Steve Dart v. Board of Arbitration

In 1924, Lord Atkin, in *The King* v. *Electricity Commissioners*,[1] considered the rules under which the writs of prohibition and *certiorari* might issue. He said:

> Wherever any body of persons *having legal authority to determine questions* affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the [courts] ... .[2]

With reference to prohibition, the decision of the Supreme Court of Canada in *Bell* v. *The Ontario Human Rights Commission*[3] permits judicial intervention to prevent an excess of jurisdiction even before a tribunal itself has fully considered the jurisdictional issue. But, will prohibition issue to prevent a person or body of persons who has no legal authority to decide any matter whatsoever from proceeding as if it had such power?

While no Canadian writer has addressed himself directly to this question, the late Professor de Smith wrote that "[i]t may be justifiable ... for a court formally to set aside decisions by usurpers".[4] However, in making that statement, Professor de Smith was merely expressing a personal view of what the law ought to be[5] since British courts have generally not issued the traditional remedies against the nugatory decisions of usurpers.[6]

By virtue of our "federalist" nature, there are apt to arise in Canada, more so, perhaps, than in a unitary state, bodies purporting to exercise powers but which in fact have no authority to decide anything whatsoever.[7] By the use of prohibition, can such bodies be restrained before they commence their proceedings, and before they oblige citizens to appear before them and suffer the apprehension and material costs of such an appearance?

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[1] [1924] 1 K.B. 171.

[2] *Ibid.*, 205 (emphasis added).

[3] (1971) 18 D.L.R. (3d) 1.

[4] De Smith, *Judicial Review of Administrative Action* 3d ed. (1973), 132.

[5] *Ibid.*, 131-32 and 377.

[6] *Ibid.*, 341-42 and 377.

[7] In this context, see, *e.g.*, the following cases in which the federal-provincial division of powers was raised: *Burk* v. *Tunstall* (1890-93) 2 B.C.R. 12 (S.C.); *R.* v. *Dodd* [1957] O.R. 5 (C.A.).

A recent decision of the Federal Court-Trial Division provides a clear, affirmative answer to this question. In *Steve Dart Co.* v. *Board of Arbitration*[8] a licensed agricultural dealer in the Province of Quebec applied for a writ of prohibition to restrain the respondent "Board" from hearing a claim filed against him. Upon receipt of a shipment of corn from an American firm, the dealer had advised the shipper that it was not in good condition and proceeded to have that allegation confirmed by the Department of Agriculture. The American shipper, however, filed a complaint with the same Department claiming non-payment for the goods. The respondent Board then formally advised the petitioner that, in accordance with section 26 of the regulations[9] made pursuant to the *Canada Agricultural Products Standards Act*[10] it must either pay the claim or file a notice and contest the claim before it. Instead, the petitioner responded by applying to the Federal Court for prohibition on the ground that the regulations issued pursuant to the Act, in so far as they purported to set up a quasi-judicial board, were *ultra vires.*

Mr Justice Addy agreed, and without citing any case authority or giving much additional explanation, said:

> I find no difficulty in coming to the conclusion that, by necessary implication, this Court has a power to grant ... relief [and] I do not find difficulty either in concluding that prohibition is a proper remedy in such a case.[11]

Does the *Dart* case therefore represent a judicial precedent or is it in harmony with previous case law relating to the issuance of prohibition? This paper will show that in Canada especially, prohibition and *certiorari* have been found appropriate in a number of different circumstances to quash "decisions" which could have properly been disregarded as void; the *Dart* decision does not seem to stray from this tradition. To substantiate this view the earlier decision of Addy J. in *Ex parte Collins*[12] and a number of other cases dealing with the issuance of prohibition and *certiorari*[12a] will be examined.

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[8] [1974] 2 F.C. 215.

[9] *Produce Licencing Regulations,* SOR/67-605 (1967) 104 Can.Gaz., pt.II, 1899 (27/12/1967).

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

[11] *Supra,* note 8, 220.

[12] *Regina* v. *Deacon, ex parte Collins* [1970] 1 O.R. 207 (H.C.). This decision may shed some light regarding Addy J.'s understanding of when prohibition might properly issue.

[12a] Essentially, *certiorari* differs from prohibition only in the time appropriate for its use.

1) Ex parte Collins

In this case, the "first point" considered by Addy J. (in the Ontario High Court) was whether the application before him was "a proper subject of prohibition".[13] The applicant had alleged that a judge of the Provincial Court, Criminal Division had no jurisdiction to hear a charge laid under sections 54(1) and 148(1) of the *Highway Traffic Act*[14] since these sections did not disclose an offence. While the Court disagreed, it did hold that the application for prohibition was nevertheless appropriate. In so deciding, Addy J. considered three Canadian cases[15] and concluded:

> Where the objection is to the statute either on the grounds that it is *ultra vires* or on the grounds that it is inoperative ... then I fail to see why this Court should not entertain an application for ... prohibition .... Furthermore I can see many instances, other than cases of *ultra vires*, where [prohibition] might be properly granted. Besides objections *ratione materiae* ... prerogative writs would lie *ratione personae* for instance, where the person purporting to hear the [matter] is not ... duly appointed .... All these matters go to the jurisdiction ... and, on these grounds, [prohibition] might properly issue.[16]

It is thus apparent that even before *Dart*, Mr Justice Addy viewed prohibition as an appropriate remedy for a number of different jurisdictional problems including the exercise of a power that was not merely excessive but for which there was no authorization whatsoever.

2) Other Cases

a) *Ex p. MacCaud*

In *Ex p. MacCaud*,[17] the Ontario Court of Appeal was asked to consider whether *certiorari*[18] might issue with respect to a disciplin-

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[13] *Supra*, note 12, 208.

[14] R.S.O. 1960, c.172.

[15] He noted that in *R.* v. *Dodd*, *supra*, note 7, prohibition was considered appropriate against a charge being laid under a provincial statute which had been rendered inoperative by virtue of the Dominion Parliament occupying the field; that in *Ex p. Grey* (1958) 123 C.C.C. 70 (N.B.S.C.), prohibition issued to restrain a court authorized under one statute from hearing an offence charged under a different enactment and that in *Viger Co.* v. *Cloutier* [1947] Que.K.B. 120, prohibition issued against an offence charged which did not exist at law.

[16] *Supra*, note 12, 212.

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

[18] "Certiorari and prohibition rest on common principles ...". Wade, *Administrative Law* 3d ed. (1971), 130.

ary action taken by the superintendent of the Beaver Creek Correctional Camp. In considering this question, the Court found it necessary to outline the way in which the institutional head was appointed and empowered. Under section 4(1) of the *Penitentiary Act*[19] the chief officer of the Penitentiary Service is the Commissioner appointed by the Governor-in-Council. Under the direction of the appropriate Minister, the Commissioner has the control and management of the system and all matters connected with it. In addition, he is responsible for the appointment of institutional heads to assist in the administration of the *Penitentiary Act*.[20] Under section 29(1) of the Act, power is conferred on the Governor-in-Council to make regulations for certain specific purposes. One such regulation gave to each of the institutional heads responsibility for the disciplinary control of inmates in his own centre. The main issue before the Court concerned the exercise of that power. In making a pronouncement on the general implications of an institutional head taking disciplinary action, the Court considered the basis for the issuance of *certiorari*:

> [I]n deciding whether certiorari lies to call up for review a proceeding of any body, the determination as to whether a particular proceeding is a judicial one must be made not with reference to the nature of the character of the tribunal but *with reference to the power purported to be exercised.* ... [A]ny purported exercise of a jurisdiction not conferred, or any exercise of such jurisdiction in excess of the limits lawfully imposed will be grounds on which the exercise of powers requiring a body to act judicially are subject to supervisory review through an application to the Court by way of certiorari.[21]

The Court concluded that *certiorari* would not lie unless, among other things, the action sought to be reviewed was in excess of any jurisdiction lawfully exercisable by the institution head or there was complete absence of any jurisdiction to take the action complained of.[22]

b) *Rogers* v. *Wood*[23]

In this early English case, prohibition was allowed to issue against a body which did not have competent jurisdiction. It was contended that the decree in question was not the regular judgment of any accredited court. Lord Tenterden C.J. agreed and explained:

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[19] S.C. 1960-61, c.53; now R.S.C. 1970, c.P-6.
[20] *Ibid.*
[21] *Supra*, note 17, 377 (emphasis added).
[22] *Ibid.*, 382.
[23] (1831) 2 B. & Ad. 245, 109 E.R. 1134 (K.B.).

> [T]he decree was not ... of any Court of Justice known at [the] time. ... It was evidently, therefore, a proceeding before persons not forming any Court known to the laws of this country, nor having any competent authority to decide the matter in issue, or to make the decree which they made.[24]

c) *Poulin* v. *Quebec*

It now goes without saying that where a statute under which an inferior tribunal purports to act is *ultra vires* of the legislature which enacted it, the inferior tribunal is without jurisdiction. As early as 1884 Ritchie C.J. commented in *Poulin* v. *Quebec*[25] on whether prohibition would lie against a tribunal in such circumstances:

> [I]f the Act is *ultra vires*, then I can see no reason why prohibition would not be a proper remedy, because there could then be no pretence that the [tribunal] could have jurisdiction over [a matter] alleged to be created by a statute which had no legal existence.[26]

Thus, where a statute is found *ultra vires*, there is no legal statutory authorization for a board or tribunal created under it, and on application for prohibition, it has been the practice of Canadian courts to restrain such "boards" from functioning.[27] It follows, then, that prohibition should be equally available against a tribunal which is not lawfully authorized by statute simply because there is no statute or statutory provision to give it jurisdiction. Indeed, it would be manifestly illogical to issue prohibition where the statute allegedly authorizing the tribunal is *ultra vires* of the enacting body, but not where statutory authorization is lacking because there has been no enactment. In either case, "all is a nullity, it is *corem non judice*".[28]

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[24] *Ibid.*, 255-56.

[25] (1885) 9 S.C.R. 185.

[26] *Ibid.*, 191.

[27] Early Canadian decisions show the courts issuing prohibition for fact situations paralleling *Dart. E.g.*, in *Burk* v. *Tunstall, supra,* note 7, under the terms of the *Mineral Act,* S.B.C. 1884, c.10, s.4 (see B.C. Consolidated Acts, 1888, vol.1, c.82, s.4), a Gold Commissioner was appointed by the Lieutenant-Governor-in-Council and given power to sit as judge in a mining tribunal. While the Court found that the colonial legislature had the power to establish a mining tribunal and set out its jurisdiction, it did not have the requisite constitutional authority to appoint judges for the tribunal it had created. Such powers are solely vested in the Governor General under s.96 of the *British North America Act, 1867,* 30-31 Vict., c.3 (U.K.). Drake J., therefore, declared the "extensive judicial jurisdiction" which s.11 of the *Mineral Act* "purports to do" (at p.14) *ultra vires* of the provincial legislature and issued prohibition to restrain the Gold Commissioner for West Kootenay from further proceeding in an action brought before him as a tribunal judge.

[28] *Rex* v. *Pulak* [1939] 2 W.W.R. 219, 222 (Sask.K.B.).

While the logic of this argument is sound it might be argued that this reasoning cannot be extended to a situation, like the one in *Dart*, where purported regulations and not a statute were held to be *ultra vires*. However, as will become evident, if a board is allegedly established pursuant to regulations then these regulations must likewise be *intra vires*.[29]

d) *Regina* v. *Bermuda Holdings Ltd*

To be lawful, regulations must be properly authorized by statute, otherwise they are of no effect. In *Rex* v. *National Fish Co.*[30] it was said that:

> Delegated authority ... must be exercised strictly in accordance with the power creating it and in the spirit of the enabling statute ... .[31]

With this decision in mind, Wootton J. in *Regina* v. *Bermuda Holdings Ltd*[32] considered whether a regulation[33] passed pursuant to the British Columbia *Motor-vehicle Act*[34] was a regulation *ultra vires* of the statute. He concluded curtly:

> What the regulations are attempting to do is, without statutory power, ... control "persons" engaged in the business of selling motor vehicles. I am of the opinion that there is no statutory power for such control and therefore none for reg.8.01, and on that account the appellant should succeed.[35]

In the *Dart* case, the Trial Division of the Federal Court found no statutory authority whatsoever for the setting up of any system of a trial and appeal tribunal or for determining issues which the regulations purported to have determined.[36] The proceedings in *Dart*, however, were not, strictly speaking, *directly* for the purpose of ascertaining the validity of a statute or regulation;[37] the petitioner in *Dart* only applied for prohibition to restrain a board from hearing a claim filed against the petitioner essentially on the ground that the board was not lawfully authorized.

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[29] It might be noted that because a statute is wholly *intra vires* does not mean that every order-in-council issued under it is necessarily valid. See *In re Constitutional Questions Act; In re Moratorium Legislation* (1954) 13 W.W.R. (N.S.) 289 (Sask.C.A.).

[30] [1931] Ex.C.R. 75.

[31] *Ibid.*, 81.

[32] (1969) 70 W.W.R. 754 (B.C.S.C.).

[33] That is, regulation 8.01 of *Regulations Pursuant to the Motor-Vehicle Act*, B.C. Reg. 26/58 (1958).

[34] R.S.B.C. 1960, c.253.

[35] *Supra*, note 32, 761.

[36] *Supra*, note 8, 222.

[37] For the way in which this may be done see Reid, *Administrative Law and Practice* (1971), 267-68.

e) *Rex* v. *Shenowski and Other Cases*

De Smith stated that while the acts of usurpers are to be regarded as nugatory, "*in order to remove uncertainty* a court would surely be justified in issuing the orders [of *certiorari* ... and prohibition] to bodies that appear or purport to be acting in pursuance of lawful authority".[38]

For this very reason, the courts in Canada have often taken the time to consider the importance of having a jurisdictional question resolved on application for prohibition. In *Bell* v. *Ontario Human Rights Commission*,[38a] for example, Martland J., speaking for the majority, made note of the "risk of delay"[39] that the appellant would encounter if prohibition were not available in the circumstances of that case. And in *Rex* v. *Shenowski*,[39a] Dysart J. spoke of the "much wasted expense and effort"[40] that would result if the court refused prohibition and left the jurisdictional issue to be brought up at a later time. He added:

> Prohibition is a prerogative right, inherent in this Court and, although discretionary, ought not to be withheld where justice and convenience will both be served by granting it.[41]

In *Dart*, the board certainly "appeared" to be legally authorized, acting as it did under certain regulations set out by a government department which was purporting to have statutory authority for its action. Needless to say, any body giving that kind of an account of itself cannot be easily ignored on the assumption that its acts are nugatory.[42] And for the party that insists on arguing that such a board is nevertheless not properly authorized, there will inevitably be a considerable amount of "uncertainty", to say nothing of "delay" and "expense", until, in one way or another, there has been some judicial pronouncement from the ordinary courts on the jurisdictional competence of the board in question.

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[38] *Supra*, note 4, 342 (emphasis added).

[38a] *Supra*, note 3.

[39] *Ibid.*, 15.

[39a] [1932] 1 W.W.R. 192 (Man.K.B.).

[40] *Ibid.*, 194.

[41] *Ibid.*

[42] In *Rogers* v. *Wood*, *supra*, note 23, 256, Lord Tenterden C.J. said with reference to those who had been called before the "Court of Exchequer" which was found to have no jurisdiction: "They were called before the persons who made the decree by an authority which at that time of day they might not think it convenient to resist."

f) *Bell* v. *The Ontario Human Rights Commission*

It now seems appropriate to consider the Supreme Court decision in *Bell*.[43] Here the Court did not preclude the applicant from having the vital issue of the Board's jurisdiction determined on an application for prohibition. The majority view was that the complaint of alleged discrimination did not relate to any matter within the purview of the *Ontario Human Rights Code*[44] and that, therefore, a board authorized under the same Code to investigate complaints of discrimination was without jurisdiction to proceed.

Thus the board involved in *Bell* fulfilled Lord Atkins' requirement that it have "legal authority to determine questions affecting the rights of subjects".[45] However, *in relation to the petitioner* the board in *Bell* had no more authorization to make the inquiry in question than did the one in *Dart*. The fact that there was statutory authorization for the board in *Bell* to inquire into certain other matters, but that there was no lawful authorization for the board in *Dart* to adjudicate on any matter whatsoever is not particularly significant. The significant jurisdictional question in such matters is whether or not the board in each instance is lawfully authorized to do what it proposes to do with reference to the parties and matters before it and not whether it is authorized to do some other thing. Indeed, it is ludicrous to suggest that only a board authorized to do something else should be prohibited from embarking upon an inquiry over which it has no authority, but that one which appears or purports to be authorized but which, in fact, has no legal authority should not be equally restrained by prohibition.

g) *Rex* v. *Pulak*

A discussion of the issuance of prohibition in situations like the one in *Dart* raises the related question of whether the courts have seen prohibition as premature in cases where the jurisdictional issue has not first been decided by the inferior tribunal. This issue was dealt with and seems to have been settled in *Bell* but it might be argued that the reasoning used in that case cannot be applied with equal force to *Dart*. However, it would be incongruous to issue prohibition in a case like *Bell* where the board *was* authorized by statute to decide if a matter came within the purview of the Code and then to refuse it where a board has no lawful right whatsoever. To do so

[43] *Supra*, note 3.
[44] S.O. 1961-62, c.93.
[45] *Supra*, note 1, 205.

would be to suggest that a board not authorized to do anything should nevertheless have the opportunity to decide whether it has jurisdiction in the matter before it.

Further support can be found in *Rex* v. *Pulak*[46] where the Saskatchewan Court of King's Bench held that prohibition would issue to prevent a tribunal from conducting a hearing even though the jurisdictional issue had not yet been considered by the lower court. The Act[46a] that purported to give the tribunal authority was *ultra vires* and, as discussed earlier,[47] a board allegedly constituted and authorized under a statute which is *ultra vires* of the enacting legislature has no power at all with reference to any matter and is in no better a position than a body not authorized by statute to do anything.

Concluding Remarks

The late Professor de Smith urged the courts to consider issuing the orders of *certiorari* and prohibition to bodies that appear or purport to be acting in pursuance of lawful authority. In the Canadian context, under section 2(g) of the *Federal Court Act*,[48] the traditional remedies are available against any federal body "exercising or *purporting* to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada". It might be argued, therefore, that section 2(g) establishes by enactment what de Smith encouraged the courts to found by judicial innovation. But this conclusion cannot be supported by the *reasoning* in *Dart*.

Indeed, as to when prohibition might issue, the judgment of Addy J. is singularly brief. He goes no farther than to suggest that since the Federal Court is empowered under section 18 of the *Federal Court Act* to issue prohibition against any federal tribunal it can, "by necessary implication",[49] also restrain a body which purports to have the powers of such a tribunal. It is not clear, therefore, from the judgment whether or not the Court interpreted section 2(g) in such a way as to permit prohibition to issue against usurpers or whether it tacitly relied on common law precedents in the Canadian context to issue prohibition in the circumstances of the case.

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[46] *Supra*, note 28.
[46a] *The Industrial Standards Act, 1937*, S.S. 1937, c.90.
[47] See text, *supra*, p.681.
[48] R.S.C. 1970 (2d Supp.), c.10.
[49] *Supra*, note 8, 220.

However, apart from any statutory provision, the *Dart* decision is not particularly novel in the Canadian context. From the cases reviewed above, it is apparent that prohibition has already been seen as appropriate in a variety of circumstances: it has issued to bodies acting in excess of their jurisdiction and also to those purporting to exercise a jurisdiction not conferred. In reaching its decision in *Dart*, the Trial Division has helped to crystallize a principle of law only implicitly recognized in the reasoning of previous authorities, and which, from a practical point of view, is both appropriate and desirable.

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