

Judicial Review Under Sections 18 and 28 of the Federal Court Act

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The *Federal Court Act*¹ was an attempt to reform the process of judicial review of administrative decisions made by federal tribunals and commissions. Unfortunately, in its efforts to consolidate the common law prerogative remedies into a codified statutory form, Parliament has enacted a review procedure which is potentially quite confusing. Particularly complicated is the relationship between sections 18 and 28 of the Act, and the effect of these provisions on the prerogative remedies at common law. This paper is an attempt to sort out some of the complexities and to analyze the present procedure of obtaining judicial review under the *Federal Court Act*.

Under section 18 of the *Federal Court Act*,² it appears that the Trial Division of the Federal Court has "exclusive original jurisdiction" to supervise within the scope of the extraordinary remedies any "federal board, commission or other tribunal".³ However, section 28 of the same Act does much to curtail the Trial Division's supervisory capacity. Subsection (3) makes it clear that "where the Court of Appeal has jurisdiction under section [28] . . . to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order". And the powers of review given the Appeal Court under section 28(1) are relatively extensive:

... 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

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¹ S.C. 1970-71-72, c.1.

² S.18 reads: "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."

³ That is, "any body or any person having or exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada". See s.2(g) of the *Federal Court Act*.

or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the... [agency]

- (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
- (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.⁴

It should be noted, however, that the right to approach the Court of Appeal under section 28 applies only to decisions made *after* the *Federal Court Act* came into force,⁵ that is, June 1, 1971.

In supervising administrative agencies, then, what is the Trial Division's power and what is the Appeal Court's power?

- (1) It appears that, with reference to decisions of federal boards made before June 1, 1971, the Trial Division has exclusive jurisdiction to issue the traditional remedies.
- (2) With regard to decisions made after that date and, presumably, also on that date,⁶ the Appeal Court has sole supervisory jurisdiction if:
 - (a) the action of the administrative tribunal can be characterized as a "decision or order";
 - (b) the decision or order is not "a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis";⁷
 - (c) the tribunal violates one of the grounds listed in section 28(1).

It would appear, therefore, that certiorari as it relates to decisions made on or after June 1, 1971, is definitely barred from the Trial Division's jurisdiction, as there are no grounds for certiorari which are not covered in section 28(1). Since certiorari has normally not issued against a decision or order which is purely administrative in

⁴ S.28(1) of the *Federal Court Act*.

⁵ S.61(1) says: "Where the Act creates ... a right to apply to the Court of Appeal under section 28 ... such a right applies ... in respect of a judgment ... made after this Act comes into force ...".

⁶ The *Federal Court Act* itself says nothing about decisions made on the day the Act comes into force.

⁷ That is to say, the Appeal Court may not review administrative decisions (as opposed to judicial ones) which are not required by law to be made on a judicial or quasi-judicial basis.

nature, there appears to be no restriction in section 28 which has not also been recognized under the "common law" remedies.

Prohibition, however, does not appear to be totally removed from the hands of the Trial Court. That remedy generally involves a decision which has not yet been made. Hence there is no "decision or order" to give the Court of Appeal jurisdiction.

Declaratory relief can be used to declare an existing state of affairs. But where such a declaration amounts to a statement that the "decision" of a federal tribunal is invalid, that jurisdiction now appears to be vested in the Court of Appeal under section 28. At common law, the two basic grounds of invalidity of administrative decisions are (1) jurisdictional defect and (2) error of law on the face of the record.⁸ Certainly these grounds are covered in section 28.

It might even be argued that mandamus is no longer available in the Trial Court: *If* failure to perform a public duty or exercise a statutory discretion were considered to be a "decision or order" constituting a jurisdictional defect, then the right to compel performance would rest with the Appeal Court under section 28 and not the Trial Division.

Fortunately it is not necessary to rely on speculation to determine the effect of sections 18 and 28. A number of cases heard by the Federal Court help clarify the rather complex statutory arrangement noted above. First we shall look at the status of the most important prerogative writ at common law, certiorari, and how it has been affected by the *Federal Court Act*. We shall then look at the other writs and recourses to assess the present state of federal judicial review.

Certiorari

The Proper Forum

One of the important questions arising early in the life of the new Court was that of deciding the correct forum. In *National Indian Brotherhood et al. and Pierre Juneau et al.* [No. 1],⁹ application was made to the Trial Division for writs of mandamus and certiorari. The applicants were challenging a decision of the Executive Committee of the C.R.T.C., dated May 28, 1971, not to inquire into the complaints of the Indian Brotherhood and three other

⁸Declarations may be available for all errors of law: I. Zamir, *The Declaratory Judgment* (1962), 157-166. See, however, *Punton v. Ministry of Pensions and National Insurance* (No. 2) [1964] 1 W.L.R. 226.

⁹[1971] F.C. 66.

associations against the telecast of an allegedly slanderous film about Indians. Noting that the Brotherhood had also proceeded under section 28, Walsh J. refused to consider the merits of the application until the Appeal Court had made a decision regarding its own jurisdiction in the matter.

Meanwhile, in *National Indian Brotherhood* [No. 2],¹⁰ the Appeal Court held that it had no jurisdiction to review and set aside a decision or order made on May 28, 1971. It cited section 61(1)¹¹ as authority for its conclusion.

In the *Medi-Data* case,¹² Walsh J., noting the allegation that the Postmaster General had failed to give notice of a prohibitory order¹³ within a prescribed period, made it clear that the plaintiff should proceed by way of certiorari. But he added:

Since this [Appeal] Court does not have jurisdiction over such proceedings with respect to an order made prior to June 1, 1971, I express no views on whether such proceedings would have succeeded...¹⁴

It would appear, therefore, that certiorari or, at least, certiorari-like jurisdiction as it relates to certain types of decisions made before June 1, 1971,¹⁵ is not to be found in the Court of Appeal; with reference to decisions made after that date, the Appeal Court does have such jurisdiction. Does this mean, however, that when the Appeal Court has such power under section 28, the Trial Division has no jurisdiction to issue certiorari? A positive response seems indicated if one applies the provisions of 28(3)¹⁶ of the *Federal Court Act*. Such a response is also suggested by some Court judgments which have helped to clarify the issue.

In *M.N.R. and the Queen v. Creative Shoes Ltd.*,¹⁷ the main question raised was whether certiorari and prohibition proceedings were available to remove into the Trial Division the record relating to certain prescriptions made on May 31, 1971, by the Minister of National Revenue. Mr Justice Thurlow, delivering the judgment of

¹⁰ [1971] F.C. 73.

¹¹ Noted *supra*, f.n.4.

¹² *Medi-Data Inc. v. A-G. of Canada* [1972] F.C. 469.

¹³ The order made under s.7 of the *Post Office Act*, R.S.C. 1970, c.P-14, prohibited mail service to two U.S. firms on the ground that they were committing offences by transmitting obscene material through the mails.

¹⁴ *Supra*, f.n.12, 497.

¹⁵ That is, before the *Federal Court Act* came into force.

¹⁶ That section says: "Where the Court of Appeal has jurisdiction... to review... a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order".

¹⁷ [1972] F.C. 993.

the Appeal Court, dealt with that issue and concurred with a Trial Division decision of Walsh J. that

... with respect to decisions or orders of federal [administrative agencies] made on or after June 1, 1971, section 28(3) of the [Federal Court] Act applies to oust the jurisdiction of the trial division which otherwise would arise under section 18 of the Act to grant relief in respect of such decisions or orders ...¹⁸

It should be emphasized at this point that it is well established in common law that certiorari lies only to quash something which is a determination or a decision¹⁹ and that it is available to question only judicial and quasi-judicial functions and does not issue against strictly administrative ones.²⁰ We shall see how these principles have been interpreted by the Federal Court in qualifying its review jurisdiction.

"Decision or Order"

In *National Indian Brotherhood* [No. 2],^{20a} Chief Justice Jockett gave some insight into his thinking about the expression "decision or order". He said:

Clearly, those words apply to the decision or order that emanates from a tribunal in response to an application that has been made to it for an exercise of its power after it has taken such steps as it decides to take for the purpose of reaching a conclusion as to what it ought to do in response to the application.²¹

In the same case, the Chief Justice made it clear that he did not think that interlocutory decisions such as those relating to setting dates, allowing or dismissing requests for adjournments, or even decisions concerning the admissibility of evidence were intended to be reviewed under section 28. He did note, however, that irregular decisions made during the adjudication process might "well be part of the picture in an attack made on the ultimate decision of the tribunal on the ground that there was not a fair hearing".²²

¹⁸ *Ibid.*, 998. For other cases on point see *Gabriel v. The Queen* [1972] F.C. 1148 and *Armstrong v. State of Wisconsin and U.S.A.* [1972] F.C. 1228.

¹⁹ See *R. v. Statutory Visitors to St. Lawrence's Hospital* [1953] 2 All E.R. 766; *R. v. Ontario Labour Relations Board* (1966) 57 D.L.R. (2d) 521; *The Queen v. Board of Broadcast Governors* (1962) 33 D.L.R. (2d) 449.

²⁰ See *Galloway Lumber Co. Ltd. v. British Columbia Labour Relations Board et al.* (1964) 44 D.L.R. (2d) 575; *Re Low and Minister of National Revenue* [1966] 2 O.R. 455 (Prohibition). But see the British decision *In re H.K. (an infant)* [1967] 2 Q.B. 617.

^{20a} *Supra*, f.n.10.

²¹ *Ibid.*, 78.

²² *Ibid.*

In *Puerto Rico v. Hernandez*,²³ The Appeal Court was unanimous in holding that the refusal of an extradition judge to issue a committal warrant²⁴ could not be considered a "decision or order" within the meaning of the *Federal Court Act*. In rendering that decision, the Appeal Court followed the judgment of the Supreme Court of Canada in *U.S.A. v. Link and Green*.²⁵

In *Armstrong v. State of Wisconsin and U.S.A.*,²⁶ the question arose as to whether a decision to actually issue a committal warrant was reviewable under the terms of the *Federal Court Act*. In the Appeal Court, the majority held that such an action was, indeed, a "decision or order" and hence subject to section 28 review. Sweet D.J., however, did not agree with that part of the majority judgment. It was his view that if a refusal to commit a fugitive was not a "decision or order" within the meaning of the *Federal or Supreme Court Acts*, then the issuance of a warrant of committal was, for the same reasons, not a "decision or order".

Rulings made by a board as to its own jurisdiction are not reviewable as "decisions" under section 28. In *A-G. of Canada v. Cylien*,²⁷ the Appeal Court held that the "conclusion" of the Immigration Appeal Board as to the nature of its statutory duty under section 11(3) of the *Immigration Appeal Board Act*²⁸ was not a "decision" made by it in the exercise of its power to make decisions. Similarly, in *B.C. Packers Ltd. v. Canada Labour Relations Board*,²⁹ the Appeal Court held that the position taken by the Board as to its jurisdiction was not a "decision" within the meaning of section 28.

It is significant to note, however, that in *In re McKendry*,³⁰ the Appeal Court accepted a decision rendered *during* the hearing of a reference to adjudication as a "decision or order" that might be reviewed under section 28. In that case, an adjudicator, in hearing a grievance under section 90(1) of the *Public Service Staff Relations Act*,³¹ was asked early in the proceedings to rule on whether certain

²³ [1972] F.C. 1076.

²⁴ Such action is authorized by s.18(1) of the *Extradition Act*, R.S.C. 1970, c.E-21.

²⁵ [1955] S.C.R. 183. In that case the Supreme Court was unanimous in holding that the refusal of an extradition judge was not a decision or order which could be appealed under the terms of the *Supreme Court Act*, R.S.C. 1952, c.259.

²⁶ *Supra*, f.n.18.

²⁷ [1973] F.C. 1166.

²⁸ S.C. 1973-74, c.27.

²⁹ [1973] F.C. 1194.

³⁰ [1973] F.C. 126.

³¹ R.S.C. 1970, c.P-35.

evidence could be properly adduced by the employer.³² The adjudicator's ruling in favour of the employer was challenged in section 28 proceedings. But the Appeal Court held the ruling to be correct and the application was dismissed. There was no discussion either by the respondent or the judges of the Court as to the Court's jurisdiction to review the "decision" in question under the terms of section 28.

Strictly Administrative Decisions

It will be remembered that under section 28(1), the Court of Appeal has no jurisdiction to review "a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". In *National Indian Brotherhood* [No. 2],³³ discussed above, the Chief Justice took considerable time to speculate about the type of decision or order that might not be reviewed because of the exception. It was then his view that a typical example of such a decision would be one made by a Cabinet Minister in fulfilling his duty to manage a government department. Chief Justice Jackett also queried whether a decision made under section 19 of the *Broadcasting Act*³⁴ would be strictly administrative in nature.³⁵ Under that section, the C.R.T.C. is empowered to hold a public hearing "if the Executive Committee is satisfied that it would be in the public interest to hold [one]". Consequently, there was some doubt in the Judge's mind as to whether a Committee decision either to hold or not to hold a hearing could be reviewed by the Court of Appeal. Such a decision appeared to him as "one of absolute unconditional discretion for the Executive Committee".³⁶ But clearly these dicta are *obiter*.

In the *Gateway* case,³⁷ the Chief Justice again took to speculation.³⁸ This time he wondered whether a decision taken by the Canadian Transport Commission under section 170 or 181 of the

³² That is, whether to admit evidence of after discovered facts.

³³ *Supra*, f.n.10.

³⁴ S.C. 1967-68, c.25.

³⁵ As used here, "strictly administrative" or "purely administrative" in nature is an administrative decision not required by law to be made on a judicial or quasi-judicial basis.

³⁶ *Supra*, f.n.10, 79.

³⁷ *Gateway Packers Ltd. v. Burlington North (Man.) Ltd.* [1971] F.C. 359.

³⁸ In these early cases Mr Justice Jackett was inclined to raise "questions . . . so that counsel [would] be prepared to assist the Court on them when they [arose] in a particular matter". See *National Indian Brotherhood* [No. 2], *supra*, f.n.10, 79.

*Railway Act*³⁹ would be a purely administrative act. Under that latter section, "any deviation, change or alteration" in a railway must "be submitted for the approval of the Board, and may be sanctioned by the Board". The Chief Justice had little doubt that an authority to exercise a supervisory and restraining power over the way in which a railway carries out its statutory power is of an administrative nature.⁴⁰ He would, nevertheless, be inclined to treat such an administrative act as one which had to be made on a judicial or quasi-judicial basis even though there was no statutory direction to that effect. Indeed, he would even be prepared to grant a right to be heard to "intervenants" on the question of whether or not such transportation services should be terminated.⁴¹

Moving away from speculation, we find that the Federal Court has so far held the two following administrative decisions to be ones which must be exercised on a judicial or quasi-judicial basis: the issuance or cancellation of a trustee licence by the Minister of Consumer and Corporate Affairs under the *Bankruptcy Act*,⁴² and the refusal by the Secretary of State to grant a certificate of citizenship under the *Canada Citizenship Act*.⁴³ The following administrative decisions, however, have been held to be ones which do not have to be exercised on a judicial or quasi-judicial basis: prescriptions made by the Minister of National Revenue under the *Customs or Anti-dumping Acts* as to the value of imported goods where there is not sufficient information to determine the normal or export price;⁴⁴ and decisions by the National Parole Board revoking paroles.⁴⁵

Summary

Assuming that the Federal Court is not inclined to issue certiorari except along traditional lines,⁴⁶ it is safe to suggest that certiorari

³⁹ R.S.C. 1952, c.234.

⁴⁰ *Supra*, f.n.37, 372.

⁴¹ In this case the intervenant was not in any strict sense either seeking an order or in jeopardy of having an order made against him, but was rather a businessman who depended on the transportation services which might be changed on application by a railway to the Canadian Transport Commission.

⁴² *Blais v. Basford* [1972] F.C. 151.

⁴³ *Lazarov v. Secretary of State* [1973] F.C. 927.

⁴⁴ *M.N.R. v. Creative Shoes Ltd.*, *supra*, f.n.17.

⁴⁵ *Howarth v. National Parole Board* [1973] F.C. 1018.

⁴⁶ It must be realized that the provisions in the *Federal Court Act* do not compel the Trial Court to issue the writs along traditional lines or as issued in some particular jurisdiction. The Trial Division could conceivably (although not likely) blaze a trail of its own as to the issuance of the extraordinary

per se no longer exists with respect to federal administrative agencies. The situation is this:

- (1) As it relates to federal agencies, certiorari no longer seems available in the provincial superior courts.⁴⁷
- (2) With reference to federal administrative decisions made before June 1, 1971, certiorari is not likely to issue at this late date from the Trial Court.
- (3) As for decisions made on or after June 1, 1971, the Trial Division is denied the certiorari jurisdiction it appears to have under section 18 of the *Federal Court Act* by subsection 28(3) of the same Act, which makes it clear that where the Court of Appeal has jurisdiction to review an administrative decision,⁴⁸ the Trial Division has no jurisdiction to entertain any proceeding in respect of the decision or order.
- (4) Certiorari-like jurisdiction is continued in the Federal Court of Appeal through the application "to review and set aside". Section 28(1) of the *Federal Court Act* codifies the grounds on which judicial review may be sought in that forum: breach of the rules of natural justice; jurisdictional error; error of law; and factual error.

The loss of certiorari proceedings in the Trial Division is unfortunate. Even if the draftsmen intended to provide a similar, though somewhat broader, proceeding in the Appeal Court, it may

remedies. Of course, it should be remembered that an appeal as of right lies from the judgment of the Trial Division to the Court of Appeal and from there to the Supreme Court of Canada, with leave of either the Appeal Court or the Supreme Court.

⁴⁷ See, for example, *Re Milbury and the Queen* (1972) 25 D.L.R. (3d) 499. The Appeal Division of the New Brunswick Supreme Court held that the jurisdiction of the provincial courts to issue certiorari against federal agencies has been excluded by the *Federal Court Act*.

Prior to the coming into force of that Act, federal boards were under the supervision of the provincial superior courts. S.18 of the Act appears to transfer that supervisory authority exclusively to the Trial Division. But does Parliament have the constitutional authority to exclude the review jurisdiction of the provincial courts as it relates to federal boards? The consensus at this time seems to be that Parliament is within its jurisdiction to do so with perhaps one exception: since the Supreme Court of British Columbia was created by imperial statute, some difficulty may arise in interfering in any way with its imperially derived power to issue the prerogative writs. See ss.101 and 129 of the *British North America Act*, 1867.

⁴⁸ Here "administrative decision" refers to a decision which must be made along judicial or quasi-judicial lines.

have been wise to leave certiorari in the Trial Court as well.⁴⁹ It is certainly more convenient in terms of saving time and money for the litigant to obtain a hearing in the Trial Court than in the Appeal Division. Further, offering a choice of forums could reduce the case load of the Appeal Division.

Prohibition

Unfortunately, there have been very few judicial pronouncements with reference to the writ of prohibition. It is therefore difficult to make a reasonably accurate assessment of its status in light of the provisions of section 28(3). Prohibition, of course, does not significantly differ from certiorari except in terms of timing.⁵⁰ In very general terms, prohibition seeks to prevent a tribunal from acting, while certiorari quashes something already done.

Some basic points may be extracted from a few cases in the Trial Division which have dealt with the writ of prohibition:

- (1) The Court will consider an application for prohibition against decisions^{50a} made well after the *Federal Court Act* came into force,⁵¹ unlike the situation as regards certiorari.
- (2) The Trial Court will consider an application for prohibition where there is an attempt to prohibit some hearing from proceeding⁵² or continuing.⁵³
- (3) Where the decision of a tribunal is the subject of section 28 proceedings, the Trial Division will probably not consider an application to review that same decision until the Appeal Court determines whether or not it has jurisdiction.⁵⁴

⁴⁹ The idea of having the old common law remedies exist alongside statutory review proceedings has been seen by others as well to have some merit. For example, the *Ontario Judicial Review Procedure Act*, S.O. 1971, c.48, as originally drafted provided for such a scheme. And the New Zealand Public and Administrative Law Reform Committee made the same recommendation.

⁵⁰ In Quebec, the two remedies have been combined into the "writ of evocation" (s.846ff. C.C.P.).

^{50a} As it relates to prohibition, "decision" is often not the final decision rendered by a tribunal after the completion of a hearing.

⁵¹ In *Wardair v. Canadian Transport Commission* [1973] F.C. 597, the decision challenged was made in May of 1973. In *A-G. of Can. v. Morrow J.* [1973] F.C. 889, the Trial Court was asked to prohibit a hearing in progress in June, 1973.

⁵² See the *Wardair* case, *ibid.*, and *Bell Canada v. Earl Palmer* [1973] F.C. 982.

⁵³ See *A-G. of Can. v. Morrow J.*, *supra*, f.n.51.

⁵⁴ This may be properly inferred from statements of Walsh J. in the *Wardair* case, *supra*, f.n.51, 599-600.

- (4) For a writ of prohibition to lie, there has to be lack of jurisdiction, bias, an error of law or a breach of natural justice in the finding of the tribunal.⁵⁵ Prohibition cannot be used to stay the judgment of a tribunal which is under review or appeal in the Federal Court of Appeal.⁵⁶

Mandamus

The question of whether or not the Trial Division has jurisdiction to issue mandamus to secure the performance of some public duty has not been finally settled. So far the remedy has been sought to compel the Minister of Public Works to remove a television cable from a bridge;⁵⁷ to compel the Chief Returning Officer to accept the nomination papers of a federal candidate;⁵⁸ to compel an extradition judge to hear an application for bail under section 457(1) of the Criminal Code;⁵⁹ and to compel the Canadian Transport Commission to issue certain licences in accordance with its usual practice.⁶⁰ In each of the above cases, the application for mandamus was against some "refusal to act" taken well after the *Federal Court Act* came into force.

It does not appear that the Trial Court considers the refusal of an administrative agency to perform some public duty to be a "decision or order" within the meaning of section 28 of the *Federal Court Act*. The several cases noted in this section bear this out. If such a refusal were indeed a "decision or order",⁶¹ the Trial Court would most likely lose its mandamus jurisdiction to the Court of Appeal *per* section 28(3). Eventually, it will surely be argued that when an agency refuses, for instance, to proceed with a hearing, it has considered the merits of the request and hence rendered a "decision". The validity of such an argument will be, of course, ultimately decided by the Court of Appeal acting in its appellate capacity⁶² or possibly by the Supreme Court of Canada.⁶³

⁵⁵ *Per* Walsh J. in the *Wardair* case, *ibid.*, 602.

⁵⁶ *Ibid.*, 603.

⁵⁷ *Weatherby v. Minister of Public Works* [1972] F.C. 952.

⁵⁸ *Szoboszloi v. Chief Returning Officer* [1972] F.C. 1020.

⁵⁹ *Commonwealth of Virginia v. Cohen* [1973] F.C. 622.

⁶⁰ *Kaps Transport Ltd. v. Canadian Transport Commission* [1973] F.C. 739.

It might be noted that in each of the cases the application for mandamus was considered on its merits and then dismissed.

⁶¹ It is probably the Federal Court of Appeal that will ultimately make this determination.

⁶² See s.27 of the *Federal Court Act*.

⁶³ It might be noted that an appeal to the Supreme Court from a decision of the Federal Court of Appeal under s.28 does not lie as of right but only with leave of either Court. See s.31 of the *Federal Court Act*.

Injunction

There is not enough case law so far to fully clarify whether or not injunctive relief against federal boards is within the domain of the Trial Division. But it is well to note a general statement of the Court of Appeal in *C.R.T.C. v. Teleprompter Cable Communications Corp.*⁶⁴ The Court was in unanimous agreement with the decision of Pratte J. in an unreported Federal Court case that the Trial Division

... has jurisdiction to make a declaration of the kind sought, [*i.e.*, that the operation of the applicant is not a broadcasting undertaking within the terms of the *Broadcasting Act*] if in the exercise of its discretion it should think fit to do so after a hearing on the merits, and also ... the [Trial] Court has jurisdiction to grant *injunctive* or prohibitory relief against the appellant ... in an appropriate situation.⁶⁵

In administrative law, an injunction restrains an inferior tribunal from acting or from carrying into effect some action which it has already taken but which is beyond its powers. The injunction granted may be temporary (*i.e.*, until the court can more fully look into the matter) or it may be permanent. It may be mandatory in the sense that it requires an administrative agency to exercise its judicial power, or it may be preventive in that it seeks to prohibit some course of action. A mandatory injunction,⁶⁶ then, resembles mandamus. If the latter remedy remains in the Trial Division, as seems indicated at this time, it is only logical that the former, for similar reasons, should remain in the same division as well. A prohibitory injunction, of course, may be likened to prohibition. Because of that similarity, it also should and is apt to remain in the same forum, the Trial Division.

But injunctive relief is sometimes sought after a tribunal has rendered a final decision to prevent it from carrying that decision into effect. In such cases, it could be argued, at least where the tribunal's decision is quasi-judicial in nature,⁶⁷ that the injunctive jurisdiction of the Trial Division is removed by section 28(3). Such an argument, however, could not apply where the decision challenged was strictly administrative in nature.⁶⁸

⁶⁴ [1972] F.C. 1265.

⁶⁵ *Ibid.*, 1270 (emphasis added).

⁶⁶ In public law, mandatory injunctions are rare.

⁶⁷ That is, required by law to be made on a judicial or quasi-judicial basis.

⁶⁸ Injunctive relief has been available to a tribunal exercising strictly administrative functions. But proceedings under s.28 are restricted to decisions which, though administrative in nature, are required by law to be made on a judicial or quasi-judicial basis.

Declaration

Some Canadian writers and jurists have suggested that a wide scope be given to declaratory relief as a supervisory vehicle for control of federal inferior tribunals. It seems unlikely, however, that the Appeal Court will allow⁶⁹ that remedy to grow to such an extent that it would virtually usurp its own power of review under section 28.⁷⁰ In other words, it seems unlikely that the Appeal Court would interpret section 28(3) as denying the Trial Court certiorari, proceed to clarify its own review power under 28(1), and then give back to the Trial Court a certiorari-like jurisdiction by permitting a broad scope for the declaratory judgment.⁷¹ Yet it is true that judicial reasoning is sometimes difficult to appreciate and it might indeed happen. But in the few cases available to date there are no indications that the Federal Court is leaning in that direction; only very basic points have been enunciated so far.

As noted above,⁷² the Appeal Court has in general terms affirmed the Trial Court's jurisdiction to grant declaratory relief. Moreover, in *Landreville v. the Queen*,⁷³ the Trial Division made it quite clear that it had jurisdiction to make declarations "which, though devoid of any legal effect, would from a practical point of view, serve some useful purpose".⁷⁴ In that case, the plaintiff was seeking two declarations: first, that a federal commission operating under certain Letters Patent dated March 2, 1966 did, among other things, exceed its jurisdiction; and that the chief and sole commissioner, the Honourable Ivan C. Rand, did not conduct the inquiry properly.

⁶⁹ It must be remembered that under s.27 of the *Federal Court Act*, an appeal lies to the Appeal Division from, among other things, any final judgment of the Trial Division.

⁷⁰ It was suggested before Bill C-192 became law that "the intention of the draftsmen [was] to abolish substantially the use of the injunction, the prerogative writs and declaratory relief in the field of federal administrative law": see G.V.V. Nicholls, *Federal Proposals for Review of Tribunal Decisions* (1970) Chitty's L.J. 254, 256.

⁷¹ The declaration has issued for violation of natural justice, bias, bad faith, and more generally, for lack of jurisdiction: see D.T. Warren, *The Declaratory Judgment: Reviewing Administrative Action* (1966) 44 Can. Bar Rev. 631. It might be noted, however, that in *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board* [1952] 3 D.L.R. (2d) 162, it was held that to the extent that certiorari, prohibition or mandamus provided an aggrieved person with a remedy, a declaration was not available as an alternative. Of course, in the issuance of common law and equitable remedies, the Federal Court is under no obligation to follow precedents in any jurisdiction.

⁷² In a passage from the *Teleprompter* case, *supra*, f.n.64.

⁷³ [1973] F.C. 1223.

⁷⁴ *Ibid.*, 1230.

The questions of law⁷⁵ determined in the *Landreville* case do not disturb the following analysis:

- (1) Where the intention is to have the court declare the "decision" of a tribunal null and void, the Trial Division has jurisdiction if such a decision was made before the *Federal Court Act* came into force.
- (2) Where such a "decision" was made after June 1, 1971, the Trial Court has no jurisdiction to issue a declaration. This is by virtue of section 28(3), which prohibits the Trial Division from reviewing a decision which may be the subject of section 28 proceedings.
- (3) When the "decision" (irrespective of when it was made) is a purely administrative one, the Trial Division has sole jurisdiction to declare it null and void. Section 28(1) only permits review by the Court of Appeal of decisions required by law to be made on a judicial or quasi-judicial basis.
- (4) Where there is no intention to quash a "decision or order" made by a tribunal, the Trial Division has jurisdiction to make a declaration on a legal issue.

Habeas Corpus

The final prerogative remedy to be discussed is that classic one, habeas corpus. Habeas corpus is still available in the provincial superior courts even in relation to federal administrative agencies, since it does not appear to have been transferred by any provision in the *Federal Court Act* to either the Trial Division or the Appeal Court. In the *Armstrong* case,⁷⁶ Thurlow J. and Cameron D.J. noted that by applying to the provincial court for habeas corpus, the applicant involved could test the validity of the committal for extradition. And early in 1973,⁷⁷ the superior court of Ontario heard an application for habeas corpus (with certiorari in aid) against a federal penitentiary warden. Thus, unlike the other writs discussed above, habeas corpus remains unaffected by the *Federal Court Act* as a common law remedy.

⁷⁵ The *Landreville* case was a reference to the Trial Court for the determination before trial of three questions of law.

⁷⁶ *Supra*, f.n.18, 1232.

⁷⁷ *Ex parte Marcotte* (1973) 10 C.C.C. (2d) 441.