

**ADMINISTRATIVE LAW:
CODIFICATION OF THE GROUNDS
OF JUDICIAL REVIEW**

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I. Introduction

An option which may be considered by those involved in the statutory reform of judicial review is codification of the grounds upon which an administrative act or decision may be reviewed by the courts. It is important to note at the outset that codification is not a peripheral issue; rather, it is intimately related to the fundamental structure of any statutory reform which may be recommended in the area of judicial review.

The larger question which is raised by the issue of codification is whether or not it is desirable to retain reference to the forms of relief which presently govern review — certiorari, prohibition, mandamus, injunction and declaration — or to fashion a new remedy which dispenses entirely with reference to these remedies.

Presently, the forms of relief developed by the courts themselves incorporate much of the substantive law of judicial review. For example, an application for certiorari entails a certain rule of *locus standi* (“person aggrieved”), specific grounds upon which the remedy is available (jurisdictional error and error of law on the face of the record), the type of decision which may be challenged (traditionally, judicial or quasi-judicial only, although recent decisions have extended the scope of the remedy to administrative decisions, at least regarding procedural fairness), the type of body against which the remedy may be sought (not restricted to suable entities; questionable if available against the Crown; unavailable against domestic tribunals), and the relief available to the applicant (quashing the decision or order). An action for a declaration brings with it a different substantive law: *locus standi* (traditionally, interference with a private right of the plaintiff or special damage peculiar to the plaintiff), grounds (jurisdictional error but probably not non-jurisdictional error of law), type of decision (judicial, quasi-judicial, legislative or administrative), type of defendant (suable entities only; available against the Crown; available against domestic tribunals), and relief (declaration of invalidity).

Reform that provides for a single procedure for seeking the traditional forms of relief, or that creates a new remedy the availability of which is determined by reference to the old remedies, will impliedly incorporate the substantive law attached to those remedies, including the grounds upon which the various forms of relief are available. (Of course, modifications to this piggyback substantive law could be effected by legislative enact-

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ment.) If, however, it is viewed as desirable to dispense entirely with the old forms of relief, consideration should be given to codifying *locus standi*, the grounds of review and other substantive law matters.

While the focus of this article will be on codification of the grounds for review, it is submitted that this issue cannot be divorced from the larger question of the general structure of judicial review reform. Accordingly, the desirability of codification will be examined in this broader context.

II. The Grounds of Judicial Review

Judicial review "is based on a fundamental principle, inherent throughout the legal system, that powers can be validly exercised only within their true limits".¹ Accordingly, in judicial review proceedings the court does not examine the merits of an administrative act or decision to determine if it was 'right or wrong';² rather, the court concerns itself with the legality of the act or decision. If an administrative authority has acted within its powers and according to law, the court will not interfere.

The formulation and categorization of the grounds of review vary widely in both case law and academic texts. Articulated on the most general level, the grounds are:

1. that the action or decision is *ultra vires* (also referred to as 'jurisdictional error');
2. that an error of law is disclosed on the face of the record;
3. that there has been a breach of the rules of natural justice/procedural fairness (although this ground is generally regarded as being subsumed by the doctrine of *ultra vires*³).

This concise formulation may be contrasted with the following list, where the basic grounds are expressed in much greater detail:⁴

1. unconstitutionality of the statute purporting to confer the power;
2. improper appointment of decision-maker or official;
3. improper delegation of power;
4. non-compliance with rules of natural justice or failure to act in a procedurally fair manner;
5. failure to adhere to statutory procedural requirements;
6. error regarding matter preliminary or collateral to jurisdiction;
7. failure to deal with the proper question;
8. making a decision which the authority was not authorized to make;
9. wrongful declining of jurisdiction;
10. taking into account irrelevant considerations;
11. failure to take into account matter requiring consideration;
12. no evidence to support decision;

1. H.W.R. Wade, *Administrative Law* (5th ed. 1982) 36.

2. See for example, *Patterson and Barker v. St. Boniface School Division No. 4* (1983), 19 Man. R. (2d) 51 (Man. C.A.).

3. H.W.R. Wade, *supra* n. 1, at 38-43, 414-415. But see *Harelkin v. The University of Regina*, [1979] 2 S.C.R. 561.

4. This list, with the exception of "fraud by party", was compiled from the grounds as discussed by D.J. Mullan, *Administrative Law* (2nd ed. 1979).

13. bad faith;
14. exercise of power for improper purpose;
15. unreasonableness;
16. improper fettering of discretion;
17. fraud by party;
18. error of law on the face of the record.

The above list is by no means a definitive statement of the grounds; it is but one expression of the flexible common law principles.

III. Defects of the Present Law

A. Forms of Relief

An imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist upon a plurality of remedies, no remedy would lie when another is available, the lines between remedies would be complex and shifting, the principal concepts confusing the boundaries of each remedy would be undefined and undefinable, judicial opinions would be filled with misleading generalities, and courts would studiously avoid discussing or even mentioning the lack of practical reasons behind the complexities of the system.⁵

Couched in language perhaps more flamboyant than that customarily employed in legal circles, Davis nevertheless captures the sentiments expressed by most academics and law reform agencies who have addressed the problems of judicial review proceedings. The present system is needlessly complex; the forms of relief are encrusted with technicalities created by history rather than dictated by reason.

The complexities and distinctions bedeviling our present pluralistic system of remedies include the following:

1. The rules of *locus standi* vary from remedy to remedy, with the standing requirements for injunctive and declaratory relief being traditionally the most stringent. In addition, the rules for each individual remedy suffer from a lack of consistency in their formulation. There is, however, an apparent trend in the common law toward a more liberal, discretionary approach to standing which is eroding, to some degree, the differences in *locus standi* requirements among the remedies.
2. Certiorari and prohibition have in recent tradition been available only to challenge those functions characterized as judicial or quasi-

5. K.C. Davis, *Administrative Law Text* (3rd ed. 1972) 458.

judicial. The task of classifying a function as 'judicial' or 'quasi-judicial', as opposed to 'administrative' or 'legislative', is notoriously plagued with difficulty.

Whether the decision of the Supreme Court of Canada in *Martineau v. Matsqui Institution Disciplinary Board*⁶ has cleared the way for the emergence of certiorari and prohibition as general all-purpose administrative law remedies remains to be seen. A cautious reading of the case would indicate that certiorari and prohibition are available to challenge the exercise of judicial and quasi-judicial powers on any basis, and the exercise of administrative powers on the ground of procedural fairness.

The availability of injunction, declaration and mandamus is not dependent upon the judicial/administrative/legislative conundrum.

3. While certiorari will issue to quash a decision where there is a non-jurisdictional error of law on the face of the record, there is some doubt as to whether a declaration is available on this ground.⁷
4. There is some support for the proposition that a declaration or injunction will not be granted in circumstances where a prerogative remedy is available.⁸ The declaration, however, is now emerging as an alternative to the prerogative remedies in some cases.⁹ Still, in Manitoba at least, the injunction appears to be inappropriate in circumstances where prohibition is available.¹⁰
5. The prerogative forms of relief are generally available only against bodies which derive their powers from statute. The injunction and declaration are appropriate to challenge the actions of both statutory and domestic bodies.
6. An injunction will issue only against a suable entity.¹¹ This may also be true of the declaration when sought in an action.¹² The prerogative remedies will issue against entities which do not have the capacity to be sued.
7. Prerogative and injunctive relief are not available against the Crown;¹³ declaratory relief is widely available.

6. [1980] 1 S.C.R. 602.

7. Compare *Punton v. Ministry of Pensions and National Insurance (No. 2)*, [1964] 1 W.L.R. 226 (C.A.) with *Board of Trustees of Edmonton Catholic School District No. 7 v. City of Edmonton* (1977), 75 D.L.R. (3d) 443 (Alta. S.C., T.D.).

8. *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board*, [1952] O.R. 366 (C.A.).

9. See for example, *Klymchuk v. Cowan* (1964), 47 W.W.R. 467 (Man. Q.B.); *Bingo Enterprises Ltd. v. Manitoba Lotteries and Gaming Licensing Board* (1983), 23 Man. R. (2d) 33 (C.A.); *Malik v. Government of Manitoba* (1983), 27 Man. R. (2d) 190 (Q.B.).

10. *Bingo Enterprises Ltd. v. Manitoba Lotteries and Gaming Licensing Board*, *ibid.* But see *Regina (City) and Regina Board of Police Commissioners v. Regina City Policemen's Association and Sherstobitoff*, [1982] 1 W.W.R. 759 (Sask. C.A.).

11. *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board*, *supra* n. 8.

12. *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board*, *ibid.*; "*B*" v. *The Commission of Inquiry pertaining to the Department of Manpower and Immigration*, [1975] F.C. 602 (T.D.); but see *Samuels and Charter Airways Ltd. v. A.G. for Canada* (1955), 1 D.L.R. (2d) 110 (Alta. S.C., App. Div.); *Malik v. Government of Manitoba*, *supra* n. 9.

13. Although this is generally accepted as an accurate summary, it should be noted that in *Re Gooliah and Minister of Citizenship and Immigration* (1967), 63 D.L.R. (2d) 224, the Manitoba Court of Appeal held that the fact that the Crown was a party to the proceedings did not bar the issuing of certiorari. But see *Border Cities Press Club v. Attorney-General for Ontario*, [1955] O.R. 14 (C.A.).

8. Prerogative relief is sought by originating notice of motion. An injunction and a declaration are sought by way of action commenced by statement of claim, although Queen's Bench Rule 536 allows for declaratory proceedings by way of originating notice in some circumstances. Both motions and actions have their own distinct procedure. Only the latter offers a full range of discovery proceedings.
9. Damages may be sought in conjunction with declaratory or injunctive, but not prerogative, relief.

B. Grounds of Review

The following difficulties may be raised with respect to the common law grounds of review:

1. The grounds are fluid and flexible; their exact content and application elude precise definition. This exposes the grounds to criticism for uncertainty and unpredictability. However, given the diverse nature of administrative authorities and the infinite variety of situations which give rise to judicial review proceedings, flexibility would appear to be more an asset than a deficiency.
2. The ground of error of law on the face of the record is somewhat anomalous, in that it is not rooted in the *ultra vires* doctrine and it is likely available only in certiorari proceedings. The desirability of requiring that the error appear on the face of the record has been debated. Also the scope of what constitutes "the record" has at times been criticized as too narrow.¹⁴
3. Several of the grounds are presently in a state of flux and evolution, particularly procedural fairness and its relationship to natural justice, the doctrine of unreasonableness and the ground of 'no evidence'.¹⁵ Not only is the state of the existing law uncertain, but there is little consensus as to what the law *should be*.
4. The distinction between jurisdictional error and non-jurisdictional error of law is notoriously troublesome. It has been noted, however, that the concept of jurisdictional error is expanding to the point where non-jurisdictional error is increasingly insignificant.¹⁶ As well, recent decisions of the Supreme Court of Canada indicate that an error of law within jurisdiction, if patently unreasonable, may constitute a species of jurisdictional error.¹⁷

14. See for example, *Royal Commission Inquiry into Civil Rights*, Ontario (1968), Report No. 1, Vol. 1, p. 274, 310-314; D.J. Mullan, *The Federal Court Act*, Law Reform Commission of Canada (1977) 55; D.J. Mullan, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform?" (1973), 23 U. of T.L.J. 14 at 36-43.

15. For a good discussion of the ground of 'no evidence', see D.W. Elliott, "'No Evidence': A Ground of Judicial Review in Canadian Administrative Law?" (1972), 37 Sask. L.R. 48.

16. D.J. Mullan, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform?" *supra* n.14. See *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.).

17. See for example, *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Teamsters Union Local 938 v. Massicotte*, [1982] 1 S.C.R. 710.

There exists in addition, of course, the ongoing debate respecting the appropriate degree of judicial control over administrative bodies.¹⁸ This article is premised on the view that the scope of review afforded by the present common law grounds of review is generally satisfactory. If, however, it is determined that the grounds require drastic revision, either to substantially expand or decrease the scope of review, the argument in favour of codification of grounds, examined later in this article, will be significantly strengthened.

The deficiencies of the common law forms of relief and grounds of review have been recognized by law reform agencies and legislatures in several Commonwealth jurisdictions. Their attempts to remedy these deficiencies will now be examined.

IV. Reform in other Jurisdictions

A. England

In 1971, The Law Commission published its working paper on remedies in administrative law.¹⁹ They recommended the adoption of a single remedy and procedure for the judicial review of administrative actions and orders, whereby the applicant could seek any relief then presently obtainable for the control of administrative action. They rejected the suggestion that it would be necessary to codify the grounds for review under the new remedy; courts would continue to apply and develop the established grounds without, however, worrying about the distinctions that at common law determined the availability of the various remedies. While no draft legislation accompanies the working paper, it appears that the Commission was contemplating a new remedy which would spell out the court's power to award relief (quashing, enjoining, commanding or declaring) without reference to the old forms of proceeding.²⁰

The report²¹ which followed in 1976 was more conservative in its recommendations. It proposed the institution of a new form of procedure whereby the applicant could seek the prerogative orders or, in appropriate circumstances, a declaration or injunction. Given the Commission's terms of reference, which limited their study to that of procedural reform, the issue of codification of grounds was unaddressed.

The Commission's recommendations were implemented by an amendment to the Supreme Court Rules.²² The ability to claim the various forms of relief in one proceeding was a welcome improvement. Coupled with the provisions allowing for amendment to the application at various stages of

18. See for example, P.W. Hogg, "Judicial Review: How Much Do We Need?" (1974), 20 McGill L.J. 157; W.H. Angus, "The Individual and the Bureaucracy: Judicial Review — Do We Need It?" (1974), 20 McGill L.J. 177.

19. (England) The Law Commission, "Remedies in Administrative Law" (Working Paper No. 40, 1971).

20. While this is the impression the writer gets from the working paper as a whole, the Commission does refer favourably at page 58 of its paper to the proposed Ontario reform, discussed later in this article, which might indicate that reference to the old forms of relief was contemplated.

21. (England) The Law Commission, *Report on Remedies in Administrative Law* (Law Com. No. 73, Cmnd. 6407, 1976).

22. *Rules of the Supreme Court (Amendment No. 3)*, 1977, S.I./77-1955, as amended by the *Rules of the Supreme Court (Amendment No. 4)*, 1980, S.I./80-2000. The Rules have been in part put into statutory form by the *Supreme Court Act 1981*, c. 54, s. 31 (U.K.).

the proceeding,²³ the new rules mitigated the risk of applying for the wrong remedy. However, it is important to stress that the problems regarding the scope of the various remedies and the technical distinctions among them were not obviated — entitlement to a particular form of relief must still be established in accordance with the pre-existing rules of law.²⁴

B. Canada (Federal Court)

In 1971, the Federal Court of Canada came into existence. Supervisory jurisdiction over federal administrative authorities by means of the prerogative writs and the injunction and declaration was, by section 18 of the *Federal Court Act*,²⁵ vested in the Trial Division. However, the Trial Division could exercise jurisdiction only in circumstances where the Court of Appeal was without jurisdiction, and the latter was given extensive power under section 28 to review certain administrative decisions on the basis of broadly-drafted grounds of review.

It is the new section 28 remedy which should be examined by those studying various options for reforming judicial review principles and procedures. It provides a general model for the provision of judicial review without reference to the traditional forms of relief. Rather, the scope of the remedy, the grounds for review and the relief available are explicitly set out in the statute.

'Federal-Court-Act-bashing' has been engaged in by most academics who have addressed the Act.²⁶ Certainly, the drafting of the Act has presented some serious problems: in particular, the jurisdictional split between the two court levels is a seemingly endless source of confusion, with litigants frequently finding themselves in the wrong division, and the section 28 phrase "a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis" is sadly convoluted and conceptually complex, entrenching the horrors of the judicial/administrative dichotomy. Mullan has suggested that the Act is probably the worst attempt at administrative law reform in Canada and that "it is certainly never likely to be copied by any other jurisdiction".²⁷

While this trenchant criticism is not without justification, it should not detract from those aspects of the Act that are worthy of study. In particular, the creation of a new remedy without reference to the old forms of relief has been commended for its simplicity and flexibility.²⁸

23. *Rules of the Supreme Court*, Order 53, ss. 3(6), 6(2).

24. As noted by J. Beatson and M. Mathews, "Supreme Court Rules — Reform of Administrative Law Remedies: The First Step" (1978), 41 *Mod. L. Rev.* 437 at 440; J.F. Garner, "The Reform of Administrative Procedure", [1978] *L.G.C.* 120.

25. S.C. 1970-71-72, c. 1; R.S.C. 1970 (2nd Supp.), c. 10.

26. See for example, G. Nicholls, "Federal Proposals for Review of Tribunal Decisions" (1970), 18 *Chitty's L.J.* 254; D.J. Mullan, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform?" *supra* n. 14; D.J. Mullan, "Reform of Administrative Law Remedies — Method or Madness?" (1975), 6 *Fed. L. Rev.* 340; D.M. Goldie, "The Federal Court" in *Proceedings of the Administrative Law Conference, University of British Columbia* (1979) 10.

27. D.J. Mullan, "Reform of Administrative Law Remedies — Method or Madness?", *supra* n. 26 at 346.

28. *Ibid.*, at 347 and 349; D.M. Goldie, "Judicial Review under Common Law Remedies and the Statutory Code of Section 28 of the 'Federal Court Act'", in *The Cambridge Lectures* (D. Mendes da Costa ed. 1981).

Subsection 28(1) of the *Federal Court Act* empowers the Court of Appeal to determine applications to review and set aside certain administrative decisions

... upon the ground that the board, commission or tribunal

- (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
- (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

The section 28 grounds of review have, in general, been the subject of little criticism. The following points should be noted:

1. Although stated in general terms, the statutory grounds cover all grounds which would support an application for certiorari, i.e., jurisdictional error and error of law.²⁹
2. The use of the word "jurisdiction" in s. 28(1)(a) has been criticized, given the long-standing confusion respecting the exact scope and definition of the term.³⁰
3. Section 28(1)(b) dispenses with the requirement that a non-jurisdictional error of law appear on the face of the record although, given the expanding scope of jurisdictional error, it is arguable that this 'extension' will have little practical effect.³¹
4. While s. 28(1)(c) theoretically expands review for error of fact, courts have interpreted it as a specific instance of error of law,³² adding little to the common law ground of 'no evidence'.
5. In spite of the fact that previous common law decisions have no necessary application to the codified grounds of review,³³ the Federal Court has chosen not to depart much from the common law principles.³⁴ The statutory enactment of grounds, therefore, has had little effect on the substantive law of judicial review at the federal level.

The Federal Court Act has been the subject of extensive study by the Law Reform Commission of Canada.³⁵ One of their principal recommendations was that judicial review of all federal administrative authorities

29. *Commonwealth of Puerto Rico v. Hernandez*, [1973] F.C. 1206 at 1207 (C.A.); W.R. Jackett, "The Federal Court of Appeal" (1973), 11 *Osgoode Hall L.J.* 258; D.M. Goldie, *supra* n. 26.

30. G. Nicholls, *supra* n. 26; D.J. Mullan, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform?" *Supra* n. 14.

31. D.J. Mullan, *ibid.*

32. *Mojica v. Minister of Manpower and Immigration*, [1977] 1 F.C. 458 (C.A.).

33. W.R. Jackett, *supra* n. 29.

34. N. Fera, "The Common Law Principles of the Extraordinary Remedies are Still Relevant in Administrative Law" (1976), 24 *Chitty's L.J.* 95.

35. D.J. Mullan, *The Federal Court Act*, Law Reform Commission of Canada (1977); Law Reform Commission of Canada, "Federal Court: Judicial Review", Working Paper No. 18 (1977); Law Reform Commission of Canada, *Judicial Review and the Federal Court* (1980).

should originate in the Trial Division. In determining how to structure the court's jurisdiction, they rejected the option of relying on the prerogative writs and other extraordinary remedies:

Continued reliance on the prerogative writs and other extraordinary remedies, either alone or as an important part of a statutory scheme of judicial review would, in our view, be a retrograde step. Admittedly, the courts have over the centuries performed yeoman service in using "extraordinary remedies" to develop principles for reviewing administrative action that is illegal or unfair. But each of these remedies has its own peculiar limits and technicalities. One must choose the proper remedy, and this can be very difficult; few lawyers indeed can describe with any certainty the precise limits of each remedy. Moreover, a remedy may cover the appropriate ground, but not afford the relief required. Or the reverse may be true.

A partial solution to this problem is the combining of all the remedies into one. Only one application to the court need then be made; a case is not lost because the wrong remedy is chosen. This approach is a clear improvement and should certainly be adopted if the prerogative writs are retained for any purpose. It has been adopted in Ontario and British Columbia and recommended by the English Law Commission (although the latter was restricted by narrow terms of reference). But this solution has clear drawbacks. First of all, it in no way diminishes the internal deficiencies and mysteries of the prerogative writs. It merely improves procedure; it effects no reform in the substantive law. And it continues to have a second important defect of making the law difficult to understand.

Section 28 was a clear advance over the situation in other common law countries. Though deficient in some respects, it went some considerable way towards setting forth the grounds of review in an understandable form. What is needed now is to build upon the approach begun by section 28 by adding the grounds and forms of relief available by means of the prerogative writs and the other extraordinary remedies. It is not enough to have a single application for judicial review. The grounds for review should be expressly articulated and the court should be empowered to grant any form of relief now available as may be appropriate to the situation before it. With Davis we think that what is needed is "a single, simple form of proceeding for all review of administrative action", and one, moreover, that articulates the grounds of review and the forms of relief.³⁶

In their final report, the Commission recommended a broadly-worded codification of the grounds of review which, in part, amounts to a more detailed articulation of the common law grounds as incorporated in the present subsection 28(1):

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.³⁷

36. Law Reform Commission of Canada, "Federal Court: Judicial Review", Working Paper No. 18 (1977) 25-27.

37. Law Reform Commission of Canada, *Judicial Review and the Federal Court* (1980) 45.

While the Commission's recommendations generally met with the approval of the Commission on the Federal Court established by the Canadian Bar Association,³⁸ they were severely criticized by N. Fera³⁹ who argued that

1. Apart from procedural pitfalls, the extraordinary remedies are working well.
2. Codification might mitigate against the kind of judicial development now possible under the traditional remedies.
3. Neither the lawyer nor the layman will be enlightened by the articulated grounds of review.
4. The generally-worded grounds fail to capture the subtleties of the common law.
5. A single application for review based on the old forms of relief, as adopted in Ontario, is the best alternative for reform.

The Department of Justice has issued a paper outlining its proposed amendments to the *Federal Court Act* relating to the Federal Court's supervisory jurisdiction.⁴⁰ These proposals depart somewhat from the Law Reform Commission of Canada's recommendation that general supervisory jurisdiction over *all* federal tribunals originate in the Trial Division. However, they do adopt the Commission's recommended model for a statutory judicial review remedy, although the suggested grounds of review differ in their drafting from those proposed by the Commission.⁴¹

C. Ontario and British Columbia

In February, 1968, the McRuer Commission submitted the first of a series of reports on civil rights in Ontario.⁴² While the Commission focused on procedural reforms of administrative law remedies, they did recommend the inclusion of statutory provisions relating to review for non-judicial error of law and 'no evidence'. They summarily dismissed the option of codifying generally the grounds of review thus:

We do not recommend statutory codification of the grounds for judicial review based on the doctrine of *ultra vires*. . . . Our law should be left free to develop refinements where appropriate.⁴³

Similarly, in 1974 the Law Reform Commission of British Columbia published a report advocating procedural reform of judicial review.⁴⁴ The Commission was of the opinion that procedural reform is separable from and may be considered independently of substantive issues of judicial review.

38. The Canadian Bar Association, "Federal Court Report" (no year indicated on publication).

39. N. Fera, "LRC's Proposals for Reform of the Federal Judicial Review System — A Critical Examination and Counterpoise" (1977), 8 Man. L.J. 529.

40. Department of Justice, *Proposals to Amend The Federal Court Act* (August, 1983).

41. *Ibid.*, at 11.

42. *Royal Commission Inquiry into Civil Rights*, *supra* n. 14.

43. *Ibid.*, at 315.

44. Law Reform Commission of British Columbia, *Report on Civil Rights, Part 4 — A Procedure for Judicial Review of the Actions of Statutory Agencies*, Report No. 18 (Vancouver, 1974).

Accordingly, the question of codification of grounds was not addressed, although they did recommend a statutory provision allowing the court to consider error of law on the face of the record as a ground for relief in all cases where judicial review is sought under the proposed procedure.

Both reports were followed by the respective adoption of legislation providing for a single procedure for applications for judicial review.⁴⁵ The central feature of both Acts is that relief is dependent upon the applicant's entitlement to one of the old forms of relief:

... [T]he prerogative writs and orders in lieu thereof we have buried, but they rule us from their graves.⁴⁶

In assessing the Ontario legislation, Mullan⁴⁷ posed the question of whether codification of grounds would have been more desirable than the adopted scheme. He suggested that codification would not necessarily prevent evolution and development; the courts would still have room to give new dimensions to the embodied concepts. While he acknowledged that codification might achieve little in elucidating the grounds of review, he concluded that:

[n]evertheless, given clarity as one of the objects of the legislation and given the age-old difficulties concerning the precise scope of the various common law forms of relief, the *complete removal of any reference to those old remedies coupled with a statement of the actual grounds for review under the new remedy, would have been much more desirable.*⁴⁸ (emphasis added)

Similarly, in evaluating the B.C. legislation, Professor MacCrimmon discussed the merits of the Ontario/B.C. model as opposed to a scheme implementing codified grounds:

An objective of reformers of the procedural means of obtaining judicial review should be to develop a single comprehensive remedy for judicial review.

...
Codification of the grounds of review would provide a single comprehensive remedy whereby relief would follow upon the applicant showing that the decision-maker made one of the errors specified in the statute. Procedural technicalities would be minimized. The danger of codification is that interpretation by the courts of statutory provisions will lead to narrow linguistic constructions, will alter the common law, and will create more confusion than existed before codification. There is also the danger that the flexibility of the common law to respond to new situations will be lost.

...
The dangers of codification, however, may be exaggerated. While difficulties do arise under section 28 of the Federal Court Act, stemming from the attempt to confine the jurisdiction of the court to certain types of decisions, few difficulties have arisen over the application of the codified grounds of review.

45. *Judicial Review Procedure Act, 1971*, R.S.O. 1980, c. 224 (first enacted as S.O. 1971, c. 48); *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209, as am. by *Court of Appeal Act*, S.B.C. 1982, c. 7, s. 64 (first enacted as S.B.C. 1976, c. 25).

46. *Re Hershoran and City of Windsor* (1973), 1 O.R. (2d) 291 at 312 (Div. Ct.), per Hughes, J.; aff'd 3 O.R. (2d) 423 (C.A.).

47. D.J. Mullan, "Reform of Judicial Review of Administrative Action — The Ontario Way" (1974), 12 Osgoode Hall L.J. 125.

48. *Ibid.*, at 134. It should be noted, however, that in a later article, Mullan demonstrates what might be interpreted as a change of heart: "... I am beginning to think that the old prerogative remedies and the equitable declaratory and injunctive orders were perhaps not quite the unruly servants we often have accused them of being. At least their deficiencies have probably been exaggerated. This view is of course influenced greatly by my horror at some of the statutory attempts at reform", *supra* n. 27, at 342.

...
*The advantage of the codified grounds of review is that the separate common law remedies are abolished and it is not necessary to classify the final relief as being authorized by, for example, the jurisdiction to grant declarations.*⁴⁹ (emphasis added)

MacCrimmon concluded that in creating a single remedy, it would be preferable to eliminate reference to the old forms of relief. She suggested, however, that without codification of grounds, reference to the old forms of relief was necessary.

While the Ontario/B.C. legislative scheme does incorporate by reference the much-maligned old forms of relief, it does mitigate many of the most troublesome aspects of the pluralistic common law system:⁵⁰

1. While the Act makes relief dependent upon the availability of a traditional remedy, s. 9(1) relieves the applicant of specifying the exact remedy sought; it is sufficient to set out the grounds and nature of relief. Since all forms of relief may be sought in one proceeding, the applicant no longer runs the risk of being refused relief because he has chosen to pursue the wrong remedy.
2. Some of the technical distinctions between certiorari and declaration are eliminated by the Act. By virtue of s. 2(2), the ground of error of law on the face of the record is no longer available only for those decisions traditionally challengeable by certiorari. Section 2(4) allows for the setting aside of decisions where the applicant is entitled to declaratory relief. However, both these 'extensions' apply only in relation to the review of statutory powers of decision.

MacCrimmon has optimistically suggested that:

[t]here is the possibility that the combining of all the older remedies for judicial review under one form of procedure will gradually eliminate the complexities of those remedies and result in the development of a single comprehensive remedy.⁵¹

D. Alberta

In 1978, the Alberta Institute of Law Research and Reform had prepared a working paper on Administrative Law Remedies.⁵² Since the main purpose of this paper was to examine ways of improving judicial review remedies, the grounds of review were discussed only as they relate to features of the remedies themselves.

The Institute's paper considered two alternatives for Alberta, the first being the adoption of the Ontario model whereby existing jurisprudence relating to grounds of review is incorporated by reference to the old remedies. It suggested that, if such a solution were to be adopted, provision should be made for authorizing review for non-jurisdictional error of law

49. M.T. MacCrimmon, "The British Columbia Judicial Review Procedure Act: Procedural Means for Obtaining Judicial Review" in *Proceedings of the Administrative Law Conference, University of British Columbia* (1979) 99 at 125-128. In a footnote at p. 128, however, MacCrimmon suggests that since the S.C.C. decision in *Martineau* (*supra* n. 6) has eliminated the need to classify a decision as judicial or quasi-judicial, the argument in favour of codification may be outweighed by the danger of a loss of flexibility.

50. The following references to section numbers are to those of the Ontario *Judicial Review Procedure Act*.

51. *Supra* n. 49, at 133.

52. Institute of Law Research and Reform, *Working Paper on Administrative Law Remedies* (July, 1978) (as yet unpublished and unadopted by the Institute).

for all acts or decisions, whether classified as judicial or administrative. It also discussed the desirability of extending review for non-jurisdictional error of law to situations where the error does not appear on the face of the record.

The second, and preferred, alternative examined was based on the general scheme implemented by s. 28 of the Federal Court Act and the recommendations of the Law Reform Commission of Canada in Working Paper No. 18. The Institute's working paper presented the view that in abolishing the existing remedies and replacing them with a new application for review, it would be necessary to specify the grounds upon which the new application could be sought. It was suggested that it would be advisable to leave the list open-ended, to enable the courts to continue developing the grounds to meet new and unforeseen circumstances.

The Institute has recently published a report focusing on the procedural aspects of judicial review.⁵³ Therein, they recommend the introduction of a single procedure for seeking the various judicial review remedies modelled on the Ontario/B.C. and English reforms. They propose that the new procedure be established by the Alberta Rules of Court which would in turn be validated by statute. The Institute's Report does not deal with substantive matters such as grounds of review; those subjects are to be dealt with in later stages of the Institute's project.

E. New Zealand

In 1972, New Zealand adopted the Ontario model of reform through the implementation of a new statutory procedure for judicial review.⁵⁴ The availability of relief under the new procedure was delimited by reference to the traditional remedies. When recommending this legislative scheme, the Public and Administrative Law Reform Committee chose to focus on procedural reform only, leaving the substantive law untouched.⁵⁵

Some years later, the question of codification of grounds was addressed by the Committee.⁵⁶ They suggested that such reform might be justified if it would serve to clarify the law and make it more accessible, or if it was desirable to change the common law grounds.

The Committee was not persuaded that codification would provide a valuable clarification of the law. To summarize their views:

1. In the 10 to 15 years preceding 1978, the courts have taken significant steps toward clarifying the law respecting the grounds for review.

53. Institute of Law Research and Reform, *Judicial Review of Administrative Action: Application for Judicial Review*, Report No. 40 (1984).

54. *Judicature Amendment Act 1972*, No. 130 of 1972, as am. by *Judicature Amendment Act 1977*, No. 32 of 1977, (New Zealand).

55. Public and Administrative Law Reform Committee, *Administrative Tribunals: Constitution, Procedure and Appeals*, Fourth Report (1971); Fifth Report (1972).

56. Public and Administrative Law Reform Committee, *Twelfth Report* (1978).

2. It would not be clear of every provision whether it merely restated the common law or effected some change. The particular drafting might introduce new linguistic arguments.
3. If the code was to apply to the very broad range of administrative powers and situations, it would necessarily be drafted in very general terms and could not take precise form.
4. It is the relevance and application of grounds in particular contexts that causes the courts difficulties. This codification would not help.

With respect to effecting changes in the common law grounds of review, particularly the grounds of error of law, 'no evidence' and unreasonableness, the Committee expressed general satisfaction with the developing common law and suggested that any expansion of these grounds should be addressed in the context of particular legislation rather than in a general statute. In rejecting codification, the Committee also expressed a desire to observe and learn from the Australian experience.

F. Australia

It is the Commonwealth of Australia which has taken perhaps the boldest steps in the reformation of the law of judicial review.

In 1971, the Kerr Committee issued its report,⁵⁷ addressing, *inter alia*, the procedures and substantive grounds for judicial review. Contained in their preliminary observations is the following:

There is a complex relationship between the principles of review and the remedies available and technical limitations diminish the effectiveness of remedies which at first sight appear to [sic] fairly comprehensive. Substantive principles are often concealed in what appear to be procedural restrictions . . . [T]here is ample room for simplifying the principles of review and the remedies available. Some think that the courts themselves are in the process of moving towards improvement of the law in this field but whether this be so or not, reform by this means must be slow and sporadic and we are persuaded that reform by legislative action, as has occurred in other places, is necessary . . . [O]n any view of the state of the law relating to judicial review of administrative action it is technical and complex and in need of reform, simplification and legislative statement.⁵⁸

Accordingly, the Committee recommended the adoption of statutory provisions allowing for an application for judicial review, with both the grounds of review and types of relief explicitly set out in the statute.

This was followed in 1973 by the report of the Ellicott Committee⁵⁹ who viewed judicial review procedures then available as "unsatisfactory"⁶⁰ and accepted the Kerr Committee's conclusion that the "complex pattern of rules as to appropriate courts, principles and remedies is both unwieldy [sic] and unnecessary".⁶¹ They endorsed the recommendation that grounds for relief should be specified in a statute, although it was their view that the list should be open-ended.

57. Report of Commonwealth Administrative Review Committee, Parliamentary Paper No. 144 (1971) ("Kerr Committee Report").

58. *Ibid.*, at 9-10.

59. Prerogative Writ Procedures — Report of Committee of Review, Parliamentary Paper No. 56 (1973) ("Ellicott Committee Report").

60. *Ibid.*, at 3.

61. *Supra* n. 57, at 20.

It is unfortunate that in neither report are the merits of alternative schemes of reform discussed nor, to any real extent, are the merits of codification addressed. They justify their specific recommendations only by general reference to the need for simplifying procedure and rendering the law more certain.

As part of a comprehensive administrative law reform package, the Commonwealth of Australia enacted the *Administrative Decisions (Judicial Review) Act 1977*,⁶² which came into effect October 1, 1980. Following the general recommendations of the Kerr and Ellicott committees, the Act features a new remedy for which the grounds of relief are enumerated in detail and the relief available is explicitly set out, all without reference to the traditional remedies.

The Act's adoption of a single, simple procedure to challenge federal administrative action has been greeted as a welcome development.⁶³ As one writer has noted:

The significant contribution made by the *Judicial Review Act* is that the grounds of review can be considered independently of the remedy sought. The focus of the existing law has been on the remedies. Judicial review has been seen as review by way of prerogative writ, injunction or declaration, and the substantive law has developed around the remedies . . .

The major step taken by the *Judicial Review Act* is that it has done away with the need to start from the character of the remedy sought. Of course, the effect of the remedy is still significant, but the Court is free to consider the substance of the grievance before it turns its attention to the appropriate remedy. The focus has moved from the remedy sought or the procedure necessary to obtain that remedy to the substantive law involved, to the question whether a particular ground of review exists. Thus the Act has not merely brought about a simplification of procedures.⁶⁴

In comparing the Australian Act to the alternative approaches to reform adopted in England and Ontario, the same writer makes the following points in favour of the Australian scheme:

1. The alternative approaches to reform have removed some procedural roadblocks, but leave substantive hurdles intact.
2. It is uncertain how far the courts alone can go in diminishing the substantive problems. Judicial reform of the law is at best a haphazard process.
3. Less extensive reform lacks the educational and presentational advantages of the Australian Act. Practical experience in discussing the Act with senior officers of the public service and of statutory authorities suggests that codification of grounds of review brings home sharply to many officials that much of what they do is subject to review by the courts.

Overshadowing this enviable basket of bouquets, however, we find the (inevitable) boxcar of beefs.

62. No. 59 of 1977.

63. L. Katz, "Australian Federal Administrative Law Reform" (1980), 58 Can. Bar Rev. 341; L.J. Curtis, "Judicial Review of Administrative Acts" (1979), 53 A.L.J. 530.

64. L.J. Curtis, *ibid.*, at 531.

Criticism has been levied at the phrase "decision of an administrative character", which delimits the scope and application of the Act. Does this exclude from the Act's ambit the review of quasi-judicial or quasi-legislative decisions and decisions with a predominant policy content?⁶⁵

It has also been argued that considerable confusion and uncertainty pervade the question of the precise scope of the statutory grounds of review in comparison to the principles of judicial review at common law.⁶⁶ While the arguments advanced relate to the specific grounds as drafted in the Australian legislation, it is likely that similar problems would arise in any legislative attempt to provide a detailed codification of grounds.

1. In theory, a code is to be construed without reference to preceding case law. Often, however, judges examine the common law which preceded the code. It is difficult to predict what will happen when the codified grounds closely reflect, but fail to exactly mirror, the common law.
2. It is possible that a listed ground (for example, breach of natural justice) will be interpreted as applying equally to all decisions which fall within the Act's ambit, even though at common law some such decisions would not attract the requirement to adhere to that particular ground.⁶⁷
3. Many subtle refinements introduced in recent case law are not captured by the Act; the language used is inadequate to convey the complete common law picture.
4. Several common law grounds are absent from the list, although this may be cured by the inclusion of the catch-all ground, "otherwise contrary to law".
5. Several grounds as drafted are narrower than the corresponding common law rules. Any redeeming quality of the catch-all ground may be undermined by the rule *expressio unius est exclusio alterius*. In this sense, an unsatisfactory attempt to reduce a common law principle to statutory form is more serious than a complete omission of the ground.
6. Where the common law grounds are in a state of flux (for example, natural justice/fairness, unreasonableness), the attempt to reduce the grounds to statutory language may stultify development.

65. A question raised by J. Griffiths, "Legislative Reform of Judicial Review of Commonwealth Administrative Action" (1978), 9 Fed. L. Rev. 42; L.J. Curtis, *supra* n. 63.

It is heartening to note, however, that the Federal Court of Australia has not taken a restrictive approach to this definitional problem. In *Hamblyn v. Duffy* (1981), 50 F.L.R. 308 (F.C. Aust.), the Court stated that while "decision of an administrative character" could not be defined with precision, it did include decisions of a statutory tribunal required to act judicially.

See also *Tooheys Ltd. v. Minister for Business and Consumer Affairs* (1981), 36 A.L.R. 64; aff'd 42 A.L.R. 260 (F.C.); *Burns v. Australian National University* (1982), 40 A.L.R. 707 (F.C.); *Mass v. Brown* (1983), 47 A.L.R. 217 (F.C.).

66. J. Griffiths, *ibid.*; see also G.D.S. Taylor, "The New Administrative Law" (1977), 51 A.L.J. 804.

67. But see L.J. Curtis, *supra* n. 63, who argues that this is neither the intent nor the effect of the Act as properly construed. The Federal Court has also taken this 'no-nonsense' approach. In *Capello v. Minister for Immigration and Ethnic Affairs* (1980), 49 F.L.R. 40 (F.C. Aust.), the Court held that the Act does not create a fresh obligation to adhere to the rules of natural justice where none existed before. And in *Hurt v. Rossall* (1982), 43 A.L.R. 252 (F.C.), the Court stated that questions regarding the content and application of the rules of natural justice are not affected by the new Act.

7. The code provides no answer to the intractable questions of what is a relevant or irrelevant consideration, what do the rules of natural justice require in this particular situation, etc.

While this is hardly a fault of codification, it does indicate that "... a code is not a panacea. One must not expect too much of it".⁶⁸

It is as yet too soon to assess the results of the Australian attempt to improve the law of judicial review. The prognosis is somewhat mixed; only time and experience will provide the basis for a complete appraisal.

G. Western Australia

In 1981, The Law Reform Commission of Western Australia issued a comprehensive working paper on judicial review.⁶⁹ Having concluded that the existing law is befuddled with fine distinctions, rendering it unnecessarily complex and uncertain, they examined three approaches to reform.

The first involved the assimilation of proceedings for prerogative writs into those for civil proceedings; the second option considered was to provide a single procedure for judicial review by creating a new remedy as was done in New Zealand and England.⁷⁰ Both options feature the advantage of permitting different forms of relief to be sought in one proceeding. However, neither does much to reform the 'befuddled' principles of judicial review. The third option examined was based on the Australian *Administrative Decisions (Judicial Review) Act 1977*. In commenting on the desirability of codified grounds, the Commission noted the following oft-advanced arguments against codification:

1. A code limits the ability of the courts to change the law to meet new circumstances.
2. Although a code may make the law more accessible, at least to a lawyer, if not to a lay person, it may not make the law more certain or predictable. This is so because it is necessary to interpret the meaning of the provisions of a code in order to apply them to a particular case.

On the other hand, the following considerations were also cited by the Commission:

1. A code can be amended readily by the legislature to meet changing circumstances. For this reason a code need not prove to be inflexible.
2. Codification provides an opportunity to reform the basic principles upon which the law is based and to rationalize the existing law.

68. F.H. Lawson, "A Common Law Lawyer Looks at Codification" (1960), 2 *Inter-American Law Review* 1 at 6.

69. The Law Reform Commission of Western Australia, "Working Paper on the Judicial Review of Administrative Decisions", Project No. 26, Part II (1981).

70. The writer would suggest that reform in England has not created a new remedy, but rather a new procedure only. The Commission, however, characterized the English model as an example of a new *remedy*. It is also questionable whether the Ontario/B.C./N.Z. model creates a new remedy or merely a new procedure.

The Commission noted that the Criminal Code has made the law more certain and predictable, and suggested that a judicial review code might also prove beneficial. However, no conclusions were reached by the Commission in this exploratory working paper.

V. Considerations for Reform

A. An Overview of the Reformer's Dilemma

The shortcomings of the remedies available at common law for securing the judicial review of administrative action have become wearisomely familiar. Their satisfactory removal has been more troublesome than might have been anticipated. A preliminary choice is available to potential reformers. The prerogative orders can be abolished and replaced by a single statutory remedy of judicial review under which a specified range of relief is available upon grounds set out in the statute. Alternatively, an attempt may be made simply to remove the obscure and unsatisfactory procedural and remedial snares and anomalies from the common law remedies, with or without some tinkering with the grounds of review associated with them, leaving enough of the common law intact so as to enable the development of the law of judicial review within its existing contours. The disadvantage of the first method is that the baby of largely satisfactory and familiar substantive law of judicial review may be thrown out with the bath water of its disfiguring procedural and remedial technicalities and archaisms. The disadvantage of the second method is that reforming legislation may not succeed in totally eliminating the unfortunate distinctions inherent in the common law remedies and may create areas of uncertainty in the relationship between the new remedy and the old law.⁷¹

To paraphrase an observation made by Wade,

... the question is whether [we should cut the courts free] from the entanglement which has been made of [the old forms of relief] and find a fresh field where they can make a new start.⁷²

B. Options for Reform

1. Abolishing the traditional forms of relief

The desirability of retaining the old forms of relief has been the subject of much debate, at times flavoured with emotional and evocative rhetoric. From Professor Wade, we have the following:

The procedure for seeking certiorari, prohibition and mandamus could be amended without any need to abolish those ancient remedies themselves. Like habeas corpus, they are monuments to the judges' genius for improvisation, for having originally been instruments of royal power they have been converted into bulwarks of the rights of the subjects. They may well still have a great part to play in the control of administrative jurisdiction.⁷³

Personally I have an affection for [the prerogative remedies], since they are both ancient and efficient and they have done very good service in administrative law. ... If I might venture to say so, it was perhaps heartless of you in British Columbia to kill off these old friends. Even though you have buried them, they are certain to rule you from their graves since the same substantive law will continue under section 2 of your Act.⁷⁴

71. J.M. Evans, "Judicial Review in Ontario — Recent Developments in the Remedies — Some Problems of Pouring Old Wine into New Bottles" (1977), 55 Can. Bar Rev. 148 at 148-149 (footnotes excluded).

72. H.W.R. Wade, "The Future of Certiorari", [1958] Cambridge L.J. 218 at 220.

73. *Ibid.*, at 219.

74. H.W.R. Wade, "The Judicial Review Procedure Act — Comment" in *Proceedings of the Administrative Law Conference, University of British Columbia* (1979) 169. See also N. Fera, *supra* n. 34.

In the other corner, Professor Davis:

... either Parliament or the Law Lords should throw the entire set of prerogative writs into the Thames River, heavily weighted with sinkers to prevent them from rising again.⁷⁵

(Hardly a fitting end for bulwarks of justice, and a most nasty way to treat dear old friends!) The dramatic differences of opinion held by these two administrative law heavyweights illustrates that this issue is not easily resolved.

The argument in favour of abolishing all reference to the old forms of relief centres on the well-acknowledged distinctions and technicalities which plague these remedies. Our pluralistic system of remedies lacks simplicity; it lacks logic; it too often buries the substantive issues in a thicket of procedural snares. The law is difficult to understand, for lawyers, for administrators, and for laymen. These distinctions and technicalities are not necessary; they arise from a long history of the courts creating a patchwork from the fragments of material they had at hand. For their ingenuity and innovation they are to be commended, but, "[t]here comes a time when even the best and most-beloved coat can no longer be patched up".⁷⁶

Those in favour of retaining reference to the old forms of relief generally acknowledge the existence of unnecessary complexities in the present system, but argue the following:

1. Concerns about the defects of the present system are overrated. Recent judicial developments are diluting the effects of these problems. Drastic reform is not necessary.
2. The problems created by the old forms of relief can be mitigated to a large extent by simply providing for the various forms of relief to be available in a single proceeding.
3. Retention of the traditional remedies preserves continuity with the substantive law of the past.
4. Attempts at substantial reform may well create new and even greater problems.

Both viewpoints are with merit; both have been advocated by distinguished writers and law reform agencies. Although not given without some hesitation, it would be my recommendation to those concerned with judicial review reform that an attempt be made to devise a single comprehensive remedy which can provide citizens with effective relief in judicial review proceedings without reference to the old forms of relief. Logic and simplicity suggest this as the preferable basic scheme of reform *if* it can be accomplished without creating myriad new complexities. It is to the viability of this last proviso that we now must turn.

75. K.C. Davis, "The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence" (1961), 61 Col. L. Rev. 201 at 204. See also G. Nicholls, *supra* n. 26 at 256.

76. H.R. Hahlo, "Here Lies the Common Law: Rest in Peace" (1967), 30 M.L.R. 241 at 245. For a reply to Hahlo's article, see M.R. Topping and J.P. Vandenlinden, "Ibi Renascit Jus Commune" (1970), 33 M.L.R. 170.

2. Codification of the grounds of review

As discussed earlier in this article, a system which adopts or incorporates the traditional forms of relief also incorporates the substantive law attached to these remedies (which substantive law may be modified to a greater or lesser extent by specific statutory provisions which override portions thereof). If a new remedy is created the parameters of which are not defined in terms of the old remedies, it becomes necessary to fashion the substantive law by statutory enactment. Matters such as *locus standi*, the types of bodies and decisions to which the Act applies, and the grounds upon which relief is available must all be addressed. The specific question here considered is how to deal with the grounds of review absent reference to the traditional forms of relief.

One alternative (some suggest the only alternative) is to codify the grounds, that is, to spell out in the statute a comprehensive list of all available grounds. While many of the arguments both for and against codification have been canvassed herein previously in relation to reform in other jurisdictions, it is perhaps best to summarize them at this point.

In favour of codifying the grounds for judicial review, the following arguments may be advanced:

1. Codification renders the law more certain and accessible.
2. It has presentational and educational advantages, for both laymen and administrators.
3. Codification need not stifle judicial development or adaptation of the law to new circumstances. The list can be left open-ended to allow for new grounds; the general wording of the grounds leaves sufficient room for the courts to manoeuvre.
4. While the common law has made progress in refining and defining the grounds of review, reform by the courts is sporadic and slow. Uncertainties and anomalies can best be rectified by logical legislative statement.
5. While codification may lead to a temporary period of greater uncertainty, experience with the *Federal Court Act* demonstrates that there need not be a drastic break with the previous jurisprudence.
6. Codification can be used as a vehicle of law reform and rationalization.
 - a) It allows for the removal of all reference to the old forms of relief, which are notoriously plagued with technicalities and anomalies.
 - b) It provides for the creation of a single comprehensive remedy in judicial review.
 - c) It dispenses with the need to classify the nature of a decision to establish entitlement to a particular form of relief.
 - d) It allows the courts to change their focus from the remedy to the substantive issues of the case.

Arguments against codification of grounds include the following:

1. "... [P]robably the least obscure aspects of the old remedies are the grounds on which they are available".⁷⁷ The difficulty lies in defining the scope of the grounds and their application in the particular circumstances of the case. Codification will merely state the obvious (the grounds) and avoid the difficult (their scope and application).
2. "One of the things which codification, contrary to a widely held view, cannot do, or can do only very imperfectly, is to bring law closer to the layman".⁷⁸ In a complex society, the law is necessarily intricate. Few will be enlightened by codified grounds which refer to such complex concepts as 'ultra vires' and 'natural justice'.
3. Codification introduces rigidity into the law which, given the myriad decisions and agencies to which it applies, requires flexibility. The courts are well on their way to clarifying the law; judicial development should not be constrained.
4. Reform of the grounds of review does not require "the heavy guns of codification".⁷⁹ Anomalies can be rectified, and reforms introduced, by specific statutory provisions (for example, as in Ontario's *Judicial Review Procedure Act*, s. 2(2)).
5. "The immediate effect of the introduction of a code, so far from making the law more certain, is to create a lengthy period of increased legal uncertainty. . . . For each head of controversy that has been cut off, there will arise, hydra-like, one or more new ones."⁸⁰
6. A code will almost certainly lead to interpretational difficulties:
 - a) The general terms used will fail to capture the subtleties and refinements which attend the common law grounds.
 - b) Courts often ascribe narrow linguistic interpretations to words presented in statutory form.
 - c) When a statutory ground inadequately expresses a common law ground, the principle of *expressio unius est exclusio alterius* may serve to narrow the common law.
 - d) In general, difficulties will arise respecting the relationship of the common law to the new statutory grounds.
7. Codification may serve to isolate our jurisdiction from others in the Commonwealth. Presently, our system benefits from, and often adopts, judicial developments regarding the grounds of review in other jurisdictions. Likewise, they benefit from our refinement of

77. D.J. Mullan, *supra* n. 27, at 357.

78. H.R. Mahlo, *supra* n. 76, at 245.

79. *Ibid.*, at 244.

80. *Ibid.*, at 249.

the common law principles. Codification may stultify this valuable exchange.

On balance, *viewing the question of codification in isolation from the question of abolishing the old forms of relief*, codification of the grounds of judicial review, particularly of the detailed variety adopted in Australia, would appear undesirable.⁸¹ In short, it accomplishes little and may well introduce new difficulties (although, in light of the admittedly limited but generally favourable experience with the *Federal Court Act* and the Australian Act, the difficulties should not be exaggerated).

3. A possible solution?

Thus far, it has been recommended in this article that:

1. A new remedy should be devised without reference to the old forms of relief;
2. Codified grounds should not be enacted.

If codification is the only alternative to retention of the old forms of relief, these recommendations would appear inconsistent and at cross purposes. Indeed, in such a state of affairs, I would recommend codification (even with its deficiencies) for the sole purpose of ridding reference to the prerogative and equitable remedies.

However, there would appear to be a third option which is briefly referred to (and rejected) by the Ellicott Committee in Australia.⁸²

In the Ellicott Report we find:

In November 1972 Professor H.W.R. Wade . . . visited Australia and . . . expressed the view that it was unwise to specify particular grounds of review . . . As one possibility he suggested that there should be an open-ended ground such as "contrary to law" leaving the court to work out the instances where it would intervene.

We have considered the remarks of Professor Wade but we think there is some merit in specifying particular grounds on which relief may be granted.⁸³

Such an option could be based on the following general scheme:

1. Definition of *locus standi*.
2. Definition of acts and decisions and/or administrative bodies covered by the Act.⁸⁴

81. I have less objection to a very general legislative statement of grounds, such as that presently found in s. 28(1) of the *Federal Court Act* in relation to orders to set aside decisions.

82. *Supra* n. 59.

83. *Ibid.*, at 9.

84. Admittedly, limiting the scope of legislation to reviewable administrative law matters is a difficult task. Yet such a definitional exercise is necessary in any attempt to devise a legislative scheme of judicial review without reference to the traditional forms of relief. See for example, *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, s. 2 and s. 28(1); *Administrative Decisions (Judicial Review) Act 1977*, No. 59 of 1977, s. 3(1) (Aust.). The problem of confining judicial review legislation to public law matters also arises in schemes which do incorporate the traditional forms of relief because of the public/private nature of the declaration and injunction. Even though the prerogative remedies are self-limiting, the injunction and declaration must somehow be confined by the Act to reviewable public law matters. See for example, *Supreme Court Act 1981*, s. 31(2) (U.K.); *Judicial Review Procedure Act 1971*, R.S.O. 1980, c. 224, paragraph 2 of s. 2(1); *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209, s. 2(2)(b); cf. *Judicature Amendment Act 1972*, No. 130 of 1972, s. 4 as am. by *Judicature Amendment Act 1977*, No. 32 of 1977, s. 11 (New Zealand).

3. Provision for a person who has standing to apply to the Court for relief in respect of an act, decision or omission which is contrary to law.⁸⁵
4. Provisions respecting procedure.
5. Provision empowering the Court, in its discretion, to make one or more of the following orders:
 - (a) an order quashing or setting aside the decision;
 - (b) an order referring the matter back to the decision-maker for reconsideration;
 - (c) an order declaring the rights of the parties;
 - (d) an order compelling the decision-maker to do any act or thing;
 - (e) an order prohibiting the decision-maker from doing any act or thing.

Such a model would dispense with the traditional remedies without at the same time specifying the grounds of review. The grounds would be left in the hands of the judiciary where, it is submitted, they best belong. The Courts could continue to apply and refine the traditional grounds of review, and award the specific type of relief required in the circumstances of the case.

Should the legislature wish to expand or reform any particular common law ground (for example, 'no evidence'), it would be possible to deal specifically with that ground in the legislation "without in any way affecting the generality of the foregoing".

It is unfortunate that, to my knowledge, little consideration has been given to this option for reform.⁸⁶ However, should a jurisdiction decide to implement reform of judicial review by way of primary legislation, some thought should be given to this relatively simple, flexible alternative.

85. The phrase "contrary to law" is merely a suggested alternative. An experienced legislative draftsman could perhaps devise a more appropriate phrase to incorporate the common law grounds without actually listing them.

86. Although perhaps this was the scheme envisaged by England's Law Commission in their Working Paper, *supra* n. 19.

