

**LRC'S PROPOSALS FOR  
REFORM OF THE FEDERAL  
JUDICIAL REVIEW SYSTEM —  
A CRITICAL EXAMINATION  
AND COUNTERPOISE**

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**Introduction**

In the early part of this decade, after having served the people of Canada for nearly a century, the Exchequer Court of Canada reached its demise. It was replaced by a new two-tier court consisting of the Federal Court of Appeal and the Federal Court — Trial Division.<sup>1</sup> Both Divisions were granted jurisdiction that had no equivalent in the Exchequer Court.<sup>2</sup>

In the area of judicial review, the Trial Division under section 18 of the *Federal Court Act*<sup>3</sup> was given what was termed "exclusive original jurisdiction"<sup>4</sup> to provide relief by way of the extraordinary remedies<sup>5</sup> or grant similar relief<sup>6</sup> against any "federal board, commission or other tribunal".<sup>7</sup> At the same time, under section 28 of the *Federal Court Act*, the Court of Appeal was given jurisdiction to review and set aside certain types of orders and decisions<sup>8</sup> made in contravention of various procedural and other requirements set out in the section.<sup>9</sup>

In commenting on that section in 1971, prior to the *Federal Court Act* coming into force, I wrote:

... if the entire reviewing process were in one place... the whole [matter would be] simplified. In addition, the confusion and delay that are apt to arise, concerning whether or not the aggrieved party has approached the right forum, would be eliminated.<sup>10</sup>

Now, some six years after the jurisdictional scheme has been in operation, the Law Reform Commission of Canada has recommended a "single route for judicial review"<sup>11</sup> originating

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1. See *Federal Court Act* R.S.C. 1970 (2nd Supp.) c. 10, s. 4.

2. Discussed by me in "The Federal Court of Canada: A Critical Look at its Jurisdiction" (1973) 6 *Ottawa Review*, 99.

3. *Supra*, fn. 1.

4. See *Federal Court Act*, *supra*, s. 18.

5. *Id.*, s. 18(1)(a).

6. *Id.*, s. 18(1)(b).

7. That phrase defined in s. 2(g) of the *Federal Court Act*, *supra*.

8. That is, as set out in section 28, "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".

9. The grounds are set out in ss. 28(1)(a), (b) and (c) of the *Federal Court Act*, *supra*.

10. See "Review of administrative decisions under the Federal Court Act (1970)", (1971) 14 *Canadian Public Administration*, 580 at 590.

11. See Law Reform Commission of Canada, *Working Paper 18: Federal Court — Judicial Review* (1977), 21. Referred to hereafter as LRC's Working Paper or simply Working Paper.

solely in the Trial Division.<sup>12</sup> The Commission has also recommended that all "grounds of review and forms of relief should be expressly articulated in legislation"<sup>13</sup> and that the court should be empowered "to review [purely] administrative, as well as judicial and quasi-judicial decisions".<sup>14</sup>

Those are what I would like to characterize as the LRC's three major reform proposals as outlined in its Working Paper (#18) dealing with judicial review in the Federal Court. Numerous other proposals for change are outlined in that Paper and some of those will be mentioned here as part of a more lengthy discussion on the three major proposals in the hope of making a useful contribution to the current debate.

#### *If Dual Review Route Were Maintained*

##### (1) Major Changes Premature

At the outset I would like to take a few moments to express my views on implementation at this time of the LRC's major changes, especially the one that would divest the Court of Appeal of its section 28 review powers. From what has already been said, it is apparent that, in 1971, I foresaw difficulties with the creation under the *Federal Court Act* of two forums in which judicial review might originate.<sup>15</sup> But whether or not one agreed (or now agrees) with the merits of the original framework or the purposes and aims<sup>16</sup> set by the draftsmen and parliamentarians, it is my firm belief that the scheme, as implemented, must be given a reasonable opportunity to function so that a proper assessment can be made as to whether it achieves any of the objectives intended, or whether it at least achieves a generally suitable and acceptable review process. In short, the Federal Court, as such, has not been in existence a sufficient period of time to yield a clear picture as to the true nature (or full ramifications) of its supervisory jurisdiction.<sup>16a</sup> And while I am not at this time generally opposed to various modest modifications within the two division original jurisdiction scheme, I am not convinced that the dual route, as we now see it, has such intolerable features that the basic framework itself must be abandoned immediately.

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12. *Id.*, at 19.

13. *Id.*, at 30.

14. *Id.*, at 38.

15. Of course, some of those difficulties have now been ironed out through education of the members of the bar, through efforts made by the Court's registry personnel and through both the rules of the Court and the cautious decisions it has rendered in performing its adjudicative functions. The last point will be considered in more detail later in the text.

16. Some of those purposes and aims discussed by me in (1973) 6 *Ottawa Law Review*, *supra*, and in "Conservatism in the Supervision of Federal Tribunals: The Trial Division of the Federal Court Considered" (1976) 22 *McGill Law Journal*, 234, esp. 258-9.

16a. From what is said in the text, *infra*, that point will be substantiated.

In some of my published works I have been or have appeared to be rather critical of particular decisions of the Federal Court — Trial Division.<sup>17</sup> However, examined as a whole, that Court has done an admirable job in its short existence. For example, to avoid being swung too rapidly and without forethought into a pattern of review that might promote the most undesirable aspects of forum shopping, that Division has taken a cautious wise approach with reference to *certiorari* against decisions made after June 1, 1971.<sup>18</sup>

Furthermore, the novel experiment, begun in 1971, of having the bulk of judicial review originate before a three-man court has much merit. And one thing is certain: while the Court of Appeal may be faulted for a particular decision, when its entire work is considered, it becomes apparent that the “quality of justice it administers” is of the highest calibre.<sup>19</sup> Whether or not that stems primarily from several judges hearing the matter at first instance has not been fully explored and perhaps can never be accurately determined. But since the Court’s decisions and reasons are in general highly regarded, and since that Division is “noted for the efficiency and expeditiousness with which it has performed its work”,<sup>20</sup> there is no apparent need at this time to interfere with its jurisdiction to any great extent and there is certainly no justification for its total demise.

If, however, there are indications that in the near future the Court of Appeal may become burdened as a result of its original review function, then, as will be suggested here, efforts can be made to maintain, improve and even increase the Trial Division’s supervisory responsibilities and to make other changes without prematurely aborting the 1971 experiment and, perhaps, in the process giving up a steady stream of good jurisprudence in the area.

All of that aside, whether or not the reader agrees with the views just expressed, he may nonetheless concur, for reasons of his own or for reasons expressed in the remaining pages, that the more modest proposals to be suggested in this paper are more appropriate at this time in the short history of the Court.

## (2) LRC’s “Minor” Proposals

It appears that whether or not the Court of Appeal is divested of its original review jurisdiction or whether the other “major” recommendations of the LRC are accepted, a significant number

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17. See (1976) 22 *McGill Law Journal*. *supra*.

18. Discussed by me in “*Certiorari in the Trial Division . . .*” to be published shortly in the *McGill Law Journal*.

19. See the LRC’s *Working Paper*. *supra*. at p. 17.

20. *Id.*

of its other proposals, with one clear exception,<sup>21</sup> should be and can be implemented without much delay. Thus, there is full support for the following changes:

- (a) Members of the Trial Division should no longer act as unemployment umpires. That task should be assigned to a specialized tribunal.<sup>22</sup>
- (b) Immigration cases should be transferred from the Court of Appeal to the Trial Division.<sup>23</sup>
- (c) Special appeals now existing from some federal authorities should be repealed whenever they involve questions ordinarily raised on judicial review, and special appeals involving review on the merits should be general appeals including questions normally subject to judicial review so there will be no need to rely on the latter as well.<sup>24</sup>
- (d) The court should have discretion within certain limits to dismiss an application for review.<sup>25</sup>
- (e) Interlocutory decisions should be reviewable in one forum only and that court should have authority to exercise a limited discretion not to review.<sup>26</sup>
- (f) At the very least, all parties and persons aggrieved should have standing in proceedings for judicial review.<sup>27</sup>
- (g) Administrative authorities should be obliged to give reasons for decisions, indicating at least the general nature of the information relied on.<sup>28</sup>
- (h) In terms of what may properly be reviewed, reports and recommendations likely to be acted upon should be subject to judicial supervision.<sup>29</sup>

Without repeating in detail all the arguments put forward by the LRC in support of such proposals, it may be said that, in general, such changes might help reduce the workload of the Federal Court as a whole and the Court of Appeal in particular and, in addition, would eliminate some jurisdictional redundancy and the accompanying procedural confusion and

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21. I cannot agree with any of the Commission's proposals discussed and summarized in Chapter II of its Working Paper entitled "Interaction with Provincial Courts". My criticisms and comments dealing almost exclusively with review of extradition matters will be published in a separate paper in another Journal.

22. See the *Working Paper, supra*, tentative view 2.8.

23. *Id.*, 2.9 and p. 18 esp.

24. *Id.*, 2.4

25. *Id.*, 3.6.

26. *Id.*, p. 30.

27. *Id.*, 5.3.

28. *Id.*, 5.2.

29. *Id.*, 3.5.

complications.<sup>30</sup> At the same time, those changes would help give greater protection to those whose rights might ultimately be affected and help achieve greater efficiency in granting relief where it is truly merited.

(c) *Certiorari* in the Trial Division

Let us continue to assume that both Divisions of the Federal Court will continue to possess original jurisdiction in the review of administrative decisions. What other changes could then be made to improve that scheme and still maintain the bulk of the review process before a three man court?

From a reading of section 18 by itself, it seems clear that the Trial Division of the Federal Court has jurisdiction to issue *certiorari* against any federal board, commission or other tribunal. But section 28(3) says the Trial Division has no jurisdiction where the Court of Appeal has jurisdiction under section 28 to hear and determine certain types of decisions.

As is well known now, the Supreme Court of Canada has expressed the view that while review under section 28 replaces the traditional forms of inquiry, it is "much broader in scope".<sup>31</sup> What then is the state of *certiorari* in the Trial Division? Professor Evans<sup>32</sup> and I<sup>33</sup> have been engaged in a public discussion over that very question. Without purporting to decide the outcome of that debate in my favor, it is perhaps fair to assume that both sides would agree that there is some confusion as to whether or not *certiorari* is available for any purpose in the Trial Division.<sup>34</sup>

That confusion should be ended now by legislative intervention. It should be made clear that *certiorari* in the Trial Division is not available to review the final decision of a federal tribunal. *Certiorari* in the Trial Division should be restricted to the review of interim or interlocutory decisions, and, perhaps, to be used in aid of one of the other traditional remedies. And, if the latter proposal were accepted, it should be made clear that *certiorari*, say, in aid of *mandamus*<sup>35</sup> is much more limited than when the former remedy, by its own strength, is used to quash a decision.<sup>36</sup>

30. Section 29 of the *Federal Court Act*, *supra*, has caused confusion. However, the rules of the Court have helped to alleviate some of it.

31. See *Puerto Rico v. Hernandez* [1975] 1 SCR 228, per Pigeon J. (for the majority) at p. 237.

32. See J.M. Evans, "The Trial Division of the Federal Court: An Addendum" (1977) 23 *McGill Law Journal*, p. 132.

33. See "Certiorari in the Trial Division . . ." to be published in *McGill Law Journal*.

34. It is therefore also reasonable to question the LRC's assertion that the "Trial Division has . . . assumed jurisdiction to review preliminary or interlocutory matters by means of the traditional remedies." See the *Working Paper* at p. 16.

It should be noted that at the time of this writing, *certiorari* has never issued against a decision rendered since the *Federal Court Act*, *supra*, came into force. Decisions given before that date have been reviewed under *certiorari* in the Trial Division.

35. To see how *certiorari* might be used in aid of *mandamus* see *Auger v. Canadian Penitentiary Service*, [1975] F.C. 330.

36. Similar views expressed by Laskin C.J. in *Mitchell v. The Queen*, [1976] 2 SCR, 570 at 578.

As suggested earlier, the Trial Division should be given discretion along the lines suggested by the LRC to refuse to review interim determinations (most of which are now not reviewable in the Court of Appeal under section 28) if the grounds are, for instance, vexatious or if the issue might conveniently be dealt with following a final decision by the tribunal.

(d) Review of Purely Administrative Decisions

With certain qualifications, it is my view that purely administrative decisions should be subject to review both for illegality and unfair procedure. Such review might now be expressly given to the Court of Appeal. Indeed, that may have been originally intended when the *Federal Court Act* was first drafted.<sup>37</sup> However, in light of recent decisions,<sup>38</sup> a fresh attempt would have to be made to carry out that goal. But my thinking on that point does not totally coincide with that of the LRC.

The Commission would do away with the judicial-administrative classification<sup>39</sup> and empower the Court — i.e., the Trial Division of the Federal Court — to review administrative as well as judicial and quasi-judicial decisions for non-compliance with natural justice unless some other public interest were to outweigh the need for the traditional procedural safeguards.<sup>40</sup>

Almost every writer<sup>41</sup> in administrative law, myself included, has despaired over trying to sort out the differences between judicial and quasi-judicial decisions (which are reviewable) and administrative decisions (which are not). At the same time, the LRC feels that some cut-off mechanism is needed. It recommends, therefore, that criteria such as efficiency in government, national security and confidentiality serve as the discriminative tools. For a number of reasons I am generally not in favour of such a proposal.

To begin with, it seems that even with reference to decisions traditionally seen as judicial or quasi-judicial, the Commission is prepared to permit a court to deny the rules of natural justice because of the need to maintain certain values such as confidentiality.<sup>42</sup> But legislative provisions of that order might

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37. Refer again to the words used in s. 28. *supra*. fn. 7.

Note also the words of Dickson J. (dissenting and speaking also for Laskin, C.J. and Spence J.) in *Howarth v. National Parole Board*. [1976] 1 S.C.R. 453 at 457: "Section 28(1) embraces all decisions or orders of a judicial nature and certain decisions and orders of a purely administrative nature".

38. See, for eg. *Howarth*, *supra* and *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board*. 33 C.C.C. (2c) 366 (S.C.C.).

Compare *Lazarov v. Secretary of State of Canada*. [1973] F.C. 927 (C.A.).

39. See the LRC's *Working Paper*, tentative view 4.3 at p. 47.

40. *Id.*

41. See particularly R.F. Reid, *Administrative Law and Practice*. (Toronto: Butterworths, 1971) at 113 *et seq.*

42. See *Working Paper*, tentative view 4.3 at p. 47.

well be used to undermine some of the progress already made in the area of disclosure.<sup>43</sup>

Secondly, while we may not agree with particular decisions with reference to what is and what is not a purely administrative decision and how the court reached that determination, there is still much to be said for preserving the judicial-administrative dichotomy:

- (1) Much experience has been gained by both the bar and the courts in dealing with that classification.
- (2) There is now much case law which clearly establishes that certain decisions are either of one kind or the other.<sup>44</sup>
- (3) Case law on point does indicate a number of reasonable and understandable legal tests for discerning whether it is one or the other.<sup>45</sup>
- (4) Such tests have a strong legal orientation and are not apt to easily involve the courts as a result of their application in the midst of a social policy or political controversy.

With reference to the last point, no one will benefit by forcing the courts to weigh one sensitive public interest against another and pushing them into "political" controversies. One can easily foresee the media seizing upon "judicial reasoning" based on such criteria: "JUDGE RULES CITIZEN CAN BE TREATED UNFAIRLY IN INTERESTS OF EFFICIENCY" or, more cryptically, "COURT RULES EFFICIENCY MORE IMPORTANT THAN JUSTICE".

Needless to say, such notoriety would not arise with every case and it could be avoided in many others. In self-defence, the courts might review all decisions or give bland or obscure reasons for refusing to require adherence to certain procedural requirements. But neither of those eventualities would help achieve the goals of the Commission. Under the first approach, no cut-off criteria would in fact exist and, under the second, we would again be in the dark as to what may be and what may not be reviewable.

It is my suggestion that strictly administrative decisions should be reviewable and that a new attempt should be made to

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43. See for eg. *R. v. Gaming Bd.*, [1970] 2 All E.R. 528 or *London Cable TV Ltd.*, A-647-75 (F.C.A.).

44. For example decisions of the National Parole Board are not judicial or quasi-judicial in nature. See *Howarth v. National Parole Board* (1974), 18 C.C.C. (2d) 385 or [1976] 1 SCR 453.

Decisions of an Inmate Disciplinary Board are also (purely) administrative. See *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board* (1977), 33 C.C.C. (2d) 366.

Reid. *supra*, discusses functions classified as administrative at p. 131 *et seq.*

45. See S.A. de Smith, *Judicial Review of Administrative Action* (3rd) (London: Stevens, 1973) P. 68. Those tests referred to by Dickson J. in *Howarth. supra*.

provide for such review by means of legislative intervention. However, the grounds of review should be expressly defined and limited so as to dissipate and avoid much of the confusion now evident about the existence of the "duty to act fairly"<sup>46</sup> and the exact scope of the procedural requirements it encompasses.<sup>47</sup>

Provisions for establishing such limitations could be approached in a number of different ways. For example, the statute might provide that while no formal hearing is required, a tribunal, in rendering a statutory decision of a purely administrative nature affecting the rights of an individual, must give the party directly affected a general description of the allegations or arguments against him so that he can personally<sup>48</sup> respond adequately either orally or in writing.<sup>49</sup>

More appropriately, it might be provided, for example, that while strictly administrative decisions affecting the rights of an individual are subject to review, they are reviewable only for illegality and on grounds of procedural deficiency which are far less onerous than those which must be followed where a judicial or quasi-judicial decision is rendered. Under the second approach, the courts would be left to work out, on a case by case basis, limited requirements of procedural fairness where a strictly administrative decision were found. And if the requirements of natural justice relative to judicial and quasi-judicial decisions were to grow and expand, so too might the other. At the same time, the proposal seems to carry within itself a kind of cut-off mechanism in that, because the procedural requirements are minimal, purely administrative functions would not and should not be challenged frequently.<sup>50</sup>

Obviously, the system suggested in this section does not do away with the judicial-administrative dichotomy. But then the Commission's alternative is none too appealing either. Think of the division between decisions requiring adherence to the rules of natural justice and those that do not because of the need to uphold efficiency in the public interest. Why should we expect

46. See, for eg, *Howarth, supra* and *Prata v. Min. of manpower and Immigration* (1975), 52 DLR (3d) 383 (SSC). From the Federal Court of Appeal see *Lazarov, supra*.

47. See for eg, the judgment of Megarry J. in *Bates v. Lord Hailsham*, [1972] 1 WLR, 1373 at 1378. Note, too, that in *Howarth, supra*, at 468 Dickson J. contrasts the "full panoply of rights accorded to an accused in a criminal prosecution" to the "minimal procedural protection" he would require of a tribunal revoking a parole.

48. I very much doubt the appropriateness of the word and its placement. But it *might* be useful in quenching any notion that the person affected has an absolute right to be represented by counsel when stating his own case or during the other proceedings of the tribunal.

49. Or consider this: He must be afforded a fair opportunity in one way or another of stating his position with respect to any matters which in the absence of repudiation or explanation would lead to a decision adverse to him. See *Lazarov, supra*.

See also description of the duty given by Lord Denning in *R. v. Gaming Board, supra*, at 430-1.

50. The need for minimal procedural requirements has here been restricted to purely administrative decisions affecting rights and, if a further narrowing were found desirable, the limited procedural rules could be made to apply to certain enumerated rights. Another approach would be to limit such review to instances where there has been "a serious adverse effect upon rights". In *Howarth, supra*, at 465 Dickson J. found such an effect.

the courts to work out a more satisfactory dichotomy under that criterion? And with reference to confidentiality, is the public interest requiring non-disclosure of, say, financial data of a rate increase applicant before a regulatory agency that self-evident?<sup>50a</sup> Is that really the public interest the Commission wishes to protect? Are the courts properly equipped to make such assessments? What information would the court have to seek and possess to make a proper determination in that regard? The questions raised here attack the Commission's proposal from a number of different sides, but all such issues (and many more) will eventually have to be resolved. And when they are, I am not at all sure we shall be further ahead in being able to predict which decisions can be impugned for failure to conform to the rules of natural justice and which cannot.

#### (e) Two Radical Proposals

At this point, I would like to set out two seemingly radical proposals. First, why not place review of purely administrative decisions, along the lines suggested, solely in the Trial Division of the Federal Court and leave the Court of Appeal with its present jurisdiction and much broader grounds of review with reference to judicial and quasi-judicial decisions?

In fact, that proposal is far from radical. It tends to accord with the present state of the law. That is, if review under section 28 is confined to judicial and quasi-judicial decisions,<sup>51</sup> as seems to be the case, then, to the extent that it is permitted under the extraordinary remedies (including *certiorari*) purely administrative decisions are now reviewable in the Trial Division<sup>52</sup> under the "fairness" doctrine (assuming that it is accepted). However, earlier, in light of the apparent confusion about the existence and requirements of the "duty to act fairly", it was suggested that there be legislative intervention and guidance at this time to define and confine the scope of review for procedural fairness as it relates to purely administrative decisions.

The proposal now being considered here is whether it would be appropriate to provide that kind of limited statutory review

50a. It might be instructive to compare the CRTC decision in 76-2 to disclose the bulk of an economic survey prepared by Bell Canada with the CRTC decision in 77-5 not to make public certain cost, revenue and marketing information submitted by B.C. Telephone.

51. In *Howarth, supra*, at 471 Pigeon J. (for the majority) noted:

"Thus, the clear effect of the combination of ss. 18 and 28 is that a distinction is made between two classes of orders of federal boards. Those that, for brevity, I will call judicial or quasi-judicial decisions are subject to s. 28 . . . The other class of decision comprises those of an administrative nature not required by law to be made on a judicial or quasi-judicial basis. With respect to that second class, the new remedy of s. 28 . . . is not available, but all the . . . common law remedies remain unchanged by the *Federal Court Act*".

And at 472, he notes that there is "no material difference between the expression 'not in any way a judicial determination'," an expression used in *Ex parte McCaud*, [1965] 1 C.C.C. 168, and the words in section 28, namely, "not required by law to be made on a judicial or quasi-judicial basis."

52. That is, assuming that in Canada purely administrative decisions must be within the bounds of fairness. See *Lazarov, supra*.

solely in the Trial Division. Obviously, if the case law were clear that a decision rendered by, say, a penitentiary official against an inmate were purely administrative in nature, then the aggrieved (through counsel) would proceed directly to the Trial Division and completely avoid the Court of Appeal at first instance. And, of course, if some other body rendered a decision and counsel were convinced it was judicial or quasi-judicial and improper, he would proceed directly to the Court of Appeal for much broader grounds of review under section 28 or some like provision.

Alternatively, and more appropriately, the Court of Appeal could also be given jurisdiction to review or rather exercise a discretion to review strictly administrative decisions on the basis described. In that way, if counsel erred in his assessment of the nature of the decision and was already in the Court of Appeal, he would not necessarily have to recommend proceedings in the Trial Division.

The significant feature of providing for review of purely administrative decisions in both Divisions under the terms described is that there already exists much case law (some from the highest authority) which definitely holds certain types of decisions to be of one kind or another. Assuming, therefore, that counsel for the aggrieved has no ulterior motives and assuming he is conscientiously aware that discretion might be exercised against him in the Court of Appeal (at first instance) when matters on point are clear, the notion of providing for limited statutory review of purely administrative decisions in the Trial Division and also in the Court of Appeal should not be summarily dismissed. Among other things, it might provide an effective way for limiting, to some degree, the number of cases commenced in the Court of Appeal. And, if the aggrieved were to proceed directly to the Trial Division, much time and expense would be saved during the litigation process itself because the question of whether the impugned decision is judicial or administrative is no longer an issue. Also, as implied above, sometimes, the aggrieved wishes no more than the opportunity to present his side of the case to the decision-making authority. In those instances, review in the Trial Division might well be seen as a means of reducing the number of contentious legal issues to be argued and resolved while still providing an effective remedy.

(f) Simple Form of Proceeding in the Trial Division

If the Trial Division were to continue to possess original jurisdiction along the lines outlined above (or as now exists) then a "single, simple form of proceeding for all review of

administrative action”<sup>53</sup> should be instituted. That approach has been adopted in Ontario and British Columbia, recommended by the English Law Reform Commission and advocated by leading American authorities on administrative law.<sup>54</sup>

The LRC, however, favours instead a single statutory remedy expressed articulating all grounds of review with no reference to the traditional remedies. But it may be argued against that proposal that a general legislative articulation achieves little because both the essence and labels of the traditional grounds of review are usually maintained.<sup>55</sup> Consequently, reference to the previous common law is barely affected.

Also, there is always the fear that the “codification” will be too rigid and so mitigate against “the kind of judicial development now possible under the traditional remedies”.<sup>56</sup> Furthermore, theorizing aside, in light of the section 28 experience and subsequent confusion, it can no longer be said with much conviction that it is exclusively an “important defect” of the type of approach taken in Ontario and British Columbia that keeps “the law difficult to understand”.<sup>57</sup> In that regard, reference need only be made to sub-section 28(1)(c) which may have been an attempt to codify the no-evidence rule. And surely, no one really expects the general practitioner, let alone the layman, to be much enlightened as to the articulated grounds of review (without an appreciation of the most recent judicial authorities) when expressions like “natural justice” and “*ultra vires*” are part of the legislative language.

In sum, I cannot agree that a general legislative articulation of the grounds of review and forms of relief is preferable to a system which simply refers to the old forms of relief and at the same time eliminates all the procedural snares that have accompanied those remedies. There will be more on that topic later in this paper.

#### *If One Review Forum*

##### (a) Maintain Original Review Jurisdiction in Court of Appeal

As I suggested in 1971, if there were to be one, and only one Division of the Federal Court with original review jurisdiction, I would then lean towards placing all such jurisdiction in the Court of Appeal and experiencing the full ramifications of that rather bold experiment. That is still my position at this time.

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53. Words of American authority K.C. Davis cited in the *Working Paper* at pp. 26-27.

54. See *Working Paper*, pp. 26-27.

55. See, for e.g., s. 28 of the *Federal Court Act*, *supra*, esp. s. 28(1)(a).

56. *Working Paper*, p. 28.

57. Words that appear in the *Working Paper* at p. 27.

In exercising its original review powers, the Court of Appeal has done more than an adequate job. In the words of the Law Reform Commission itself:

... from its establishment the [appellate] court has been noted for the efficiency and expeditiousness with which it has performed its work. Nor... has there been any general criticism that the quality of justice it administers is defective.<sup>57a</sup>

It is ludicrous, therefore, to suggest abandonment of that Court's review function because one "senses"<sup>58</sup> that it has too much to do or because some judgments are "quite cryptic".<sup>59</sup> Practitioners who have had experience both in the provincial superior courts and in the Federal Court of Appeal in applications for review will certainly attest to the greater accessibility and efficiency of the latter.

The merits of continuing original review jurisdiction in that three-man court have been considered elsewhere and there is no need to repeat them here. I reiterate, however, the point that no substantial and credible reasons have been advanced to warrant the demise of such jurisdiction at this time.

#### (b) Grounds of Review and Forms of Relief

Let us assume that the fervour for reform of the Federal Court has reached such a pitch that minor changes will not appease and that one Division or the other will lose its review jurisdiction at first instance. The next major reform issue seems to centre on whether the grounds of review and forms of relief should be expressly articulated in legislation and the extraordinary remedies done away with for all time.<sup>60</sup> There appears to be no general consensus on that point.

The particular decision or specific test aside, I have felt for some time now that, when considered as a whole, the system of review that has developed under the extraordinary remedies has yielded a well-balanced scheme of judicial involvement. Under it, for example, when the judicial-administrative bifurcation proved inadequate, the courts seized upon some middle ground and spoke of a quasi-judicial function to be treated like its judicial parent.<sup>60a</sup> With reference to discretionary decisions, the courts evolved a set of rules that would also bring those determinations under some kind of supervision. They subdivided discretion into executive<sup>61</sup> and judicial<sup>61a</sup> and set out principles

57a. *Id.*, p. 17.

58. *Id.*

59. *Id.*

60. In that regard see the LRC's proposals (3.1 and 3.2) in the *Working Paper* at p. 46.

60a. For a brief comment on that evolution see H.W.R. Wade, *Administrative Law* (3rd) (Oxford: Clarendon Press, 1971), pp. 190-1.

61. See, for e.g., *Shawn v. Robertson et al.* (1964), 46 D.L.R. (2d) 363 (Ont. H.C.) or *Ex parte Joble*, [1963] 2 Q.B. 243 (C.A.), esp. 261-2.

61a. A number of the grounds of review are canvassed in *Westminster and London and North Western Railway Co.*, [1905] A.C. 173 (H.L.) and *Roberts v. Hopwood and Others*, [1925] A.C. 578 (H.L.).

for the review of each — rules that would not stifle the original intent of granting power of that nature and at the same time would give some protection against abuses. And more recently, we have seen the courts, especially those in Britain,<sup>62</sup> begin to see the necessity for some supervision over the myriad of strictly administrative decisions.

In sum, apart from the procedural pitfalls, no one can complain too strongly about the total review framework the courts have been able to fashion under the extraordinary remedies. It encompasses a sufficient degree of variety so as to permit both the growth and the smooth operation of the administrative process without disregarding the needs of the individual who might otherwise be ignored, mishandled or abused by it.

Could the draftsmen and legislators do as well in one fell swoop? With all due respect, I have my doubts that they could. But the LRC's legislative scheme setting out the grounds of review are compelling. They seem so readily understandable and uncluttered.<sup>63</sup> *But do they maintain the subtleties alluded to?* Could they be enacted as they are without further elaboration? Is, for example, "error in law" to be construed as error whether or not on the face of the record? Does "lack of evidence to support a decision" refer to a total lack of relevant evidence or does it relate to sufficiency of evidence or the weight of evidence? And what would be the result if the draftsmen were to qualify, elaborate or "clarify" those grounds of review?

Section 28 of the Federal Court Act is one example of a recent attempt to expressly articulate in legislation the grounds of review. But that provision, considered as a whole, has proven to be most troublesome.<sup>64</sup> Consider the present state of the law. That is, after some six years, nothing more than these rather vague and somewhat contradictory and tentative principles may be stated:

- (1) While it may appear from reading the opening words of section 28 that certain kinds of administrative decisions may be reviewed in the Court of Appeal,<sup>65</sup> it seems, instead, that under the authority of the highest court in the land, that only judicial and quasi-judicial decisions are reviewable.<sup>66</sup>

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62. See *R. v. Gaming Board, supra* and *Lazarov, supra*.

63. See *Working Paper* at pp. 46-47.

64. In 22 McGill L.J., 234, I wrote of s. 28:

"... at best it is minimally defined, poorly qualified and often confusingly ambiguous in significant places."

65. See also comment of Thurlow J. in *Blais, supra*, and *Re War Amputation of Canada and Pension Review Board et al.*, [1975] 55 DLR (3d) 724.

66. Only judicial and quasi-judicial decisions seem reviewable under section 28. See *Howarth, supra*.

- (2) While most interim or interlocutory decisions are not reviewable in the Court of Appeal,<sup>67</sup> a statutory determination of law or jurisdiction is clearly a "decision" within the meaning of section 28.<sup>68</sup>
- (3) While the grounds of review under ss. 28(1)(b) appear broader, there is yet no case indicating the use of that subsection to grant review where it would not have previously been available.<sup>69</sup>
- (4) While it cannot be said definitely that ss. 28(1)(c) amounts to nothing more than the traditional no-evidence rule, no case yet shows an application beyond that.<sup>70</sup> Interestingly, despite the preponderance of previous authority, it seems as though the Court of Appeal is now treating it as part of the concept of error of law and not jurisdictional error. And it cannot be said definitely whether review under that provision is simply for a total lack of evidence,<sup>72</sup> for sufficiency,<sup>73</sup> or for something more.<sup>74</sup>
- (5) While the Supreme Court of Canada has expressed the view that the grounds of review are much broader than previously available,<sup>75</sup> it is difficult to find case authority that reflects that assessment.<sup>76</sup>

Thus, after much jurisprudence, expense and analysis, we are still uncertain as to what was originally meant by the legislative provisions or what is now the governing interpretation of such enactments. Significantly, the confusion just described does not arise primarily out of the delicate relationship between the review jurisdiction of the two Divisions of the Court. It seems to stem largely from an attempt to articulate in legislative form the grounds and limitations of the review power in the Court of Appeal.

In light of the current state of the law, the following comments by the LRC on the point seem somewhat out of touch:

At the federal level, a full reinstatement of the prerogative remedies would obviously be a retrograde step. Section 28 was a clear advance

67. See *In re Anti-Dumping Act and In re Danmor Shoe Co.*, [1974] 1 F.C. 22.

68. See *Re War Amputations of Canada*, *supra*.

69. That view supported by the *Commission Background paper*.

70. See for e.g., *S.I.U. v. Kent Line Ltd.*,<sup>27</sup> [1972] F.C. 573 or *Mojica v. M.M. and I.*, [1977] 1 F.C. 458.

71. See for e.g., *Mojica*, *supra*.

72. See, for e.g., comments of Walsh J. in *In re North Coast Air Services Ltd.*, [1972] F.C. 390 at 416 where he speaks of the Court inquiring if there is "any evidence".

73. See *P.I.P.S. v. A.G. Canada*, [1972] F.C. 1316 per Jaccett, C.J. at 1321.

74. There was considerable speculation that the provision — 28(1)(c) — created something in the nature of an appeal.

75. *Hernandez*, *supra*.

76. That view may be supported by the *Commission Background Paper*.

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*.<sup>77</sup>

### The Paper goes on:

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 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 . . . .<sup>77a</sup>

In general I disagree with that submission. If there is to be a major revamping of the *Federal Court Act* in this area and if jurisdiction is to rest solely in one forum, then a system comparable to those adopted in Ontario and British Columbia may be preferable for some of the reasons already outlined. Under such a system

. . . only one application to the court need be . . . made [and] a case is not lost because the wrong remedy is chosen.<sup>78</sup>

### And as the LRC itself concedes:

This approach is a clear improvement and should certainly be adopted if the prerogative writs are retained for any purpose.<sup>79</sup>

It must be pointed out that those who adopt such a scheme are not necessarily confined to "merely [improving] procedure".<sup>80</sup> The Ontario statute — *The Judicial Review Procedure Act*<sup>81</sup> — shows how the traditional grounds and forms of relief can be modified and improved.<sup>82</sup> Indeed, it is submitted that this approach is far superior for the purpose of achieving the most refined "reform in substantive law".

However, given that the Federal Court of Appeal has operated under "codified" grounds of review, and given that considerable jurisprudence has now been amassed on the interpretation of section 28, would it be wise, at this stage, to establish a "new" remedy<sup>82a</sup> whose scope is defined largely in terms of the old forms of relief? Would that not truly be a "retrograde step" in that it would effectively dash all hopes that "much broader grounds of review" have been established?

77. See *Working Paper* at p. 27.

77a. *Id.*

78. *Id.*

79. *Id.*

80. At p. 27, the *Working Paper* says this about combining all remedies into one like that which has been done in Ontario:

"It merely improves procedure: it effects no reform in the substantive law".

81. S.O., 1971, Vol. 2., c. 48.

82. *Id.*, s. 2(4). Also reference might be made to s. 2(2).

82a. It might similarly be argued against the Commission's proposal to articulate in legislation the grounds of review.

At the rational level, however, while section 28 has been touted both by judicial pronouncement<sup>83</sup> and by comments of writers<sup>84</sup> in the field as extending the scope of judicial review, in fact, relative to the grounds upon which relief might be granted, there is little in the case law so far to substantiate those assertions. If that is so, apart from the expense and time which has already been expended in testing and seeking out broader grounds of intervention, the principles to be found in the case law are therefore applicable to the traditional forms of relief. For example, in the cases<sup>85</sup> dealing with sub-section 28(1)(c), all the judgments in the Court of Appeal deal minimally, if at all, with the words and phrasing of that provision and the interpretation to be given to them. Tacitly, or, perhaps, intuitively, the Court has treated it like the common law "no-evidence rule". As a result, the cases are very instructive in giving us an appreciation of what the Court perceives as the components of that traditional principle.

In short, therefore, if the bent for reform leads into this area, there is no real obstacle, even at this time, to adopting the Ontario approach with appropriate legislative expansion or qualifications. Alternatively, and perhaps less appropriately, the grounds of review under section 28 could be maintained as they are and the power to issue the traditional remedies (now in the Trial Division) could be transferred to the Court of Appeal. Subsections 28(a) to (c) as they now stand could be seen as an elaboration and "expansion" of some of the traditional grounds of review.

As stated earlier, however, there appears to be no good reason for getting involved in this type of reform at this time. If it were begun, though, the suggestions and arguments given here and by the LRC should be fully considered.

### *Concluding Remarks*

Prior to the work of the LRC in this area, rumblings were heard that the Department of Justice was considering changes in the federal system of judicial review. However, neither their proposals for change nor the rationale behind them have ever been officially disclosed. Since it is difficult both to fight phantoms and to argue against what is rumoured, it seemed wise to say little or nothing about that agency's current inclinations for reform.

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83. *Hernandez, supra.*

See also remarks of Thurlow, J. in *Blais, supra.* at 162.

84. See, for e.g., *Mullan, supra* at 36. But note his later assertion in the same article that "In theory these two subsections [28(1)(b) and (c)] represent a significant increase in the area of judicial review."

85. See, *supra.* ff. 70-73.

In contrast, the LRC, as might be expected from such a body, has candidly and clearly set out its reform package and attempted to explain its reasons for change. It has even gone further. In some instances it has courageously set out proposals that clearly go against the current consensus of opinion. Undoubtedly, it expects and will receive much criticism. Nevertheless, such ideas have to be put forward, argued and re-considered from time to time. We should be pleased that the Commission has reached that level of maturity and security which permits it to lead in the discussion.

On the other hand, there are indications that the Commission's Paper was hastily prepared. For example, there is the unqualified assertion that interlocutory decisions are now reviewable in the Trial Division<sup>86</sup> and, in advocating statutory articulation of the grounds of review, it seems to ignore the section 28 experience and rely to a certain extent on pre-1971 "authorities" to justify its position.<sup>87</sup> In addition, it may have "unwantingly" (but inevitably) or unwittingly advocated curtailment of the need to conform with natural justice even where a judicial or quasi-judicial decision is involved because some other public interest such as efficiency or confidentiality outweighs the former interest.<sup>88</sup>

As noted throughout, the Commission's justification for advocating its "major" changes is, at best, weak or specious. For instance, its argument for placing original review jurisdiction solely in the Trial Division is supported partly by reference to a *feeling* it has that the Court of Appeal has too much to do.<sup>89</sup> That feeling seems to have arisen largely from an examination of the Court's docket<sup>90</sup> and the fact that some of the decisions of the Court of Appeal seem quite cryptic.<sup>91</sup> But the Commission brings that — its own assessment — into question a short time later when it unequivocally states that "from its establishment the [Appeal Court] has been noted for the efficiency and expeditiousness" and for the high "quality of justice it administers".<sup>92</sup>

In any event, there is much to be gleaned from the LRC's Working Paper. Its proposals dealing with what it calls "mechanical transfers of jurisdiction"<sup>93</sup> warrant serious

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86. *Working Paper* at p. 16.

87. *Id.* at 26-27.

88. *Id.* See tentative view 4.3 at p. 47.

89. The Commission writes in its *Working Paper* at p. 17: "In a general way, we *sense* that the Court of Appeal may have too much to do". (Italics added).

However, it does put forward other more substantial reasons. At pp. 16-17 it refers to difficulty in determining with precision what falls within the jurisdiction of one Division or the other.

90. See *Working Paper* at p. 17.

91. *Id.*, p. 18.

92. *Id.*, p. 17.

93. *Id.*, p. 19.

consideration for implementation at the earliest opportunity. Some of its other "minor" reform proposals have been mentioned and those too should be given immediate consideration.

Since there appears to be no sound or pressing reasons at this time to abolish the dual review route within the Federal Court, this paper has taken some time to advocate other generally minor changes that could be incorporated into the present two-tier jurisdictional framework. For instance, to end speculation as to the availability of *certiorari* in the Trial Division, legislative intervention has been suggested to specify the purposes for which it is available in that forum. And more importantly, a simple form of proceeding in the Trial Division like that available at present in the province of Ontario has been advocated.

With reference to the review of purely administrative decisions, it has been suggested that to fully involve the Federal Court in this process and at the same time to avoid much of the confusion as to the procedural requirements of the "duty to act fairly", legislative intervention should now be initiated setting out minimal standards relative to such decisions. Several advantages to that approach have been suggested. Only a few are re-stated here. First, the jurisprudence and tests relating to the judicial-administrative dichotomy with which the Canadian judiciary and bar are now familiar would not become instantly obsolete. Also, as alluded to earlier, the indications at present are that the procedural requirements of the "duty to act fairly" are not exactly known. They may be less than or the same as the requirements of natural justice. On the other hand, it may be that each situation carries its own requirements. If so, then the confusion surrounding the judicial-administrative dichotomy would be replaced by a more pernicious variable. Thus, to clarify and resolve such doubts and to prevent a more destructive type of uncertainty, the proposal suggested here merits consideration.

If both Divisions of the Federal Court were to retain review jurisdiction at first instance, then supervision of purely administrative decisions could arise solely in the Trial Division or, more appropriately, in either, provided the Court of Appeal were given discretion to refuse to entertain such a review where the applicant clearly ignored the authorities on the issue of classification.

The experiment of having the decisions of tribunals reviewed at first instance by a three-man court is still relatively new. There are no indications that it is doomed to fail. Thus, efforts should be made to continue original review jurisdiction

in the Court of Appeal until some future time when its efficiency, costs and other ramifications can be more accurately appreciated and assessed. And if the urge to confine original review jurisdiction to one forum and only one were to persist, then it is the Court of Appeal which should win out. It is that forum which should be given the full panoply of review powers along the lines discussed. To achieve that end, any one of a number of approaches is possible. But for reasons suggested earlier, a single application for review based on the old forms of relief seems to be the best alternative. That proposal, however, is not likely to be accepted. Alternatively then, the Court of Appeal might be given the current jurisdiction of the Trial Division (as qualified and improved upon in accordance with the various submissions) while at the same time being allowed to retain its section 28 review power more or less as presently articulated.

In conclusion, the main thesis of this paper is re-stated: There appears to be nothing in the present federal supervisory system of review that is so intolerable as to warrant immediate major or radical change. Minor improvements will suffice. Let us then continue (and improve where necessary) the experimental framework of 1971 and ignore the pleas to abort.

