Howarth v. National Parole Board: A Comment

Howarth v. *National Parole Board*[1] raises some of the most important issues in contemporary Canadian Administrative law. When does the maxim *audi alteram partem* apply to the exercise of statutory powers? Does it apply to merely administrative bodies, or only to such bodies exercising a judicial or quasi-judicial function? Is it possible to devise a test to distinguish judicial or quasi-judicial functions on the one hand from merely administrative ones on the other? What is the status in Canada of the recent line of English and Commonwealth cases concerning a more general "duty to be fair"? And, finally, what is the relationship between sections 18 and 28 of the *Federal Court Act*?[2]

Howarth raises these questions, in the following way. In 1969, Lenard John Howarth was sentenced to seven years' imprisonment for armed robbery. He was paroled in 1971, and became a full-time university student, complete with summer job. On August 3rd, 1973, however, Howarth was arrested and charged with indecent assault. His parole was suspended and he was remanded into custody until September 18th. On September 14th, the charge was withdrawn. Nevertheless, the National Parole Board, acting under statutory authority, revoked Howarth's parole; he was then required to complete the remainder of his sentence for armed robbery —

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[1] (1974) 50 D.L.R. (3d) 349 (S.C.C.); (1973) 41 D.L.R. (3d) 309 (F.C.A.D.). The more penological aspects of the decision have been thoroughly canvassed by S. Silverstone in (1975) 53 Can. Bar Rev. 92; and by Richard V. Ericson in (1975) 17 Crim.L.Q. 251.

[2] R.S.C. 1970, c.10 (2d Supp.).
S.18 provides:
"The Trial Division has exclusive original jurisdiction
(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal."
The material part of s.28 provides:
"(1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground...".

including 779 days "served" while on parole and 210 days' statutory remission to which he had been entitled when paroled. The Board neither gave Howarth any reasons for its decision, nor any opportunity to make representations about the matter.

The Federal Court of Appeal unanimously rejected Howarth's application under s.28(1) of the *Federal Court Act* to have the Board's decision reviewed for breach of natural justice. Instead, Jackett C.J., Pratte and Thurlow JJ. all held [3] that parole was a purely administrative matter, not required to be exercised on a judicial or quasi-judicial basis; and therefore the Court of Appeal had no jurisdiction under s.28(1) to deal with the matter at all. The Court of Appeal adopted this characterization of the parole process on the authority of *Ex parte McCaud,* where one of the issues was whether an inmate had a right to be informed of the reasons for revocation of his parole or to make any opposition thereto. There the Supreme Court of Canada [4] upheld Spence J.'s refusal [4a] of McCaud's leave to appeal, and specifically adopted his judgment, which included the following sentence:

> The question of whether that sentence must be served in a penal institution or may be served while released from the institution and subject to the conditions of parole is altogether a decision within the discretion of the Parole Board as an administrative matter and is not in any way a judicial determination.[5]

McCaud's case was equally important to the majority in the Supreme Court in *Howarth,* where Pigeon J. — writing for Martland, Judson and de Grandpré JJ. and adopted by Beetz J. — reasoned as follows: Firstly, s.28(1) of the *Federal Court Act* is merely an exception to the general supervisory power of the Trial Division of the Federal Court granted by s.18 of the same Act; therefore, the strict requirements of s.28 must be fulfilled before any application for review of the Board's decision can be entertained by the Court of Appeal. Accordingly, any attempt to have an executive action reviewed on the basis of a general duty to be fair should be made in the Trial Division and not in the Court of Appeal — which only has jurisdiction "to review and set aside a decision or order, *other than a decision or order* [1] *of an administrative nature* [and 2] *not required by law to be made on a judicial or quasi-judicial basis* . . .".[6] Pigeon J., referring to the passage from *Ex parte McCaud*

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[3] (1974) 41 D.L.R. (3d) 309. Pratte J. concurred with Jackett C.J., and Thurlow J. wrote a separate opinion.

[4] [1965] 1 C.C.C. 168.

[4a] (1964) 43 C.R. 252.

[5] *Ibid.,* 254.

[6] S.28(1) of the *Federal Court Act, supra,* f.n.2; italics and numbers added.

quoted above, could perceive no material difference between the expression "not in any way a judicial determination" (from Spence J. in *McCaud*) and "not required by law to be made on a judicial or quasi-judicial basis" (from s.28). Yet nowhere did Pigeon J. examine the history or use of the phrase "quasi-judicial", or even refer to the myriad of cases where the principles of natural justice have undoubtedly been held to apply to the exercise of functions obviously administrative in nature. One realizes that Pigeon J. has decided that the revocation of parole is not "quasi-judicial", but one does not know why, or how one could have determined that before the litigation.

Secondly, Pigeon J. justifies this dependence on the decision in *McCaud's* case by referring to the doctrine in *North British Railway* v. *Budhill Coal and Sandstone Co.*,[7] where Lord Loreburn, L.C. said:

> When an Act of Parliament uses a word which has received a judicial construction it presumably uses it in the same sense.

Therefore, according to Pigeon J.,[8] since the law concerning the duty of the Parole Board in making a decision on a parole had been conclusively determined by a recent judgment of the Supreme Court, Parliament should not be presumed to have acted in ignorance of that determination. Yet nowhere in *McCaud* is the word "quasi-judicial" used, nor is that the leading case in the Supreme Court on the application of principles of natural justice. Further, s.28 of the *Federal Court Act* is not restricted to decisions of the Parole Board, but rather applies to a very large number of federal boards, commissions and other tribunals. It is not at all unthinkable that Parliament might have ignored *McCaud* in its attempt — five years later[9] — to rationalize and widen judicial review of federal administrative actions.

Thirdly, Pigeon J. denies that s.16(4) of the *Parole Act*, enacted after the decision in *McCaud*, implies an intention to require the Board to act on a judicial or quasi-judicial basis in revoking parole. Previously, the relevant section of the Act read: [10]

> The Board shall forthwith after a remand by a magistrate ... review the case and shall either cancel the suspension or revoke the parole.

In 1969, this section was changed to read: [11]

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[7] [1910] A.C. 116, 127.

[8] *Supra*, f.n.1, 352.

[9] *McCaud* was decided in 1964 and 1965; the *Federal Court Act* was passed by Parliament in 1970.

[10] S.12(3) of the *Parole Act*, S.C. 1958, c.38.

[11] Enacted by s.101(1) of the *Criminal Law Amendment Act*, S.C. 1968-69, c.38.

> The Board shall, upon referral to it of the case of a paroled inmate whose parole has been suspended, review the case and cause to be conducted all such inquiries in connection therewith as it considers necessary, and forthwith upon completion of such inquiries and its review it shall either cancel the suspension or revoke the parole.

Clearly, nothing in this section or any other part of the Act requires a hearing even vaguely resembling a courtroom trial. Indeed, s.11 of the Act expressly provides that:

> The Board, in considering whether parole should be granted or revoked, is not required to grant a personal interview to the inmate or to any person on his behalf.

But the mere existence of this provision does not, in itself, definitively preclude some sort of duty on the Board to permit the inmate to make his case, even if only by written notes. On the contrary, s.11 only says that the Board need not give a personal hearing, not that it is exempt or prohibited from giving *any* hearing, or from generally acting fairly. Indeed, Dickson J., writing the minority opinion for himself, Laskin C.J.C., and Spence J., could only explain the new two-stage procedure under the *Parole Act* by implying some duty on the Board to give Howarth an opportunity to make at least some sort of representations.

It may well be that the principal source of any duty to hear a party or to act fairly derives from the specific provisions of the legislation creating the power in the first place. Certainly this was one leg of Pigeon J.'s judgment for a unanimous Supreme Court of Canada in the *Saulnier*[12] case, decided only four months after *Howarth.* Nevertheless, it is equally true that such a duty may arise at common law — which provided the second leg of the decision in *Saulnier,* and which is not really referred to by the majority in *Howarth* at all.[13]

It may not be surprising, therefore, in light of this omission by the majority, to discover that they make no reference whatever to the decision in *Ridge* v. *Baldwin,*[14] where the House of Lords very carefully analyzed the circumstances in which the principle of *audi alteram partem* applies. Indeed, the House of Lords specifically examined the context of both the dictum of Atkin L.J. in the *Electricity Commissioners'* case[15] as well as the gloss put

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[12] Decided by the Supreme Court of Canada in February 1975; not yet reported.

[13] Although conceded by counsel: see *supra,* f.n.1, 356 *per* Dickson J.

[14] [1964] A.C. 40.

[15] [1924] 1 K.B. 171, 39 T.L.R. 715 (C.A.).

upon it by Lord Hewart C.J. in *The King* v. *Legislative Committee of the Church Assembly*.[16] Certainly in England and in most other parts of the Commonwealth, the requirement for judicial review that the exercise of a statutory power must not only affect the rights of a subject, but also be subject to a superadded duty to act judicially, is now thoroughly discredited. In other words, the ratio of *Nakkuda Ali* v. *Jayaratne*[17] in the Privy Council — and hence, one would have thought, of *Calgary Power* v. *Copithorne*[18] in the Supreme Court of Canada — is no longer good law. Yet the majority in *Howarth* specifically relies on *Calgary Power* to reject the proposition that the duty to act judicially arises whenever private rights are affected.[19]

Now it is quite possible that there are good reasons why the law relating to natural justice should be narrower in Canada than in England and in the rest of the Commonwealth. And of course the Supreme Court of Canada is in no way bound to follow changes in English or Commonwealth law made since 1949. On the other hand, a House of Lords decision remains persuasive authority, and one might have expected the majority in *Howarth* at least to have referred to *Ridge* v. *Baldwin* and to have demonstrated why similar principles should not be applied in Canada.[20]

Another — and, it is submitted, more devastating — complaint can be made with respect to the majority's complete disregard of that growing line of cases (including some from the Federal Court of Appeal, no less)[21] which resurrects Lord Loreburn's famous dictum in *Board of Education* v. *Rice*[22] that anyone who decides anything has a duty to do so fairly. This general duty to be fair may or may not be the same as *audi alteram partem*,[23] but it has been applied to functions which are no more quasi-judicial than

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16 [1928] 1 K.B. 411, 415.

17 [1951] A.C. 66, [1950] 2 W.W.R. 927 (P.C.).

18 (1958) 16 D.L.R. (2d) 241, [1959] S.C.R. 24.

19 *Supra*, f.n.1, 353.

20 As, for example, the Supreme Court did on the facts in *Posluns* v. *Toronto Stock Exchange* [1968] S.C.R. 330.

21 See: *Blais* v. *Basford* [1972] F.C. 151; *Blais* v. *Andras* [1973] F.C. 182; *Re Lazarov* (1973) 39 D.L.R. (3d) 738, [1973] F.C. 927; and generally the cases cited by Fera in *Judicial Review under Sections 18 and 28 of the Federal Court Act* (1975) 21 McGill L.J. 255.

22 [1911] A.C. 40 (H.L.).

23 See the discussion in S.A. de Smith, *Judicial Review of Administrative Action* 3d ed. (1973), 208.

the revocation of parole in *Howarth*.[24] The whole concept of a general duty to be fair raises in bold terms the policy behind the very existence of judicial review of executive actions: namely, that justice not only must be done, but seen to be done. "Justice" is an attribute which one expects to accompany the exercise of every public (or, indeed, private) power. Justice cannot be done if it is closed, secretive, arbitrary, or dispensed without reasons. And it is arguable that the same need for fairness should apply to virtually every governmental action which seriously affects individual rights — even if "merely administrative" in nature. On the other hand, it may be that Canadian courts are not at all eager to grant judicial review in such sensitive areas as parole.[24a]

This is not to say that every decision on every matter must necessarily be accompanied by a full-blown trial. Nor (as Dickson J. quite rightly pointed out) does it even imply that confidentiality must be thrown to the winds.[25] But why should affected persons not at least have the opportunity to make their views known before their property is expropriated,[26] condemned,[27] or forfeited; [28] their trading licences suspended; [29] their liability to tax assessed; [30] or their application to enter the country denied? [31] Can anyone possibly assert that decisions — even if made within the framework of the broadest discretion — will be worse because the decision-maker has had the benefit of the views of those most directly involved? On the contrary, the failure of the National Parole Board to inform someone like Howarth of the considerations it intends to take into account in reviewing his parole, and its failure to permit him to make

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[24] See: *In re H(K)* [1967] 2 Q.B. 617; *R.* v. *Gaming Board for Great Britain, ex p. Benaim and Khaida* [1970] 2 Q.B. 417; *Pearlberg* v. *Varty* [1972] 1 W.L.R. 534 (H.L.); *Bates* v. *The Lord Chancellor* [1972] 1 W.L.R. 1373, 1378; *R.* v. *Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299, 307-8 *per* Lord Denning M.R., 310 *per* Roskill L.J. See also the cases cited *supra*, f.n.21, and in the judgment of Dickson J., *supra*, f.n.1, 357-8.

[24a] *Cf.* the position in the U.S.: *Gagnon, Warden* v. *Scarpelli* 411 U.S. 778 (1973); *Morrissey* v. *Brewer, Warden* 408 U.S. 471 (1972); and Sklar, *Law and Practice in Probation and Parole Revocation Hearings* (1964) 55 J.Crim.L.C. & P.S. 175, 198, n.182.

[25] *Supra*, f.n.1, 359.

[26] *Calgary Power* v. *Copithorne, supra*, f.n.18.

[27] *Board of Health for the Township of Saltfleet* v. *Knapman* [1956] S.C.R. 877, 6 D.L.R. (2d) 81.

[28] *Bonanza Creek Hydraulic Concession* v. *The King* (1908) 40 S.C.R. 281.

[29] *Nakkuda Ali* v. *Jayaratne, supra*, f.n.17.

[30] *Re H(K), supra*, f.n.24.

[31] *Guay* v. *Lafleur* [1965] S.C.R. 12.

representations in some form, can — again to quote Dickson J.[32] — "surely only engender bitter feelings of injustice".

It may, of course, be argued that the duty to be fair is far too vague a concept to be applied without constant litigation. But is the distinction between judicial and quasi-judicial functions on the one hand and merely administrative ones on the other any more clear, any more workable? One can leaf through any recent part of any series of law reports and see how very many cases raise precisely the point of whether a quasi-judicial function is involved. Surprisingly few of these judgments even attempt to define what constitutes a quasi-judicial function, or indicate how a potential plaintiff can identify this characteristic of some statutory powers short of litigation. And all too few judges (happily, Dickson J. among them)[33] seem aware of the problems which many academics, particularly the late Professor S.A. de Smith,[34] have found in this area of present Administrative law.

Further, the Supreme Court's strict interpretation of s.28 of the *Federal Court Act* may have devastating consequences on federal Administrative law. Henceforth, a plaintiff is at his peril in instituting an action in either division of the Federal Court. If the federal decision or order which it is sought to impugn is required to be made on a judicial or quasi-judicial basis, then s.28(1) totally excludes the jurisdiction of the Trial Division, and the action should properly be commenced in the Court of Appeal. Yet if it turns out that the decision or order was not required to be made on a judicial or quasi-judicial basis, then the Court of Appeal has no jurisdiction. However, after one false start in the wrong Division, it may well be too late for the plaintiff to re-commence his action in the correct Court — unless, of course, (as did not happen in *Howarth*) the Chief Justice or his designate exercises the discretion contained in Rule 359[35] to transfer the action to the other Division

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[32] *Supra*, f.n.1, 362.

[33] *Ibid.*, 361-3.

[34] *Supra*, f.n.23, 64ff.

[35] Rule 359 of the *General Rules and Orders of the Federal Court* provides as follows:

"The Chief Justice, or another judge designated by him for the purpose, may, if it appears just to do so having regard to the interests of all parties, order that a matter that has been commenced in one Division be transferred to the other Division, and may give incidental directions for the further conduct of the matter."

Of course, even if the discretion under Rule 359 had been exercised in *Howarth*, what remedy would have been available in the Trial Division? Certiorari and prohibition are commonly presumed to be available only against the exercise

of the Court. In any event, it is quite plain from the proceedings in Parliament and from the statements made by various officials of the Department of Justice during the passage of the *Federal Court Act*[36] that the whole purpose of s.28 was to consolidate the various intricate remedies available against federal bodies into one "application for review" centralized in one court, and hence avoid exactly this type of judicial roulette. Regrettably, in its first opportunity to construe s.28, the Supreme Court of Canada undoubtedly has frustrated the intention of Parliament.

The American realist school of jurisprudence is well-known for suggesting that the upshot of a particular case may be determined by what the judges had for breakfast. A Canadian Administrative lawyer might be forgiven for concluding that, in the end, the existence of a quasi-judicial element in the exercise of any particular statutory power merely hangs on the inclination of the majority of the court to grant judicial review, without any further legal or rational justification. Obviously the time has come for Parliament and the legislatures to take much greater pains to spell out in detail the procedures they wish to be adopted by persons upon whom they confer statutory powers.[37]

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of a judicial or quasi-judicial function, although the decision in *Re H(K)* and the other cases cited, *supra*, f.n.24, would seem to indicate that this restriction is too narrow. See ch.8 in de Smith, *supra*, f.n.23, esp. 346-9, where the author discusses the relationship of the duty to be fair to certiorari and prohibition. To the extent that both the Federal Court of Appeal and the majority of the Supreme Court of Canada hint that a remedy *might* have been available to Howarth in the Trial Division, are they implicitly accepting de Smith's view that certiorari and prohibition are not restricted to judicial and quasi-judicial functions?

[36] See D.J. Mullan, *The Federal Court Act: A Misguided Attempt at Administrative Law Reform?* (1973) U.ofT.L.J. 14, 29, f.n.57, where a letter from the Minister of Justice to Professor G.V.V. Nicholls of Dalhousie University is reproduced. See also the speech by the Minister of Justice, Hon. J.N. Turner, during the Second Reading debate of the Bill in the House of Commons: *House of Commons Debates*, 25 March 1970, vol.V, p.5470.

[37] The reader may be interested in two subsequent judicial decisions in which the Supreme Court of Canada's judgment in *Howarth* has been relied upon: *Regina* v. *Gorog* [1975] 4 W.W.R. 191 (Man. C.A.), concerning habeas corpus (Matas J.A. diss.); and *In the Matter of an Application by "B" and The Commission of Inquiry pertaining to the Department of Manpower and Immigration at Montreal* No.T-1679-75 (F.C. T.D.), 24 June 1975 (Mr Justice Addie).

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