of Canada* (1979) Law Reform Commission, available at the Commission's Library.

5. [1979] 1 S.C.R. 311.

6. Dec. 13, 1979 (not yet reported).

7. *Martineau v. Matsqui Institution Disciplinary Board*, ibid.

8. *Re Commonwealth of Puerto Rico v. Hernandez* [1975] 1 S.C.R. 228.

9. This is true of both recent Governments: See 1979 Bill S-8 and 1978, Bill S-9.

10. See *Martineau and Butters v. Matsqui Institution, Inmate Disciplinary Board*, [1976] 2 F.C. 198, [1978] 1 S.C.R. 119; and *Martineau v. Inmate Disciplinary Board, Matsqui Institution (No. 2)*, [1978] 1 F.C. 312. These and the subsequent peregrinations of the case through the courts are related in the Report of the Canadian Bar Association Commission on the Federal Court, pp. 50-53. The most recent development is the latest decision of the Supreme Court of Canada on the subject referred to in footnotes 6 and 7.

11. See the Summary Report in *The National*, July-August 1978, p. 17.

12. *Martineau v. Matsqui Institution Disciplinary Board*, Dec. 13, 1979 (not yet reported).

13. *Ibid.*

14. See *Anti-dumping Act*, R.S.C. 1970, c. A-15, s. 20; *Customs Act*, R.S.C. 1970, c. C-40, s. 48; *Excise Tax Act*, R.S.C. 1970, c. E-13, s. 60.

15. See A. Leadbeater, *supra*, note 4, at pp. 20 *et seq.*

16. *Broadcasting Act*, R.S.C., 1970, c. B-11, s. 26; *Immigration Appeal Board Act*, R.S.C., 1970, c. I-3, s. 23; *National Energy Board Act*, R.S.C., 1970, c. N-6, s. 18; *National Transportation Act*, R.S.C., 1970, c. N-17, s. 64(2); *Northern Inland Waters Act*, R.S.C., 1970, c. 28, 1st Supp., s. 21.

17. A. Leadbeater, *supra*, note 4, at p. 7.

18. These appeals are provided in the following:

    1. *Canada Grain Act*, S.C. 1970-71-72, c. 7, s. 83.

2. *Canadian and British Insurance Companies Act*, R.S.C., 1970, c. I-15, s. 78.
3. *Canadian Citizenship Act*, R.S.C., 1970, c. C-19, s. 30(2).
4. *Cooperative Credit Associations Act*, R.S.C., 1970, c. C-29, s. 61.
5. *Defence Production Act*, R.S.C., 1970, c. D-2, s. 20.
6. *Dominion Water Power Act*, R.S.C., 1970, c. W-6, s. 8(5).
7. *Foreign Insurance Companies Act*, R.S.C., 1970, c. I-16, s. 9(4).
8. *Government Railways Act*, R.S.C., 1970, c. G-11, s. 16.
9. *Income Tax Act*, R.S.C. 1952, c. 148, as amended by S.C. 1970-71-72, c. 63, s. 172.
10. *Indian Act*, R.S.C., 1970, c. I-16, s. 47.
11. *Investment Companies Act*, S.C., 1970-71-72, c. 33, s. 23(6).
12. *Loan Companies Act*, R.S.C., 1970, c. L-12, s. 74(5).
13. *Patent Act*, R.S.C., 1970, c. P-4, s. 19, s. 20(2), s. 33(6), s. 41(11), s. 44, s. 73.
14. *Pension Benefits Standards Act*, R.S.C., 1970, c. P-8, s. 15.
15. *Public Servants Inventions Act*, R.S.C., 1970, c. P-31, s. 5(2).
16. *Railway Act*, R.S.C., 1970, c. R-2, s. 408(4).
17. *Trade Marks Act*, R.S.C., 1970, c. T-10, s. 56, 57.
18. *Trust Companies Act*, R.S.C., 1970, c. T-16, s. 78.
19. *Western Grain Stabilization Act*, S.C., 1974-75-76, c. 87, s. 29.

19. *Administrative Appeals Tribunal Act*, 1975, Comm. Stats. (Australia), No. 181 of 1976.
20. [1979] 1 S.C.R. 311.
21. *Supra*, note 12.
22. *Inuit Tapirisat of Canada v. The Right Honourable Jules Léger*, [1979] 1 F.C. 213.
23. See *Proulx v. Public Service Staff Relations Board and Tremblay*, [1978] 2 F.C. 133, per Le Dain J. (diss.), at p. 142.
24. *Ibid.*, per Jackett, C.J. at p. 141.