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# REFORM OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION— THE ONTARIO WAY<sup>1</sup>

By DAVID J. MULLAN\*

## 1. Introduction

“A New Magna Carta” proclaimed an editorial headline in the *Toronto Globe and Mail* on Saturday, April 22, 1972<sup>2</sup> in welcome to the coming into force of the package of legislation based on the Report of the Ontario Royal Commission Inquiry Into Civil Rights, more commonly known as the McRuer Commission Report.<sup>3</sup> The last paragraph of that editorial expanded emotively on the headline

The Legislature of Ontario has written a new sort of Magna Carta for the ordinary man, who has been subject to too many petty dictators.<sup>4</sup>

It is not my purpose in this article to measure the validity of that claim with respect to all five Acts which came into effect in Ontario on April 17, 1972.<sup>5</sup> In particular I do not intend to comment on the substance of the procedural protections brought about by the Statutory Powers Procedure Act<sup>6</sup> and the Civil Rights Statute Law Amendment Act. I will however consider the justification for the remark in the context of discussing the judicial review implications of the legislation generally and the Judicial Review Procedure Act<sup>7</sup> in particular. Some reference will also be made in this context to two of the other Acts in this legislative package, the Statutory Powers Procedure Act<sup>8</sup> and the Judicature Amendment Act.<sup>9</sup>

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<sup>1</sup> This article is a modification of a chapter of an LL.M. thesis submitted at Queen's University, Kingston. I wish to express my thanks for their assistance and valuable suggestions to my supervisors Professors D.D. Carter and I.M. Christie and also to Professors W.H. Angus and H. Janisch.

<sup>2</sup> The second part of this editorial appeared on Monday, April 24, 1972.

<sup>3</sup> (Toronto: Queen's Printer, 1968).

<sup>4</sup> *Supra*, note 2.

<sup>5</sup> The Judicial Review Procedure Act, S.O. 1971, c. 48; The Statutory Powers Procedure Act, S.O. 1971, c. 47; The Public Inquiries Act, S.O. 1971, c. 49; The Civil Rights Statute Law Amendment Act, S.O. 1971, c. 50; The Judicature Amendment Act (No. 4), S.O. 1970, c. 97, as amended by the Judicature Amendment Act, S.O. 1971, c. 57. Note the legislation has no effect in relation to decisions taken before April 17, 1972. See *Re Merrens and the Municipality of Metropolitan Toronto* [1973] 2 O.R. 265 (Div. Ct.); *Re Ashby and Ontario Council of Regents for Colleges of Applied Arts and Technology* [1973] 3 O.R. 418 (Div. Ct.).

<sup>6</sup> This legislation has already been commented on in this journal. See R.G. Atkey, *The Statutory Powers Procedure Act, 1971* (1972), 10 Osgoode Hall L.J. 155.

<sup>7</sup> *Supra*, note 5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

The Judicial Review Procedure Act<sup>10</sup> has two distinct aspects which merit separate consideration. First, the Act establishes in Ontario a new remedy for judicial review of administrative action, a remedy which virtually replaces the old forms of relief by orders in the nature of the prerogative writs and the equitable remedies of declaration and injunction.<sup>11</sup> Secondly, the Act superficially at least expands the common law basis for judicial review of administrative action.<sup>12</sup> The theses that I will put forward in relation to this legislation in many senses duplicate some of the remarks which I have previously made in relation to the Federal Court Act<sup>13</sup>:

- (i) Any attempt to simplify the procedural process for those seeking to secure judicial review of administrative action is commendable.
- (ii) Nevertheless, some of the detail of the Judicial Review Procedure Act in this respect is open to criticism because of the potential sources of confusion that it creates.
- (iii) Rather than attempting to increase the scope of judicial review of administrative action and rather than concentrating on uniformity of judicial review for all statutory decision-makers the Ontario Legislative Assembly would have been better engaged in a detailed empirical study of the particular roles of individual statutory decision-makers and their appropriate relationship with the ordinary courts, leading to a rationalization of appeal structures.
- (iv) However, as against this criticism, the Judicial Review Procedure Act, despite the aspirations of the McRuer Commission Report and the legislators, may not have in fact brought about any or, at most, any significant increase in the scope of judicial review of administrative action.

My order of approach will be first to consider the various theories of judicial review of administrative action which have competed for attention in Canada and to identify the particular philosophy which underlies the legislation of 1971. I will then examine the relevant details of the Judicial Review Procedure Act as well as the relationship between the Judicial Review Procedure Act and the Statutory Powers Procedure Act. Finally, comment will be made on the links between the new remedy and the creation of a new division of the Supreme Court of Ontario to deal, *inter alia*, with matters of judicial review. Here at least is a move towards specialization which hopefully will lead in time to a greater rapport between the courts of this province and the administrative and executive arms of government.

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<sup>10</sup> For the legislative history of the Judicial Review Procedure Act, see Debates of the Ontario Legislative Assembly, Fourth Session, 28th Assembly, 1971 at p. 2373 (1st reading), p. 3168 (2nd reading), p. 3858 (Committee), p. 3936 (3rd reading) and pp. 470-476 (Royal Assent). The history of the Statutory Powers Procedure Act appears in the same volume at p. 2373, p. 3155, p. 3847, p. 3936 and pp. 470-472 respectively.

<sup>11</sup> See particularly section 2(1).

<sup>12</sup> See particularly section 2(2) and (3).

<sup>13</sup> *The Federal Court Act — A Misguided Attempt at Administrative Law Reform?* (1973), 23 U.T.L.J. 14.

## 2. *Philosophy Behind the Legislation*

In Canada, probably more than in any other Commonwealth jurisdiction, legal writings have emphasized the basic tension which exists between the demands of the administrative process for efficiency and effectiveness through an absolute minimum of judicial interference on the one hand, and the traditional role of the courts as the protectors of private interests from the ever-extending reach of executive power on the other. This is a tradition which stretches back many years. Concern with excessive judicial review can be detected as early as a 1929 article in the *Law Quarterly Review* by D. M. Gordon, Q.C. of the British Columbia Bar,<sup>14</sup> where the theme is developed that the concept of jurisdiction on which the common law of judicial review is based is no more than an illogical device used to support judicial review in situations where the courts should be deferring to the judgment of the statutory decision-maker given authority to decide the matter. This is a stance that the learned author has in fact continued to maintain right down to the present day.<sup>15</sup> Of somewhat more recent vintage are the writings of Bora Laskin (now Laskin C. J. of the Supreme Court of Canada) and John Willis. In his seminal article, *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses*,<sup>16</sup> published in 1952, Laskin deplored the way in which Canadian courts, by virtually ignoring sections in statutes designed to restrict their review powers, had frustrated the objects of compulsory collective bargaining in Canada. This attack on the record of the courts in the labour field is also one which continues today on various fronts.<sup>17</sup> Willis's concern on the other hand has been much more general. In 1962, he made the following comment in the course of a paper presented to the Administrative Law Subsection of the Canadian Bar Association.

As to showing up actual injustices in actual concrete cases — which is worth doing — we should, as lawyers be careful that we do not line ourselves up behind the individual and against the government merely because he is an individual,

<sup>14</sup> *The Relation of Facts to Jurisdiction* (1929), 45 L.Q. R. 459.

<sup>15</sup> See the succession of articles and notes by D.M. Gordon on this subject. *The Observance of Law as a Condition of Jurisdiction* (1931), 47 L.Q.R. 386 and 557; *Excess of Jurisdiction in Sentencing or Awarding Relief* (1934), 55 L.Q.R. 521; *Tithe Redemption Commission v. Gwynne* (1944), 60 L.Q.R. 250; *Conditional and Contingent Jurisdiction of Tribunals* (1960), 1 U.B.C.L.R. 185; Book Review (1960), 76 L.Q.R. 306; Book Review (1966), 82 L.Q.R. 515; 'What Did the *Anisminic* Case Decide?' (1971), 34 Mod. L.R. 1.

<sup>16</sup> (1952), 30 Can. Bar Rev. 986.

<sup>17</sup> See e.g. P.C. Weiler, *The "Slippery Slope" of Judicial Intervention* (1971), 9 O.H.L.J. 1, where the theme is developed that the Supreme Court of Canada's recent record of judicial review in the labour law area indicates not only a complete failure to define clearly the scope of judicial review of administrative action but also a very *ad hoc* basis for the grant of judicial review based on the Court's own conception of the merits of each case. See also J.N. Lyon, Casenote (1971), 49 Can. Bar Rev. 365; the evidence of the representatives of the Canadian Labour Congress before the House of Commons Standing Committee on Justice and Legal Affairs, on the Federal Court Act (See Minutes of the Committee for Tuesday, 26 May 1970: 28th Parliament, 2nd Session, No. 31); the comments of the Chairman of the Ontario Labour Relations Board to an inquiry by the McRuer Commission (*supra*, note 3 at pp. 306-307).

or because we fail, through lack of understanding of the total situation, to grasp the government's point of view.<sup>18</sup>

At that time he was critical of the Gordon Report's concern with 'existing safeguards against the abuse of power.'<sup>19</sup> Six years later the same criticism was brought to bear in an article criticizing Volumes 1 to 3 of the *Royal Commission — Inquiry into Civil Rights* (the McRuer Commission Report) and its recommendations for increases in the scope of judicial review and procedural safeguards on the exercise of statutory power in Ontario.<sup>20</sup>

At one level, this attack on the record of the courts and resistance to suggested increases in the scope of judicial review can be seen as resulting from a concern that the courts hamper rather than assist good, efficient and effective administration. In an extreme form this kind of attitude portrays the courts as a body of men lusting after authority which either should never have been taken away from them and given to administrative tribunals or officials or, alternatively, should have been conferred on the courts rather than on an administrative tribunal or official. More realistically, the argument made is that the courts do not really possess the kind of specialised knowledge necessary for them to be able to engage in any extensive supervision of the affairs of expert and specially-appointed tribunals and officials. Not only this, but extensive and frequent judicial review leads to the situation where administrative efficiency is impaired and many of the advantages of administrative decision-making over judicial decision-making are lost. Extensive and frequent review means long delays in both individual decision-making and policy formation. It means a repetition of a decision-making process, which has already taken place, at a much more formal level. It means an increase in cost, both in terms of money and manpower and all of this for what may well turn out to be a less satisfactory and well-reasoned decision.

At the other end of the spectrum are those who see judicial review and increased procedural protections as the only satisfactory way of protecting individuals from abuse of administrative power. These are the latter day apostles of such writers as Professor A. V. Dicey<sup>21</sup> and England's Lord Chief Justice Hewart<sup>22</sup> who deplored the growth of administrative power and fervently advocated the retention of broad powers of judicial review

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<sup>18</sup> Reproduced in I.M. Christie, D.D. Carter and D.J. Mullan, *Judicial Review of Statutory Powers — Cases and Materials* (Kingston: Queen's University, 1971) at p. 35.

<sup>19</sup> *Id.*, at p. 32.

<sup>20</sup> See *The McRuer Report: Lawyers' Values and Civil Servants' Values* (1968), 18 U.T.L.J. 351.

<sup>21</sup> Professor A.V. Dicey in successive editions of his classic work, *The Law of the Constitution*, was most concerned that in England discretionary, administrative authority be confined to an absolute minimum. See Volume 1 of the McRuer Commission Report (*supra*, note 3 at pp. 57-59).

<sup>22</sup> See Hewart's major criticism of the growth of the administrative process, *The New Despotism* (London: Benn, 1929), a book which led to the setting up of the Committee on Ministers' Powers in England (The Donoughmore Committee Report, 1932, Cmd. 4060).

over tribunals and administrators, whom they regarded as supplanting many of the courts' traditional functions. Individual interests are seen as necessarily dependent on the wide scope of judicial review. It is this notion which seems to have been the basic philosophy of the McRuer Commission Report on which the Ontario legislative reforms are largely based<sup>23</sup> and which gave such political attractiveness to that legislation.<sup>24</sup>

Two quotations from the first volume of the Report should suffice to illustrate this point.

The lack in the law of Ontario of any comprehensive principle for review of conclusions of law or findings of fact within the powers conferred on a tribunal deprives the individual whose rights may be affected of an essential safeguard against unjustified encroachment on his civil rights.<sup>25</sup>

and

The disciplinary effect of a right of review gives to the individual, whose rights may be affected, a very real status before a tribunal. He is not one who is subject to the caprice of the tribunal.<sup>26</sup>

Of course, this concern over excessive judicial intervention in the administrative process is not simply a battle between those supporting individual interests on one hand and those desiring efficient administration on the other. For many, the courts do not represent an agency for the protection of individual interests in this country and their criticism of the extent of judicial review of administrative action is based on a notion that in certain areas the individual is likely to fare better with an administrative tribunal than with the courts. For example, the concern of trade union leaders (perhaps ill-founded)<sup>27</sup> is that the courts in exercising review powers in the labour relations field tend to favour management at the expense of unions and employees. This can also explain the seemingly ambivalent attitude of those who argue that the Supreme Court of Canada decision in *Bell v. Ontario Human Rights Commission*<sup>28</sup> was incorrect because it was an unjustified interference with a specialist tribunal yet at the same time are prepared to explore every possibility for securing judicial review of the decision of a local welfare administrator denying welfare to a person in need. In this

<sup>23</sup> *Supra*, note 3 at p. 306, when McRuer cites *The New Despotism* approvingly.

<sup>24</sup> See e.g. the editorials in the *Toronto Globe and Mail* for April 22 and 24, 1972, *supra*, notes 2 and 4.

<sup>25</sup> *Supra*, note 3 at pp. 308-309.

<sup>26</sup> *Id.*, at p. 278.

<sup>27</sup> The reservation 'perhaps ill-founded' is included because, despite the concerns of the Canadian Labour Congress leaders (*supra*, note 17), Weiler's scalogram analysis of Supreme Court decisions (*supra*, note 17) indicates that not only was there no really discernible antipathy on the part of the Court towards unions in the period 1950-1970 (at p. 12) but also that the Court through that period exhibited 'extreme sensitivity to claims of individual employees against unions, employers and both. The Court's decisions have, without exception, sustained these claims.' (at p. 17).

<sup>28</sup> [1971] S.C.R. 756, (1969), 18 D.L.R. (3d) 1. For criticisms of the decision of the Supreme Court of Canada in this case, see P.W. Hogg, *The Jurisdictional Fact Doctrine in the Supreme Court of Canada: Bell v. Ontario Human Rights Commission* (1971), 9 O.H.L.J. 203; I.A. Hunter, *The Development of the Ontario Human Rights Code: A Decade in Retrospect* (1972), 22 U.T.L.J. 237 and *Judicial Review of Human Rights Legislation: McKay v. Bell* (1972), 7 U.B.C.L.R. 17.

respect, Innis Christie's 1970 address to the Law Society of Upper Canada, *The Nature of the Lawyer's Role in the Administrative Process*<sup>29</sup> is most illuminating. Professor Christie's dilemma as a teacher of administrative law, as well as a teacher of labour law and poverty law, is that he sees both the 'poor' record of the courts exercising review powers in the labour area and the potential of judicial review as a means of rectifying injustices in the administration of welfare.<sup>30</sup>

The lesson to be learned from all of this dialogue is a very simple one. There are both poor tribunals and poor courts. This suggests that the answer lies not in complete faith in either but an appropriate balance of authority between the two. Philosophically, I agree with the views of Peter Hogg when he stresses the importance of the role of an independent judiciary in the protection of basic constitutional and civil libertarian values and that any attempt to remove that kind of review authority from the courts is insupportable.<sup>31</sup> At the less ethereal level, what really seems to be needed is a more effective reconciliation of the relationship between administrative tribunals and officials and the courts and, in my view, that cannot be achieved by an across the board increase in the scope of judicial review of administrative action. The creation of a specialized administrative court is part of the answer and there has been some acceptance of that principle in the new legislation with the establishing of the Divisional Court. Beyond this there should be an empirical study of the functioning of administrative tribunals and officials across Ontario leading to a rationalization of statutory appeal processes coupled with a working out of the appropriate scope of appeal and review on an individualized basis.<sup>32</sup>

To a degree this notion was accepted in Ontario by the McRuer Commission. It did examine all tribunals on an individual basis. However, the operation proceeded in a perverse fashion. Rather than surveying the func-

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<sup>29</sup> [1971] Special Lectures of the Law Society of Upper Canada 1.

<sup>30</sup> *Id.*, at pp. 3-5.

<sup>31</sup> See P.W. Hogg, *The Supreme Court of Canada and Administrative Law, 1949-71* (1973), 11 O.H.L.J. 187 at pp. 188-191. This theme is developed in more detail in his as yet unpublished public lecture, *Judicial Review: How Much Do We Need?*, delivered at Osgoode Hall Law School of York University on Thursday, 16 November 1972 as part of a lecture series on the theme of *The Individual and the Law*. See also a subsequent lecture in the same series on February 15, 1973 where Professor William Angus takes up this same theme. Indeed it is for this very reason that I find the provisions of clause 33 of Bill 11 — Labour Code of British Columbia Act — now before the British Columbia legislature quite objectionable insofar as they are clearly aimed at a total deprivation of judicial authority with respect to labour relations matters. No matter how competent the statutory authority in question may be, such provisions are a serious threat to basic Canadian constitutional notions.

<sup>32</sup> This of course is by no means, a novel plea. See for example John Willis's article *Lawyers' Values and Civil Servants' Values* (*supra*, note 20) at p. 359 'The principle of "uniqueness" is the principle for me'. Indeed, the Federal Law Reform Commission is also apparently intending to move in this direction in its consideration of the topic of administrative law.

tions of all tribunals initially and then discussing the role of the courts and judicial review, the Commission, at least as indicated by the order in which the various volumes of the Report were published and by the tone of Volume 1, considered the whole question of judicial review in the abstract and then proceeded to a survey of particular tribunals preconditioned by the conclusions already reached.<sup>33</sup>

The new legislation is based, it seems, on two fundamental assumptions; first, that the proper manner in which to proceed in this area is by the imposition of a generally uniform standard of judicial review for all statutory decision-makers and, secondly, that legitimate private interests demanded that the administrative process be subject to wider judicial review authority than existed at common law. Both assumptions are open to serious doubt. In the course of this article I hope to demonstrate how these assumptions have led to some of the unfortunate provisions in the new legislation and that a more neutral stance towards the administrative process could have produced more satisfactory reforms.

### 3. *Rationale for a New Simplified Remedy*

In my article on the judicial review aspects of the Federal Court Act,<sup>34</sup> I have already commented favourably on the aspirations of the McRuer Commission to simplify the remedial structures in this area by the creation of a single comprehensive remedy. The eradication of all the complicated features of the old forms of remedy does not therefore deserve too much reiteration here, though I will comment later in some detail on the reference in the Act to the old remedies as the basis of the new remedy and also on the failure of the Ontario Legislative Assembly to abolish completely the old remedies. Suffice it to say that the historically-rooted and constitutionally vital prerogative writs and the associated remedies of declaration and injunction had become shackled by procedural intricacies and were scarcely an efficient or fair method of securing judicial review.<sup>35</sup> It is also important to differentiate at this stage between arguments about the procedures for obtaining judicial review and arguments about the appropriate scope of judicial review. While the case for limiting the scope of judicial review may at present be quite strong, there is really no contradiction in contending at the same time for improved procedures for obtaining that review. The previous system of judicial review, because of its inconsistencies and procedural difficulties, on occasions tended to operate unfairly against deserving applicants and, whatever the appropriate scope of judicial review, individual

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<sup>33</sup> Indeed, the present Federal work is somewhat of the same order, following as it does the reforms of the Federal Court Act.

<sup>34</sup> *Supra*, note 13 at pp. 33-34.

<sup>35</sup> The McRuer Commission Report was particularly concerned about this problem. *Supra*, note 3 at pp. 317-318.



cases deserve fairness and equality of treatment.<sup>36</sup> Insofar as the Judicial Review Procedure Act goes towards achieving such a situation, it is to be commended. Indeed, by the creation of a single remedy covering all the previously available grounds of review and the entire range of remedial relief afforded by the old writs the new legislation has probably achieved an optimum result (at least, in principle) for it avoids all the dangers previously associated with praying for the wrong kind of relief or seeking an inappropriate remedy. However, despite the overall praiseworthiness of this objective of the new legislation, it does appear to contain not only a number of potential difficulties in the detail of its application but several of its provisions can also be questioned from the standpoint of their substance.

#### 4. *The Basis of the New Remedy — Section 2(1) and Related Provisions*

The cornerstone of the new legislation is section 2(1). It establishes the new remedy called an 'Application for Judicial Review' and provides for its availability 'notwithstanding any right of appeal'. The section then goes on to define the scope of the new remedy very largely in terms of the old forms of relief. The Supreme Court of Ontario is empowered to grant by order

. . . any relief that the applicant would be entitled to in any one or more of the following

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

In order to discuss all the problems and controversial aspects of this section it is however necessary to refer to certain other provisions in the Act. First, the term 'statutory power' which is used in section 2(1) is defined in section 1(g), the definition section of the Act, as follows: —

- (g) 'statutory power' means a power or right conferred by or under a statute,
- (i) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation;
  - (ii) to exercise a statutory power of decision,

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<sup>36</sup> For example, the plaintiff in an action for a declaration in *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board* [1952] O.R. 366; [1952] 3 D.L.R. 162 (Ont. C.A.) must have had some very serious doubts about the wisdom of a law, which told him that a declaration was not available where certiorari was an appropriate remedy and that if relief was wanted new proceedings would have to be commenced, and all this after an expensive trip to the Court of Appeal and some rather dubious reasoning by that Court. The English law on which this decision was based was in fact nowhere nearly as definite as the Court of Appeal made out. See *Cooper v. Wilson* [1937] 2 K.B. 309 and the judgment of Lord Denning in *Pyx Granite Co. v. Ministry of Housing and Local Government* [1958] 1 Q.B. 554 at p. 571 (C.A.), both referred to and discussed in *Klymchuk v. Cowan* (1964), 45 D.L.R. (2d) 587 (Man. Q.B.). See also *McRuer (Id.)* and *Re Low and Minister of National Revenue* [1967] 1 O.R. 135; (1967), 59 D.L.R. (2d) 664 (Ont. C.A.). See, however, P.W. Hogg, *The Supreme Court of Canada and Administrative Law, 1949-71* (*supra*, note 31) at pp. 194-196 where it is demonstrated that these have not been problems for litigants before the Supreme Court of Canada.

- (iii) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,
- (iv) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party.

The term 'statutory power of decision' used in this definition is also defined: —

- (f) 'statutory power of decision' means a power or right conferred by or under a statute to make a decision deciding or prescribing,
  - (i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
  - (ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not, and includes the powers of an inferior court;

Secondly, section 7 provides that where proceedings are commenced for orders in the nature of one of the old prerogative writs referred to in section 2(1), they are to be treated in future as if they were an application for judicial review under the Act while, by virtue of section 8, where an action is brought for a declaration or an injunction in relation to a 'statutory power', a judge of the High Court has a discretion on the application of any party to the action to

. . . if he considers it appropriate, direct that the action be treated and disposed of summarily, insofar as it relates to the exercise, refusal to exercise or proposed or purported exercise of such power, as if it were an application for judicial review and may order that the hearing of such issue be transferred to the Divisional Court or may grant leave for it to be disposed of in accordance with subsection 2 of section 6.

Having regard to these auxiliary provisions, as well as to section 2(1) itself, the following questions arise: —

- (a) Why has the availability of the new remedy been expressed in terms of the availability of one of the old forms of remedy?
- (b) Given the superficially all-embracing scope of the relief afforded by section 2(1), why has the possibility of using the old forms of relief been left open by sections 7 and 8?
- (c) Why is the new remedy to be available 'notwithstanding any right of appeal'?
- (d) Why is relief in the nature of a declaration and an injunction limited to 'statutory power[s]' whereas a similar limitation has not been imposed on the availability of the new remedy with respect to relief in the nature of the prerogative writs?

Aside from these matters of substance there also seem to be some interpretative difficulties in relation to section 2(1).

- (e) What is the precise effect of the combination in section 2(1) of all the kinds of relief previously available within the confines of one remedy?
- (a) *Relation of the new remedy to the old forms of relief.*

In a most effective piece of rhetoric, Professor K. C. Davis once remarked:

. . . either Parliament or the Law Lords should throw the entire set of prerogative writs into the Thames River, heavily weighted with sinkers to prevent them from rising again.<sup>37</sup>

Unfortunately, this advice has only been partially heeded in the Ontario legislation. The writs and the other forms of relief have been thrown into Lake Ontario but the sinkers are not nearly heavy enough and they continue to bob about the surface in a disconcerting way. Not only have the old forms of relief not been abolished completely but the new remedy's availability is dependent upon the previous availability of one of the old forms of relief.

I will discuss below the implications of the limited preservation of the old forms of relief and also the precise meaning and effect of section 2(1). Aside from these matters, there still remains, however, the broader question of whether the Ontario legislation should have codified the grounds of review rather than relate the availability of the new remedy to the old forms of relief.

This failure of the Ontario legislation to codify the grounds of relief is once again a matter that I have commented on in some detail in my article on the Federal Court Act.<sup>38</sup> The McRuer Commission's justification for such a failure to codify was to the effect that the 'law should be left free to develop refinements where appropriate'.<sup>39</sup> Arguably, though, the legislation in fact leaves little room for the development of refinements in that the availability of the new remedy depends on the establishing of entitlement to one of the old forms of relief as they existed *prior* to the Act. Aside from this, codification does not necessarily prevent evolution as every civil lawyer will attest. Section 28 of the Federal Court Act codifies the grounds on which judicial review may be sought from the Court of Appeal. Nevertheless, there is little doubt that the Court of Appeal will still be able to give new and different dimensions to such concepts as breach of the rules of natural justice and abuse of discretion despite the codification.

Of course, it may be argued that such a general codification as that contained in section 28 of the Federal Court Act achieves little. Everyone knows, without being told, that breach of the rules of natural justice and jurisdictional error<sup>40</sup> are the bread and butter of all Commonwealth judicial review systems. Furthermore, error of law and factual error, the other two grounds in section 28(1)<sup>41</sup> are dealt with in specific subsections of the Judicial Review Procedure Act.<sup>42</sup> Nevertheless, given clarity as one of the objects of the legislation and given the age-old difficulties concerning the precise scope of the various common law forms of relief, the complete removal of any reference to those old remedies coupled with a statement of

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<sup>37</sup> See K.C. Davis, *The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence* (1961), 61 Col. L.R. 201 at p. 204; repeated in *English Administrative Law — An American View* [1962] P.L. 134 at p. 149.

<sup>38</sup> *Supra*, note 13 at pp. 34-35.

<sup>39</sup> *Supra*, note 3 at pp. 315.

<sup>40</sup> Section 28(1) (a).

<sup>41</sup> Section 28(1) (b) and (c).

<sup>42</sup> Section 2(2) and (3).

the actual grounds for review under the new remedy, would have been much more desirable. The potential litigant should not have to inquire whether this was a person against whom he could have obtained mandamus at common law if he wishes to secure a mandatory remedy. Not only that, but the old forms of relief, because of their unfortunate past, are somewhat unsightly bobbing around the surface of Lake Ontario.

(b) *Preservation of the Existing Modes of Relief*

The McRuer Commission Report seemed to contemplate that the legislation establishing the new judicial review remedy would abolish the old forms of relief.<sup>43</sup> As noted already, this recommendation has not been fully accepted in the Judicial Review Procedure Act. As far as orders in the nature of the prerogative writs of certiorari, prohibition and mandamus are concerned, it is still possible to actually commence proceedings for these orders, though the court is obliged to treat such proceedings as if they were an application for judicial review under the Act.<sup>44</sup> With respect to declaration and injunction actions, the ability to seek these remedies in the High Court is left open by the legislation and whether or not such an action will be transferred to the Divisional Court and treated as an application for judicial review depends on the application of a party to the proceedings and an exercise of discretion by a judge of the High Court.<sup>45</sup>

There seems to be very little reason for even this limited amount of retention. If the new judicial review remedy is indeed comprehensive, and it seems to have been intended that it would be,<sup>46</sup> the retention of the old remedies would appear to be completely unnecessary. Certain reasons for retention do however suggest themselves, though they are all of dubious validity.

First, at least as far as the prerogative writs are concerned, there may have been some doubts as to whether complete abolition was within provincial competence. However, there does not appear to be much justification for such an attitude. The granting of the prerogative writs in relation to provincial tribunals and statutory decision-makers clearly seems to be a matter of 'property and civil rights in the province'<sup>47</sup> and the 'administration of justice in the province',<sup>48</sup> and therefore subject to provincial statutory modification. Perhaps the only basis for arguing the unconstitutionality of their abolition does not stem from a federal-provincial allocation of powers argument at all but rather from sections 96-101 and the preamble to the British North America Act, a preamble which purported to endow Canada

<sup>43</sup> *Supra*, note 3 at pp. 319-320 and p. 326.

<sup>44</sup> Section 7.

<sup>45</sup> Section 8.

<sup>46</sup> See Explanatory Notes to Bill 54 (The Judicial Review Procedure Bill), 4th Session, 28th Assembly of the Ontario Legislature. Reproduced in I.M. Christie, D.D. Carter and D.J. Mullan, *Judicial Review of Statutory Powers — Cases and Materials* (*supra*, note 18) at p. 603.

<sup>47</sup> Section 92(13) of the British North America Act, 1867, 30 Vict., c. 3 (U.K.).

<sup>48</sup> Section 92 (14).

with a constitution similar in principle to that of the United Kingdom.<sup>49</sup> From these it might be argued that in 1867 one of the important features of the United Kingdom's constitutional framework was the availability of judicial review through the prerogative writs and that the intention of the drafters of the British North America Act, as exemplified by the structure of the Act and particularly sections 96-101, the judicial sections, as well as the preamble, was to preserve the judicial institutions and procedures existing at that date.<sup>50</sup> Certainly, this argument has prevailed to a certain extent for the courts have recognized that there are certain 'judicial' tasks which must in the various provinces be exercised by the courts, if they are to be exercised at all, and which cannot be conferred on some other functionary, be it executive official or administrative tribunal.<sup>51</sup> However, this limited recognition of the notion of separation of powers in Canada by virtue of the British North America Act does not also involve acceptance of the conclusion that the provincial legislative assemblies are precluded from tampering in any way with the remedial structures accepted in the United Kingdom in 1867. It is difficult to draw this implication from a reading of sections 96-101. Moreover, the preamble to a statute, whether it be a constitutional document or not, is not normally regarded as giving substantive content to that statute though it may be commonly used as a guide to statutory interpretation.<sup>52</sup> Furthermore, the sovereignty of the legislature was also a recognized feature of the United Kingdom constitution at that time, if not the keystone. In a conflict between legislative supremacy and guaranteed procedural protections, the former at least in conventional theory would inevitably triumph.

However, even conceding the validity of this type of constitutional argument, involving as it does implied constitutional principles transcending even the authority of Parliament, and the legislatures it does not necessarily clinch

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<sup>49</sup> 'Whereas the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom. . . .'

<sup>50</sup> Presumably, there may also be some relevance in this argument to the creation of a federal court exercising exclusive review jurisdiction over federal statutory decision-makers. This could perhaps be seen as an abrogation of a guaranteed core of provincial court jurisdiction. See also my Federal Court article, (*supra*, note 13) at pp. 19-28.

<sup>51</sup> See e.g. *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.* [1949] A.C. 134, [1948] 4 D.L.R. 673, for an invaluable judicial discussion of this problem, even though the argument was rejected in that case. See also W.R. Lederman, *The Independence of the Judiciary* (Part II) (1956), 34 Can. Bar. Rev. 1139 at pp. 1166-1177 for a succinct but penetrating development of the problems in this area. See also J.N. Lyon, Casenote (*supra*, note 17) and D.W. Elliott, Note on *Pringle v. Fraser* (1972), 7 U.B.C. Law Rev. 293. All three writers question the constitutionality of any legislative attempt to deprive provincial superior courts of the inherent powers of review. However, whether procedural and organizational changes by a statute which ostensibly increases the courts' review power constitutes an unconstitutional interference with their inherent review powers is a somewhat different question than that of abolition or diminution. Arguably, it is the substance of judicial review rather than the historic forms which is important.

<sup>52</sup> See *Maxwell on Interpretation of Statutes* (London: Sweet and Maxwell, 11th ed., 1962) at pp. 43-48.

the issue of whether the prerogative writs can be abolished. Presumably, as long as another judicial review procedure embracing the kind of relief afforded by the prerogative writs is established in their place, there can be no complaint. After all there is nothing sacred in the names of writs or in the details of the procedure required to obtain them. Rather the important factor in this kind of argument is the guaranteed core of judicial review authority. Indeed this type of change had already taken place in Ontario in the past when the prerogative writs were replaced by the procedurally more advantageous orders in the nature of the prerogative writs.<sup>53</sup> Accordingly, it seems that there is very little or no basis for an argument based on the unconstitutionality of retention.

Even so, perhaps the historical roots of the prerogative writs and their constitutional importance convinced a sentimental draftsman that their retention in name only was cosmetically important. Perhaps the same draftsman thought also of the elderly practitioner with his reams of prerogative writ precedents and decided that such accumulated knowledge and paper deserved protection and consideration, at least to the extent of allowing the proceedings to be commenced, if not dealt with, under the old and familiar format. To me all of these reasons are inconsequential particularly when the individual litigant may have to bear the extra costs of drafting involved in the old procedures. However, it may well be that criticisms of this kind are somewhat trifling. In all probability little use is going to be made of the old forms of procedure in the future and the sight of an application for an order in the nature of certiorari will become an historical curiosity.

As mentioned earlier, the new remedy was intended to be comprehensive.<sup>54</sup> However, later in the article I will discuss the problems of whether the Act in fact covers all the grounds for judicial review under the old forms of relief and, more particularly, question whether an application for judicial review is available in the place of a declaratory judgment against the Crown or even a Crown servant acting as an agent of the Crown. If these doubts are in fact well-founded there may be some merit, albeit fortuitous, in the preservation of the rights of an affected person to commence an action for a declaration in the High Court.

Aside from this consideration, the retention of actions for a declaration and an injunction may also have stemmed from the fact that these equitable remedies are not confined in their scope to matters of public law or statutory decision-making but are quite often also appropriate remedies in private law disputes. However, this is not a very strong argument for retention at all, particularly as it would have been a relatively easy drafting task to have provided for their abolition except in respect of the exercise of non-statutory powers.

A booklet prepared by D. W. Mundell,<sup>55</sup> who was largely responsible

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<sup>53</sup> See Robert F. Reid, *Administrative Law & Practice* (Toronto: Butterworths, 1971) at pp. 322-325.

<sup>54</sup> *Supra*, note 46.

<sup>55</sup> D.W. Mundell, *Manual of Practice on Administrative Law and Procedure in Ontario* (Toronto: Department of Justice and Attorney General, 1972).

for Volume 1 of the McRuer Report and the drafting of the Judicial Review Procedure Act, and sent to all members of the Law Society of Upper Canada, took a somewhat peculiar attitude towards the section in the Act preserving actions for a declaration and injunction as public law remedies:

The provision in section 2(1) . . . does not prevent an action for such a declaration or injunction from being brought. Although an application for judicial review is summary and in general more expeditious and less costly than such an action, bringing an action might be thought to be of advantage to a person as a delaying tactic.<sup>56</sup>

If all these things are true, it seems to be far more logical to have abolished these forms of action outright, rather than devising a statutory scheme enabling a party to the proceedings to have them transferred to the Divisional Court and treated as an application for judicial review, with the consequential costs not only of money but also in terms of expedition and convenience.

In short there seems to be little reason at all for the retention of the old forms of relief in section 7 and 8 of the Act.

c. *Availability 'notwithstanding any right of appeal'*

Section 2(1) of the Judicial Review Procedure Act provides that the Divisional Court 'may notwithstanding any right of appeal' grant relief on an application for judicial review. The first question that arises in relation to this provision is the problem of whether it should be interpreted as to preclude the Court from considering at all the existence of statutory rights of appeal when it decides whether or not to grant a remedy. The second problem is more one of substance. Is there any justification for excluding the Court from considering the existence of statutory appeal rights? Alternatively, even if the Court can consider the existence of such rights, should a remedy still be available at the discretion of the court in all cases despite the existence of a statutory appeal?

In general, section 2(5) of the Judicial Review Procedure Act preserves the existing discretions possessed by the courts to refuse judicial review in certain situations even when a ground for review has been successfully made out by the applicant. This discretion has traditionally covered matters such as misconduct on the part of the applicant, undue delay in seeking relief, waiver of the defect in question and an absence of a substantial miscarriage of justice resulting from the defect.<sup>57</sup> There was also the possibility at common law that a failure to exercise appeal rights afforded by the empowering statute would be a ground for the refusal of relief, despite the fact that a basis for review had been separately made out.<sup>58</sup> Certainly, the

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<sup>56</sup> *Id.*, at p. 52.

<sup>57</sup> See Robert F. Reid (*supra*, note 53) particularly at pp. 350-357 (certiorari and prohibition), pp. 385-386, (mandamus) and pp. 401-403 (declaration). S.A. de Smith, *Judicial Review of Administrative Action* (London: Stevens, 3rd. ed., 1973) is also as usual authoritative on this aspect of the law.

<sup>58</sup> See Reid, *Id.*, particularly at pp. 350-353. Basically, the authorities reveal considerable inconsistency in this area. This is also briefly discussed in a Canadian context by D.W. Elliott, *supra*, note 51 at pp. 294-295.

courts were not inclined to do this where the ground of challenge was a clear absence of jurisdiction in the decision-maker concerned<sup>59</sup> but in other review situations this was a recognized ground for denial of a remedy.

There seem to be two possible interpretations of the relevant part of section 2(1) on the question of the role of the Courts in relation to statutory appeals. First, the section may be interpreted as providing that the Divisional Court is to ignore completely existing statutory rights of appeal in deciding whether to grant a remedy. In other words, the discretion which existed at common law is rejected in section 2(1), and therefore section 2(5) which generally preserves the courts' common law discretions must be read subject to the specific provisions of subsection (1). A second possible interpretation of this provision is that the Divisional Court can, because of the use of the permissive word 'may' in subsection 1, ignore existing rights of appeal but need not necessarily do so. This of course would allow section 2(5) to be operative and preserve the previous common law discretions. The only problem with the second interpretation is that if that was all that was intended, why were statutory rights of appeal mentioned in subsection (1) at all? Subsection 5 itself would have been sufficient for the purpose of preserving the existing discretion. Attributing some intention to the legislature in the use of these words in subsection (1), perhaps the most favourable interpretation of those words is to the effect that the draftsmen wanted to make clear that the existence of statutory appeal rights did not automatically preclude the granting of judicial review but placed the issue in the realm of the Court's discretionary powers. This interpretation has the merit, not only of attributing some purpose to the use of the words in the subsection but also of preserving the common law discretion.

If this discretion has not in fact been preserved by the new Act, the provision is somewhat difficult to rationalize. The notion of exhaustion of statutory remedies is one that is much more highly developed in American law than in Canada<sup>60</sup> but it rests on the basically sound principle that judicial review should generally be a last alternative where all other means have failed and that it should not be able to be invoked until the legislatively-provided remedies have been utilized. Frequently in the past, the prerogative writs were described as 'extraordinary' remedies and this terminology emphasizes the historically special and reserve nature of judicial review. Indeed, in terms of time, expertise, cost and convenience there are compelling arguments for the exhaustion of all avenues of appeal before seeking review. Invocation of the administrative appeal process will generally be less expensive, more expeditious and even perhaps lead to a better decision than

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<sup>59</sup> See Reid, *Id.*, at pp. 352-353.

<sup>60</sup> For a brief discussion see B. Schwartz and H.W.R. Wade, *Legal Control of Government — Administrative Law in Britain and the United States* (Oxford: Clarendon Press, 1972) at pp. 278-280. It is also of some significance that the United Kingdom Law Commission in its *Published Working Paper No. 40, Remedies in Administrative Law* (London: H.M.S.O., 1971) recommended that the discretion of the court to refuse a remedy for failure to exhaust statutory appeal rights be statutorily confirmed if a new judicial review remedy is introduced in the United Kingdom. See p. 102.



judicial review, particularly where the statutory right of appeal is to a specialist administrative appeal authority rather than to a court.

Even where the statutory right of appeal is to a court, rather than a board, there is an argument for retention of such a discretion. After all, the statutory appeal is the primary designated remedy as far as affected individuals are concerned. Extraordinary relief is not needed in such a situation, at least to the extent that the right of appeal covers the grounds upon which relief is being sought. Indeed, putting this argument in the particular context of the legislation setting up the Divisional Court it gains additional strength. By virtue of the Judicature Amendment Act,<sup>61</sup> the Divisional Court is constituted as the court to deal with all appeals from administrative agencies and tribunals to the Supreme Court of Ontario.<sup>62</sup> Presumably this was done in order to achieve continuity in the relationship between the courts and the administrative process and to have one court at least which specializes in matters of administrative law. Given such a situation one would have thought that the Judicial Review Procedure Act might even have obliged recourse to the Divisional Court in its appellate capacity before judicial review could be sought.<sup>63</sup>

Indeed, in this respect the Judicial Review Procedure Act is in marked contrast to the Federal Court Act. Section 29 of that Act provides that insofar as a person has a right of appeal to the Federal Court, the Supreme Court, the Governor General in Council or the Treasury Board he is obliged to pursue that avenue of recourse rather than invoking the judicial review provisions of the Act.<sup>64</sup> It is also significant that this section only applies to the extent that the person affected has a right of appeal. Accordingly, if the ground of complaint that is being alleged is not covered by the statutory

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<sup>61</sup> S.O. 1970, c. 97, as amended by S.O. 1971, c. 57.

<sup>62</sup> Section 14a(1) (a) provides that the Divisional Court has jurisdiction to hear . . . all appeals to the Supreme Court under any Act other than this Act and the County Courts Act.

<sup>63</sup> Perhaps the only reservation that needs to be made with respect to this suggestion is that the ability of a person to seek an injunction or prohibition to prevent a tribunal wrongly taking jurisdiction should not be impaired. See e.g. *Bell v. Ontario Human Rights Commission* (*supra*, note 28). Of course, even here, as the court pointed out in *Bell*, the issue of a remedy should be discretionary. At times even where the allegation is a wrongful assumption of jurisdiction, particularly where there are factual matters in issue, the expert administrative decision-maker should at least be given an opportunity of making a preliminary determination of the issue. See the judgment of Martland J. at pp. 774-775 (18-19). I have developed that theme in more detail in *The Jurisdictional Fact Doctrine in the Supreme Court of Canada — a Mitigating Plea* (1972), 10 Osgoode Hall L.J. 440.

<sup>64</sup> Discussed in detail in my article on the Federal Court Act, *supra*, note 13 at pp. 43-49. With reference to footnote 63, section 29 does not prevent the seeking of prohibition and injunction prior to the decision where there has been a wrongful assumption of jurisdiction since it refers to a 'decision or order' which has already been made.

right of appeal, then review can still be sought at least to that extent. It would not have been too difficult to have included such a provision in the Judicial Review Procedure Act. Instead, general judicial review has been given the potential to supplant specific statutory appeals as the primary basis for judicial scrutiny of administrative action, a concept which is directly contradictory of the idea of tailoring the extent of judicial control to the needs of particular tribunals.

d. *Limitation of Declaratory and Injunctive Relief to 'Statutory Power[s]'*

An interesting feature of the structure of section 2(1) of the Judicial Review Procedure Act is that the availability of relief in the nature of a declaration and an injunction is limited to the exercise of 'statutory power[s]' whereas no such restriction is imposed on the availability of relief in the nature of that afforded by the prerogative writ procedures.

Perhaps the primary reason for this distinction as between the kinds of remedy is that the declaratory judgment and injunction, as has been mentioned previously, have wide uses outside of the public law area and because of this it was thought necessary to include this limitation. In contrast, the prerogative writs are peculiarly public law remedies appertaining to the exercise of statutory powers and because of this there was no need to state the obvious. The omission of the term 'statutory power' from this part of the section may also have stemmed from a study of the fairly recent English decision of *R. v. Criminal Injuries Compensation Board, Ex parte Lain*,<sup>65</sup> which suggests that the availability of the prerogative writs is not restricted to exercises of statutory powers but also extends to cover certain exercises of prerogative power. The exact scope for such review was not made clear by the court and the applicability of this proposition in Canada is open to grave doubts.<sup>66</sup> Nevertheless, it may have been because of a desire to ensure that the new remedy extended to all the bases of review provided by orders in the nature of the prerogative writs that this point has been left open for argument by the draftsmen of section 2(1).

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<sup>65</sup> [1967] 2 Q.B. 864. (D.C.). In this case certiorari was awarded with respect to the decision-making process under the British Criminal Injuries Compensation Scheme which was established not by statute or statutory instrument but by the executive act of the Crown alone.

<sup>66</sup> Canadian courts have always followed the earlier English decision of *R. v. National Joint Council for the Craft of Dental Technicians, Ex parte Neate* [1953] 1 Q.B. 704 (D.C.) which held that the availability of certiorari was restricted to statutory bodies. See e.g. *Howe Sound Co. v. International Workers (Canada) Local 633* [1962] S.C.R. 318, (1962), 33 D.L.R. (2d) 1. See also *Re Ness and Canadian Racing Association* [1946] O.R. 387, [1946] 3 D.L.R. 91 (Ont. C.A.); *Re Thomas and Committee of College Presidents* [1973] 3 O.R. 404 (Div. Ct.). *Quaere* also whether the type of scheme in issue in *Lain* could ever in Canada be merely established by executive order alone.

Aside from this question, a more detailed examination of the definition of the term 'statutory power' reveals some potentially awkward problems with the exact scope of the new judicial review remedy. In fact it may well be that the new remedy will not cover some of the situations where relief was available under the common law. Putting the same proposition in different terms; 'statutory power' as defined in the legislation may not include all exercises of statutory power.

The legislative background of a recent New Zealand appeal to the Judicial Committee of the Privy Council<sup>67</sup> serves to illustrate the problem quite well. One of the statutory regulations in issue in that case provided as follows: —<sup>68</sup>

4. Preliminary investigations of complaint — (1) Where a Board receives a complaint against a teacher, it shall, before taking any action in accordance with regulation 5 of these regulations, either appoint a person (who may be member of the Board or any other person except an employee of the Board) to investigate the complaint or set up a sub-committee (which shall include a representative of the teachers' organisation) for that purpose.

(2) The person so appointed or the sub-committee set up for the purpose shall undertake the investigation of the complaint at such time and place as the Board may determine, and shall, on completing the investigation, forward a report in writing to the Board which shall include any recommendation which the person or the sub-committee, as the case may be, thinks fit to make.

At common law, it was always possible for a person affected by such an investigation to come before the courts and allege that the investigator had no jurisdiction over him. For this purpose in Ontario the equitable remedy of injunction or a declaration under section 18(2) of the Judicature Act or even, possibly prohibition was available.<sup>69</sup> The question does however arise as to whether such an investigation comes within the definition of 'statutory power' in the Judicial Review Procedure Act. At least as far as the teacher under investigation is concerned, the appointment and activities of the investigator would not seem to be included within the statutory definition. Looking to the potentially relevant parts of the definition of 'statutory power, the Regulations do not require the teacher to do or refrain from doing anything, they do not authorize the investigator to do any act or thing that would but for the regulation be a breach of the teacher's legal rights (unless it be a right to privacy) nor does any recommendation of the investigator decide or prescribe the teacher's 'rights, powers, privileges, immunities, duties or liabilities.' From this perspective the definition of 'statutory power' appears to be contemplating only exercises of power which have final and

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<sup>67</sup> *Furnell v. Whangarei High Schools Board* [1973] 2 W.L.R. 92 (J.C).

<sup>68</sup> Regulation 4 of the Secondary and Technical Institute Teachers Disciplinary Regulations, 1969.

<sup>69</sup> See e.g. *Bell v. Ontario Human Rights Commission*, *supra*, note 28.

determinative effect. It would not seem to include statutory functions of an investigative and recommendatory nature.<sup>70</sup>

Presumably the only way of arguing that the teacher may bring proceedings under section 2(1) in such circumstances is on the basis that the Regulations require the investigator to do something that aside from the regulation he could not be compelled to do and, accordingly, the teacher, as a person affected by that requirement on the investigator, has standing to bring an application to challenge the setting up of the investigation. This is a somewhat tortuous route by which to reach an entitlement to commence proceedings under section 2(1), though it does at least accord with the perceived legislative intention to make the new remedy comprehensive. From another perspective, it may well be that it was because of such uncertainties and to guard against such contingencies that the legislation leaves open the possibility of still applying for a declaration or injunction in the High Court.

In Ontario, similar problems can be seen in the provisions of the Ontario Human Rights Code which were in issue in *Bell v. Ontario Human Rights Commission*.<sup>71</sup> At that time, a board of inquiry appointed under the Act could not make any definitive decision as to the appropriate course of action when an allegation of discrimination had made out. All a board could do was make recommendations to the Minister.<sup>72</sup> However, as opposed to the situation in *Furnell*, the New Zealand case, a board could summon witnesses and compel evidence in oath,<sup>73</sup> so that once a person, against whom

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<sup>70</sup> This seems to be confirmed by the only reported decision on this point so far. In *Re Florence Nightingale Home and Scarborough Planning Board* [1973] 1 O.R. 615, (1972), 32 D.L.R. (3d) 17, a Divisional Court consisting of Wells C.J.H.C., Parker and Osler JJ., held that a Planning Board of a municipality which had made zoning recommendations to a City Council was not exercising a 'statutory power of decision' for the purposes of the Statutory Powers Procedure Act. As the Board, aside from holding a meeting, did not do anything else besides making a recommendation, it was presumably not exercising a 'statutory power' either. See also *Re Thompson and Lambton County Board of Education* [1972] 3 O.R. 899, (1972), 30 D.L.R. (3d) 32 (Ont. H.C.) and *Re Thompson and Lambton County Board of Education (No. 2)* [1973] 1 O.R. 766, (1972), 32 D.L.R. (3d) 339 (Div. Ct.) where a decision-making process bearing some similarity factually to that in issue in *Furnell* was held to come within the Statutory Powers Procedure Act because the Minister of Education was bound to implement the decision and recommendations of the Board of Reference appointed to inquire into a dispute under the relevant Act.

<sup>71</sup> *Supra*, note 28.

<sup>72</sup> R.S.O. 1970, c. 318, section 14. This procedure has now been altered significantly, so that a board of inquiry appointed under the Act has decision-making and enforcement powers. See section 63 of the Civil Rights Statute Law Amendment Act, S.O. 1971, c. 50.

<sup>73</sup> *Id.* See subsection (2) which conferred on a board of inquiry the powers of a conciliation board under section 30 of The Labour Relations Act, R.S.O. 1970, c. 232. Such boards can compel the attendance of witnesses and the giving of evidence under oath.

an allegation had been made, was summoned he could presumably claim that a 'statutory power' had been exercised in the sense that he had been required to do something. Of course, in terms of the definition, problems would be created for such a person if the board decided not to summon him. Arguably then the board would not be exercising a 'statutory power' in terms of the definition.

Basically the major problem with the definition of the term 'statutory power' in the Act (at least in this context) is that it seemingly addresses itself to decision-making processes of a final and a binding nature which are determinative of status, whereas at common law it is clear that remedial relief, at least by way of declaration and injunction, is available in situations outside of this.<sup>74</sup> Insofar as declaratory and injunctive relief are tied to exercises of 'statutory power' by the new Act, such proceedings which relate to decisions outside the scope of the definition will still have to be commenced in the High Court rather than the Divisional Court. This not only creates a potential source of confusion for litigants but is also difficult to rationalize in terms of the creation of a special division of the Supreme Court to deal with matters of judicial review. Moreover, there is no provision in the Act allowing for the transfer of proceedings to the High Court which have been wrongly commenced in the Divisional Court, so that the danger exists of proceedings being struck out and having to be recommenced if a 'statutory power' is not involved on an application for judicial review.

Of course, if the statutory power (in the wider sense) being exercised can be brought within the rubric of judicial or quasi-judicial then relief in the nature of certiorari and prohibition can be sought under the new Act, as in this respect at least the availability of the remedy is not tied to the statutory definition. Indeed, it is presumably on this point that the applicant for relief in *Bell* would be able to apply for relief under the Judicial Review Procedure Act, since the Supreme Court ultimately decided in that case that a board of inquiry appointed under the Act was performing a function which

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<sup>74</sup> This has already been demonstrated in a somewhat different context. See the decision of the Ontario Court of Appeal in *Re Lamoureaux and the Registrar of Motor Vehicles* [1973] 2 O.R. 28, reversing [1973] 1 O.R. 573, (1972), 31 D.L.R. (3d) 669 (Div. Ct.).

In this case, a declaration was sought under the Judicial Review Procedure Act as to the invalidity of the suspension of a driver's license. Because the suspension became effective, if at all, by reason of the operation of a statute rather than by the decision of an individual such as the Registrar of Motor Vehicles, a unanimous Court of Appeal held that the Judicial Review Procedure Act had no application. Section 2(1) of that Act allows for review in relation to the "exercise" of a statutory power and a suspension which became effective by virtue of a statute did not involve the "exercise" of a statutory power. In such a case therefore there would seem to be two alternatives open to an affected person: —

- (1) to seek a declaration from the High Court that the notification of his suspension was ineffective.
- (2) to risk prosecution by continuing to drive and to challenge the applicability of the Act if prosecuted.

It is, however, despite the availability of these alternatives, somewhat of an anomaly that an application of judicial review is excluded.

made it amenable to an order in the nature of prohibition.<sup>75</sup> Once such a decision is made, then the definition of 'statutory power' under the Act becomes irrelevant.

One final point perhaps should be made on this aspect of the Act. Frequently, a consideration of the subject of judicial review of administrative action includes the topic of domestic or non-statutory tribunals. This is mainly because the grounds for reviewing the decisions of such bodies are basically identical with those for reviewing statutory tribunals — abuse of jurisdiction, breach of the rules of natural justice. As non-statutory bodies, they are appropriately reviewed by actions for a declaration and injunction rather than by way of the prerogative writs. Of course under the new Act they are outside the jurisdiction of the Divisional Court because of the 'statutory power' limitation on declaratory and injunctive relief.<sup>76</sup> Nevertheless, there may have been some merit, because of the basic identity of issues raised with respect to such bodies, to have included them within the review authority of the specialist Divisional Court.

#### e. *Previous Limitations on Particular Remedies*

Under the old regime, some of the remedies were subject to limitations which did not apply to others. For example, certiorari, prohibition, mandamus and an injunction<sup>77</sup> could not be sought against the Crown while a declaration could.<sup>78</sup> Certiorari and prohibition were in certain instances in

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<sup>75</sup> Note, however, that Abbott J. dissented in *Bell* on the basis that the remedy of prohibition was not available with respect to mere recommendatory action and cited quite strong previous Supreme Court authority for this proposition. *Supra*, note 28 at p. 780 (6). The cases cited by Abbott J. were *Guay v. Lafleur* [1965] S.C.R. 12, (1965) 47 D.L.R. (2d) 226 and *Baldwin v. Pouliot* [1969] S.C.R. 577. This dissenting judgment of Abbott J. in *Bell* has also attracted academic approval in Ian A. Hunter, *The Development of the Ontario Human Rights Code: A Decade in Retrospect* (*supra*, note 28) at p. 249 and *Judicial Review of Human Rights Legislation: McKay v. Bell* (*supra*, note 28) at pp. 23-24. Suffice to say that until *Bell*, the weight of authority in Canada was to the effect that merely recommendatory decisions were not subject to review by certiorari and prohibition because of their non-final nature (see e.g. *Wolfe v. Robinson* [1962] O.R. 132; (1962), 31 D.L.R. (2d) 233 (Ont. C.A. — Coroner's inquest). If this trend re-emerges, then presumably the only way of challenging such proceedings will be by way of an action for either a declaration or an injunction in the High Court and the Divisional Court will have no jurisdiction, except in the very limited kind of case where mandamus is available with respect to an investigatory function. Unlike certiorari and prohibition, mandamus was not of course at common law tied to the establishing of a duty to act judicially so that, if at any time, the exercise of a statutory investigatory function gives rise to an enforceable legal duty, the person to whom that duty is owed can presumably seek an order under the Judicial Review Procedure Act.

<sup>76</sup> This is confirmed by *Re Thomas and Committee of College Presidents* (*supra*, note 66).

<sup>77</sup> *Certiorari and prohibition*: — *Border Cities Press Club v. Attorney General (Ontario)* [1955] O.R. 14, [1955] 1 D.L.R. 404 (Ont. C.A.); *Mandamus*: — *R. v. Lords Commissioners of the Treasury* (1872) L.R. 7 Q.B. 387; *Injunction*: — Section 18, Proceedings Against the Crown Act, R.S.O. 1970, c. 365.

<sup>78</sup> Section 18, Proceedings Against the Crown Act (*Id.*) This provides that the court may award a declaration in lieu of injunctive relief against the Crown. See also P.W. Hogg, *Liability of the Crown* (Law Book Co.: Melbourne, 1971), Chapter 2, 'Remedies'.

the discretion of the courts available at the suit of strangers or persons having no special interest.<sup>79</sup> In contrast mandamus, an injunction and a declaration were always considered to be restricted in their availability to persons having a special interest over and above that of the general public.<sup>80</sup> These variations as between the old remedies give rise to an interpretative difficulty as far as the Act is concerned. Does the combination of all the previous forms of relief within one remedy in section 2(1) mean that previous restrictions in relation to certain types of relief have now been removed or is it still necessary for an applicant for the new remedy to demonstrate that there were no restrictions on *his* obtaining that *kind* of relief against the defendant prior to the Act? For example, can relief in the nature of mandamus now be sought against the Crown or is the applicant, despite the combination achieved by section 2(1), still restricted to declaratory relief when the Crown is the statutory decision-maker under challenge? Can a stranger now be awarded relief of all kinds, as opposed to the previous situation where the kind of relief available to him was restricted?

Despite any arguments that might be made for the desirability of eliminating the inconsistencies of the past and making the new remedy truly comprehensive, it appears more likely that the restricted interpretation is probably the correct one for the following reasons: —

(i) The use of the words 'that the applicant would be entitled to . . .' in section 2(1) are indicative of the need to relate the type of relief sought to availability under the old law. By focusing on the particular applicant's entitlement to a remedy under the old law, the section would seem to negative any argument that all the applicant has to do under the new remedy is establish a ground of relief under the old law, without reference to his own position or that of the defendant under that law.

(ii) The provisions of section 2(4) to the effect that the ability of the Court to set aside a decision is extended to all cases where the Court could otherwise make a declaration is a specific removal of a previously-existing restriction on the nature of relief and, as such, is indicative that other restrictions of that kind will continue (*Expressio unius, exclusio alterius*).

(iii) The Explanatory Notes annexed to the Judicial Review Procedure Bill, when it was before the Ontario Legislative Assembly, stated that the Bill was not intended to 'expand the powers of the courts in supervising governmental action but is a change in procedure only'.<sup>81</sup> The wider interpretation of section 2(1) would seem to transcend procedural change and be a matter of substantive reform.

(iv) The explanatory booklet sent to all members of the Law Society of Upper Canada when the legislation was proclaimed in force was quite firmly

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<sup>79</sup> Discussed by D.C.M. Yardley, *Certiorari and the Problem of Standing* (1955), 71 L.Q.R. 388.

<sup>80</sup> See de Smith, *supra*, note 57, at pp. 488-493 (mandamus), pp. 401-410 and pp. 527-529 (injunction) and pp. 452-454 (declaration).

<sup>81</sup> *Supra*, note 46 at p. 603.

of the view that the new legislation did not remove existing restrictions on the obtaining of judicial review against the Crown or servants acting as agents of the Crown rather than as *personae designatae*.<sup>82</sup>

(v) A similar statement appears in the explanatory booklet in relation to problems of *locus standi*.

The law on *locus standi* remains unaltered . . . The law on *locus standi* differed to some extent under the former proceedings depending upon the nature of the proceedings . . . The courts will be faced with the problem of rationalizing the law having regard to the subject matter of the application.<sup>83</sup>

Moreover, it is worth noting that even if the contrary argument prevails, this will not mean that injunctive relief will be available against the Crown or Crown servants acting as agents of the Crown for, by virtue of section 18 of the Proceedings Against the Crown Act,<sup>84</sup> the award of injunctive relief against the Crown or Crown servants acting as agents of the Crown is expressly prohibited. There scarcely seems room for argument that such a specific prohibition has been impliedly repealed by the Judicial Review Procedure Act. On the other hand, the restrictions on the availability of certiorari, prohibition and mandamus against the Crown are common law restrictions and therefore are not caught by the net of this particular argument.

However, whichever approach is adopted to this problem, there does seem to be a further difficulty in relation to the availability of any form of relief against the Crown under the Judicial Review Procedure Act. This difficulty goes not only to the problem of whether the Act extends the relief available against the Crown but also bears on the availability of declaratory relief against the Crown under the new Act, a form of relief against the Crown well-established both at common law and by statute. Section 11 of the Interpretation Act<sup>85</sup> provides

No Act affects the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.

The Judicial Review Procedure Act contains no express provisions to the effect that the Act binds Her Majesty and because of this it could be argued that an application for judicial review cannot be made against the Crown in any circumstances, even in cases where, prior to the Act there was a remedy.

Perhaps this failure to include such a provision stems from the draftsmen's faulty perception that at common law there was no basis for seeking any judicial review remedy against the Crown. Indeed, this is borne out to a certain extent by the booklet sent out to members of the Law Society. The following statement appears in that document: —

<sup>82</sup> *Supra*, note 55 at p. 42.

<sup>83</sup> *Id.*, at p. 49. Note however page 40 of the same booklet which seems to imply that after the Act the previous restriction on the availability of a declaration or an injunction to a legal person has been removed. This would seem to be of the same order of restrictions as those relating to the Crown and *locus standi*. Note, also, that the author of the Manual seemed to be of the erroneous view that prior to the Act no judicial review relief was available against the Crown (see once again p. 42).

<sup>84</sup> *Supra*, note 78.

<sup>85</sup> R.S.O. 1970, c. 225.



Relief may be obtained against officers of the Crown upon whom statutes directly impose duties or confer powers but not where the duty or power was imposed or conferred directly on the Crown or a servant acting on behalf of Her Majesty.<sup>86</sup>

If indeed this is the position established by the Act, a position seemingly based upon this misapprehension, then there is perhaps some further rationale for the continued availability of a declaratory judgment outside of the Act.

Assuming for the moment that relief can be sought against the Crown under the Judicial Review Procedure Act, the singular statutory position of the injunction in the Proceedings Against the Crown Act gives rise to another interpretative difficulty which should also be noted here. The prohibition in section 18(1) of the Proceedings Against the Crown Act against the obtaining of injunctive relief against the Crown and Crown servants acting as agents of the Crown presumably also applies to interim or interlocutory injunctions.<sup>87</sup> However, section 4 of the Judicial Review Procedure Act makes specific provision for the Court to make interim orders pending the final determination of any application. Obviously this covers relief in the nature of an interim or interlocutory injunction and the question that arises is whether this provision overrides section 18 of the Proceedings Against the Crown Act. Is the specific form of relief created by section 8 limited in that it does not extend to what is in substance interim or interlocutory relief against the Crown? Of course this problem may be pre-empted by a ruling that the Act does not bind the Crown anyway. In the absence of such a ruling, there is unfortunately nothing to be gained from the legislative history in assisting the Divisional Court to determine this question.

##### 5. 'Statutory power' v. 'Statutory power of decision'

As noted previously the Act contains separate definitions for the terms 'statutory power' and 'statutory power of decision', the former definition including the latter but extending beyond it. The reason for these separate definitions is that some of the provisions of the Act apply only to a 'statutory power of decision' as opposed to a 'statutory power'. The provisions which make this distinction are: —

- (a) Section 2(4) which authorizes the Court to make an order setting aside a decision in all situations where, prior to the Act, a declaration was available.

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<sup>86</sup> *Supra*, note 78.

<sup>87</sup> Where the principal remedy being sought is an injunction there would be no possibility at all of obtaining an interim or interlocutory injunction against the Crown, since in such cases the plaintiff has to make out a *prima facie* entitlement to the relief being sought in the principal proceedings. (See e.g. *George v. Township of Vaughan* [1971] 3 O.R. 701, (1971), 21 D.L.R. (3d) 513 (Ont. H.C.). The same would also seem to be true where the principal relief being sought is a declaration, even though the plaintiff may be able to demonstrate a *prima facie* entitlement to a declaration. This rule is stated and the logic of it criticized in the Law Commission's Working Paper on Remedies (*supra*, note 60) at pp. 35-36. The authority relied upon is *International General Electric Co. of New York Ltd. v. Commissioners of Customs and Excise* [1962] Ch. 184. (C.A.).

- (b) Section 3 which gives the Court power to ignore defects in form and technical irregularities and validate decisions tainted in this way where there has been 'no substantial wrong or miscarriage of justice'.
- (c) Section 10 which enables the Court to give directions as to the filing of a record when there has been an application for review.
- (d) Section 2(2) which ostensibly extends the scope of judicial review for error of law on the face of the record.
- (e) Section 2(3) which confers limited authority on the Court to review for an absence of evidence.

Two principal issues would seem to arise in relation to the two separate definitions. What precisely is the relationship between the two different terms 'statutory power' and 'statutory power of decision'? Why was the application of the five provisions set out above confined to exercises of a 'statutory power of decision'?

a) *Overlap?*

As noted 'statutory power' is defined as including 'statutory power of decision'. The form of the Act would seem to indicate that the term 'statutory power of decision' is more limited in scope than 'statutory power', being just one of four separate and distinct categories of 'statutory power'. However, the extent to which it is more limited and separate and distinct can be questioned since many of the decision-making powers embraced by the other three categories of 'statutory power' would seem to also come within the definition of 'statutory power of decision'.

To take an example, the term 'statutory power' includes the making of 'any regulation, rule, by-law, or order' or the giving of 'any notice or direction having force as subordinate legislation', action which superficially may be regarded as outside the ambit of and additional to a 'statutory power of decision'. Nevertheless, this does not appear to be justified on a close reading of the definition of 'statutory power of decision'. In terms of that definition, most, if not all, subordinate legislation affects the 'rights, powers, privileges, immunities, duties or liabilities' of persons. Moreover, the definition of 'statutory power of decision' is not confined to 'deciding' but also extends to 'prescribing' and by virtue of this would seem to apply not only to individual determinations as to entitlement under existing law but also the creation, modification or extinction of rights, powers, privileges, immunities, duties and liabilities, the function of subordinate legislation-making powers.<sup>88</sup>

Similarly, a decision or order requiring a person to do or to refrain from doing something may be seen as something which decides or prescribes that person's rights, powers, privileges, immunities, duties or liabilities, though in this respect it may be possible to distinguish between an order that someone do something on the one hand and a decision or prescription concerning

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<sup>88</sup> See R.G. Atkey, *supra*, note 6 at pp. 156-157.

that person's 'rights'<sup>89</sup> on the other hand. For example, an order that someone produce documents and attend for cross-examination is arguably different from a substantive decision about or prescription of that person's 'rights'.<sup>90</sup> The empowering legislation has already decided or prescribed that person's 'rights'.<sup>91</sup> The order to attend or produce is merely an exercise of power already existing, though it does of course presuppose that the body requiring such production or attendance has made a prior decision to invoke the statutory authority affecting individual 'rights'<sup>92</sup> in the particular case.

Much the same kind of difficulties also arise in relation to the fourth category of statutory power in the definition section. The doing of 'an act or thing that would, but for such power or right, be a breach of the legal rights of any person' would seem to presuppose 'a decision deciding or prescribing — (a) The rights, powers, privileges, immunities, duties or liabilities of [that] person'. For example, the actual act of arresting someone involves a prior decision to exercise a power of arrest.

In summary therefore there do seem to be considerable problems in delineating what exactly is meant by the terms 'statutory power' and 'statutory power of decision', thus creating a potential source of serious confusion for judges trying to interpret the Act.

b) *Reasons for Distinction in Particular Sections*

At the outset it is important to point out that because of the degree of overlap between the term 'statutory power of decision' and the other three categories of 'statutory power', the fact that a number of provisions are confined to the exercise of a 'statutory power of decision' may not be of much practical significance.

However, assuming for the moment, for example, that making of subordinate legislation does not come within the definition of 'statutory power of decision', there appears to be no legitimate reason that the authority to set aside, instead of merely issuing a declaration, conferred on the Court by section 2(4) should not extend to subordinate legislation. A similar criticism can also be made of the restriction of section 3 to the exercise of a 'statutory power of decision'. Once again, assuming that a subordinate legislation-making power does not come within the definition, it is difficult to see any reason for not extending section 3 to such exercises of authority. Defects in form and technical irregularities in subordinate legislation which do not cause a substantial wrong or miscarriage of justice would seem to have as much claim to statutory protection as similar defects in relation to other kinds of decision-making authority. By way of mitigation, however,

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<sup>89</sup> For 'rights' read 'rights, powers, privileges, immunities, duties or liabilities'.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

it must be said in defence of this aspect of the legislation that formal defects in by-laws are already the subject of specific legislation in Ontario.<sup>93</sup>

With respect to the other three provisions in the Act that are confined in their effect to the exercise of a 'statutory power of decision', it is quite clear that they, for the most part, relate only to decision-making bodies required to make a decision after a consideration of evidence and argument presented by affected parties. They have little or no significance with respect to the exercise of policy-making authority, unilateral decision-making or the making of subordinate legislation, and, accordingly, no purpose would be served by extending their application to all forms of 'statutory power'.

#### 6. *Expanding the Remedial Alternatives*

It is clear from both the Commentary to the Bill and the Law Society Booklet,<sup>94</sup> that the draftsmen of the legislation regarded three provisions of the Judicial Review Procedure Act as expanding the remedial alternatives available to the Divisional Court. These provisions are: —

- (a) Section 2(4) giving the Court authority to set aside formally a decision in circumstances where a declaratory judgment was previously available in relation to the exercise of a statutory power of decision.
- (b) Section 3 giving the Court authority to validate exercises of a statutory power of decision where the sole ground of relief established was a defect in form or a technical irregularity and where no substantial wrong or miscarriage of justice had occurred.
- (c) Section 4 giving the Court authority to make interim orders pending final determination of an application for judicial review.

It can, however, be questioned whether these provisions really do make any additions to the scope of the Court's remedial authority. Arguably the old system of remedies effectively dealt with most, if not all, of the situations covered by the new legislation and seemingly regarded by the draftsmen as existing limitations on the courts' powers. Nevertheless, even if these provisions were strictly unnecessary and do not bring about significant increases in the scope of the remedies, they do have something to commend them in that they may be seen as a clarification and codification of existing confused areas of the law.

#### a) *Section 2(4)*

Certiorari to quash a decision has traditionally only been available with respect to statutory authorities exercising judicial or quasi-judicial

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<sup>93</sup> See section 639 of the Ontario Municipal Act, R.S.O. 1970, c. 284. Substantial conformity with the forms prescribed by the Act for the making of by-laws is sufficient to protect the by-law from objection provided that the form is not misleading. See also section 27(d) of the Interpretation Act, R.S.O. 1970, c. 225, which excuses minor deviations from prescribed forms which do not mislead.

<sup>94</sup> *Supra*, notes 46 and 55. See p. 604 and pp. 48-49 and p. 51 respectively.

powers.<sup>95</sup> As far as statutory decision-makers outside of this range were concerned there was no formal remedial procedure available for the quashing or setting aside of an invalid decision. The provisions of section 2(4) are obviously aimed at filling that gap in the old law. The subsection is expressed in terms of the equitable remedy of the declaration. This of course was the generally appropriate remedy to seek if the decision under challenge was not of a judicial or quasi-judicial nature. Its effect was to declare the legal rights of the parties to the proceedings but, in the words of the Commentary to the Bill, a declaratory judgment 'does not technically annul the decision'.<sup>96</sup> However, despite the fact that a declaratory judgment does not directly quash or set aside the decision under attack, it may be argued that the grant of such a remedy has the same effect and that therefore section 2(4) was not really necessary.

In Ontario the authority of the High Court to issue a declaratory judgment is contained in section 18(2) of the Judicature Act.<sup>97</sup> This is basically identical with the equivalent provision in the English Rules of the Supreme Court<sup>98</sup> and states: —

No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right, whether or not any consequential relief is or could be claimed.

The key word in the section for purposes of the present discussion is 'binding'. If declaratory judgments when issued are binding and have effect as *res judicata* then it would appear to be of little significance that a declaratory judgment 'does not technically annul the decision'.

However, in a few English decisions the statement has been made that because a declaration does not nullify the decision under attack, the remedy should not be granted for intra-jurisdictional error of law, as intra-jurisdictional error of law renders a decision voidable rather than void and to issue a declaration with respect to such a decision would be to leave two inconsistent decisions in effect (the court's and the statutory decision-maker's) thereby creating confusion and the risk that the court's decision will be ignored.<sup>99</sup> It is difficult to see how such an argument can be sustained in the face of the word 'binding' in the relevant Rule. There does not appear to be any Canadian authority directly on this point. Nevertheless, to the extent that the new Act ostensibly expands review for intra-jurisdictional error of law, it may have been thought prudent, on the basis of the English authority, to include a section allowing for the formal setting aside of decisions tainted

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<sup>95</sup> See *R. v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co.* [1924] 1 K.B. 171 (C.A.).

<sup>96</sup> *Supra*, note 46 at p. 604.

<sup>97</sup> R.S.O. 1970, c. 228.

<sup>98</sup> See R.S.C., Order 15, r. 16.

<sup>99</sup> See e.g. *Healey v. Minister of Health* [1955] 1 Q.B. 221 at p. 228 (C.A., per Denning L.J.); *Punton v. Ministry of Pensions and National Insurance (No. 2)* [1964] 1 W.L.R. 226 (C.A.). Discussed in the Law Commission's Working Paper, *supra*, note 60 at p. 42.

by such an error. At least, a possible source of confusion and litigation has been removed.

b) *Section 3*

At common law it seemed to be the position that if the court decided that, despite the procedural defects in the decision under challenge, there had not been a substantial wrong or miscarriage of justice there was an overriding discretion to refuse to grant relief.<sup>100</sup> At least in terms of this position, section 3 adds nothing to the already-existing remedial framework. However, the above statement of the common law position was confused to a certain extent by the notion that there was a distinction between mandatory and directory procedural requirements. If failure to observe a mandatory procedural requirement occurred that was thought to have the effect of invalidating the decision aside from any other consideration.<sup>101</sup> Whether, in such circumstances the court had an overriding discretion to refuse a remedy on the basis of no substantial wrong or miscarriage of justice was a moot point. As such a defect could be seen as nullifying a decision it was sometimes argued that the court had no option but to grant relief.<sup>102</sup> In contrast to this position, was the contention that failure to adhere even to a mandatory provision did not lead to such absolute consequences and the court's overriding discretion to refuse a remedy remained, not only on the basis of an absence of a substantial wrong or a miscarriage of justice but also because of a lack of standing, delay, or misconduct on the part of the applicant.<sup>103</sup> Insofar as these doubts are clarified by section 3 and the latter and more flexible view of failure to adhere to mandatory procedural requirements is preferred, the section is to be commended, though arguably not as an extension of the Court's remedial authority.

c) *Section 4*

Under the common law remedial situation, it was always possible to approach the courts for an interim injunction pending the final disposition of any cause of action. It was in fact irrelevant whether the relief being sought in the principle action was an injunction. However, the conditions under which the courts were prepared to grant an interim injunction were quite stringent. Basically the applicant was required to establish that he had at least a *prima facie* or arguable case for the principal relief being sought. It was also necessary to demonstrate that an interim injunction was necessary to maintain the *status quo* and prevent irreparable prejudice or damage to the applicant pending trial of the principal proceedings.<sup>104</sup>

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<sup>100</sup> See e.g. *Marsh v. Marsh* [1945] A.C. 271 (J.C.); *Glynn v. Keele University* [1971] 1 W.L.R. 487 (Ch.D.); *Graham v. Attorney-General* [1966] N.Z.L.R. 937. (S.C. and C.A.).

<sup>101</sup> This very confused area of the law is well-discussed by de Smith, *supra*, note 57 at pp. 122-128.

<sup>102</sup> See e.g. *Godber v. Wellington City* [1971] N.Z.L.R. 184 (S.C.).

<sup>103</sup> See e.g. *Marsh v. Marsh* (*supra*, note 100); *Montreal Street Railway v. Normandin* [1917] A.C. 170 (J.C.); *McPherson v. McPherson* [1936] A.C. 177 (J.C.).

<sup>104</sup> See e.g. *George v. Township of Vaughan* (*supra*, note 87); *Pike v. Council of the Ontario College of Art* [1972] 3 O.R. 808; (1972) 29, D.L.R. (3d) 544 (Ont. H.C.).

Section 4 of the Act presumably enables the Divisional Court to make orders in the nature of an interim injunction. However, the very broad and general language of the section may be interpreted as giving the Court a much greater potential for the awarding of interim relief than was possible under the common law principles. For example, the section seems to contemplate the possibility of a judge acting unilaterally without application having been made by one of the parties. Furthermore, the section is not hedged with any restrictions, thus leaving open the possibility that the Court will not feel obliged to apply the rigid tests imposed by the common law on the availability of an interim injunction.

This section in the Act must also be read in relation to section 25 of the Statutory Powers Procedure Act. This applies to all tribunals coming within the ambit of Part I of the Act; that is, generally those required by law to act in a judicial or quasi-judicial manner and provides: —

25. (1) Unless it is expressly provided to the contrary in the Act under which the proceedings arise, an appeal from a decision of a tribunal to a court or other appellate tribunal operates as a stay in the matter except where the tribunal or the court or other body to which the appeal is taken otherwise orders.

(2) An application for judicial review under The Judicial Review Procedure Act, 1971, or the bringing of proceedings specified in subsection 1 of section 2 of that Act is not an appeal within the meaning of subsection 1.

Subsection 2 codifies the common law position in the province of Ontario in the sense that a tribunal is not obligated according to the case law to cease its proceedings immediately an application for judicial review has been commenced.<sup>105</sup> In the light of this, it seems quite important to have a provision such as section 4 which gives the Court authority to issue an interim injunction in appropriate circumstances to prevent the continuation of proceedings by an administrative tribunal. This would seem to be particularly apt in situations where a tribunal persists in continuing with a matter, despite the commencement of judicial review proceedings protesting its jurisdiction.

Basically therefore it would seem that the three provisions just discussed, rather than being substantial extensions of the Court's remedial powers, as seemed implicit in the Commentary to the Bill, are more aptly regarded as provisions clarifying some of the uncertainties existing previously under the common law. However, to the extent that they resolve those uncertainties and also to the extent that they create greater remedial flexibility, they are useful provisions to have included in the new legislation.

#### 7. *Extensions in the Substantive Scope of Judicial Review*

As with the Federal Court Act, the Judicial Review Procedure Act ostensibly brings about an increase in the substantive scope of judicial review. Indeed, the areas affected by the two statutes are the same — notably, review for intra-jurisdictional error of law and review on the basis of an absence of evidence. There are, however, differences in the detail of the two Acts in this regard and these will be discussed later.

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<sup>105</sup> See *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183* [1971] 3 O.R. 832; (1971) 22, D.L.R. (3d) (Ont. C.A.).

The relevant subsections of section 2 of the Judicial Review Procedure Act provide as follows: —

(2) The power of the court to set aside a decision for error of law on the face of the record on an application for an order in the nature of certiorari is extended so as to apply on an application for judicial review in relation to any decision made in the exercise of any statutory power of decision to the extent it is not limited or precluded by the Act conferring such power of decision.

(3) Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review.

Subsection 2 actually uses the words “is extended” but it is also quite clear that subsection 3 was intended as an extension of the common law of judicial review also. This is confirmed by the McRuer Commission Report. It describes the existing law as not covering review for intra-jurisdictional errors of law except those appearing on the face of the record of a tribunal obliged to act judicially.<sup>106</sup> The same comment is made with respect to review on the basis of an absence of evidence<sup>107</sup> and change is recommended in both areas.<sup>108</sup>

#### a) *What Extensions?*

However, before discussing the detail of the two subsections, it is important to point out the common law of judicial review may not be quite as straightforward as the McRuer Commission Report makes out. More specifically these subsections may not in fact represent any increase in the substantive scope of judicial review. As far as intra-jurisdictional error of law is concerned, it has generally been thought that the ability of the courts to review was restricted to the extent described above.<sup>109</sup> Nevertheless, from time to time, there have been indications, at least in England, that the equitable remedy of a declaration may be available for all errors of law, irrespective of whether they appear on the face of the record of a tribunal obliged to act judicially.<sup>110</sup> Of somewhat greater strength is the argument that an absence of evidence to support a decision otherwise within jurisdiction is a ground of judicial review at common law or, at least, can be brought within the rubric of other definitive grounds of review such as error

<sup>106</sup> *Supra*, note 3 at p. 302. See also Commentary to the Draft Bill, *supra*, note 46 at p. 604.

<sup>107</sup> *Id.*, at pp. 261-263.

<sup>108</sup> *Id.*, at pp. 307-308.

<sup>109</sup> See e.g. *Re Ontario Labour Relations Board, Bradley and Canadian General Electric Co.* [1957] O.R. 316, (1957) 8, D.L.R. (2d) 65 (Ont. C.A.).

<sup>110</sup> Discussed by I. Zamir, *The Declaratory Judgment* (London: Stevens, 1962) at pp. 157-166. See, however, *Punton v. Ministry of Pensions and National Insurance* (*supra*, footnote 99). I have been unable to find any Canadian authority directly on this question. Perhaps this results from a comparative absence of instances where a declaration has been sought in relation to quasi-judicial decisions.



of law on the face of the record, failure to take account of relevant factors, abuse of the principles of natural justice or improper declining of jurisdiction.<sup>111</sup>

On this point it is interesting to note that the McRuer Commission Report states the common law position in the following terms: —

The law seems to be authoritatively laid down that not only is the tribunal the exclusive judge of the weight which should attach to particular testimony or other evidence, but that the tribunal can make an effective decision notwithstanding that there is no evidence whatsoever to support some factual ingredient essential to the decision.<sup>112</sup>

The authority given for this proposition is the frequently cited decision of *R. v. Nat Bell Liquors*<sup>113</sup> and the Report quotes a fairly lengthy extract from the reasoning of Lord Sumner delivering the advice of the Judicial Committee of the Privy Council.<sup>114</sup> It is then stated: —

That this is the law in Ontario, where no statutory right of appeal is provided, cannot now be challenged.<sup>115</sup>

However, despite these quite categorical statements (a characteristic of much of the McRuer Commission Report's description of the existing law), two points deserve to be made. First, in a recent penetrating article,<sup>116</sup> D. W. Elliott makes a convincing argument to the effect that the ratio of *Nat Bell* does not extend to the second of the propositions detailed by McRuer<sup>117</sup> or, alternatively, even if it does so, the principles upon which that part of the reasoning in *Nat Bell* are based are contrary to earlier Judicial Committee authority.<sup>118</sup> In other words, *Nat Bell* is arguably only authority for the proposition that a reviewing court has no concern with the weight attached to the evidence by a statutory decision-maker. It does not deal authoritatively with the problem of a complete absence of evidence. Secondly, since McRuer, there have been at least two Ontario decisions which raise doubts as to the Report's assertions about the Ontario position on this matter. In *R. v. Ontario Racing Commission, Ex parte Taylor*,<sup>119</sup> Gale C.J.O., in an extract cited by Elliott,<sup>120</sup> made it quite clear that the basis on which the Court was intervening was an absence of evidence leading to a jurisdictional error.<sup>121</sup>

<sup>111</sup> Discussed by J.A. Smillie, *Judicial Review of Abuse of Discretionary Power* (1969), 47 Can. Bar Rev. 623. See also my Federal Court Act article, *supra*, note 13 at pp. 39-40.

<sup>112</sup> *Supra*, note 3 at p. 261.

<sup>113</sup> [1922] 2 A.C. 128, (1922) 65 D.L.R. 1 (J.C.).

<sup>114</sup> *Supra*, note 3 at pp. 262-263.

<sup>115</sup> *Id.*, at p. 263.

<sup>116</sup> D.W. Elliott, "No Evidence": A Ground of Judicial Review in Canadian Administrative Law? (1972), 37 Sask. Law Rev. 48.

<sup>117</sup> *Id.*, at pp. 56-60.

<sup>118</sup> *Id.*, at pp. 60-65 and pp. 81-84.

<sup>119</sup> [1971] 1 O.R. 400; (1970), 15 D.L.R. (3d) 430 (Ont. C.A.).

<sup>120</sup> *Supra*, note 116 at pp. 85-86.

<sup>121</sup> *Supra*, note 119 at p. 402 (432).

The authority of the general proposition laid down by McRuer is also thrown into question by the following extract from the judgment of Kelly J.A. in *Re McCann*,<sup>122</sup>

. . . if the finding of the board of review whose decision is under attack is totally unsupported by any evidence, a question of law is raised which may be dealt with by this Court.<sup>123</sup>

If a declaration can be sought for all errors of law and if 'no evidence' is a ground of review at common law, then subsections (2) and (3) of section 2 may not only be needless verbiage in the Act but they may also be narrower in their application than the common law. Subsection (2) restricts review for error of law to circumstances where that error appears on the face of the record. Those decisions which give some support to the argument for the availability of a declaration for intra-jurisdictional error of law suggest no such restriction. A similar position obtains with respect to subsection (3). That subsection qualifies the 'no evidence' rule to the extent that it only applies to a tribunal 'exercis[ing] a statutory power of decision' where 'the findings of fact . . . are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice'. The meaning and significance of this qualification will be discussed later. Suffice to say for the present, that it is not a limitation suggested by any of the common law decisions upholding 'no evidence' as a ground of review.

Despite the fact that these subsections are arguably more restricted than the common law, this does not mean that they restrict the common law. As recommended by McRuer,<sup>124</sup> the Act does not attempt a codification of the existing grounds of review. Indeed, as discussed earlier, the availability of the new judicial review remedy is tied to the grounds of relief available at common law so that if the common law grounds of review on these two bases are in fact wider than subsections (2) and (3), there is presumably still room for arguing on those wider bases before the Divisional Court. In a sense, subsections (2) and (3) may be seen as desirable provisions in that, rather than extending the common law of judicial review, they clarify existing doubts. However, that clarification is somewhat illusory for if the common law is in fact wider than the two subsections, then confusion is thrust upon confusion.

#### b) *Desirability of Any Extensions*

Giving McRuer the benefit of the doubt, however, and assuming that the common law of judicial review was restricted as detailed in the Report, the question does arise again as to whether these so-called extensions are desirable from the standpoint of policy.

A uniform standard of judicial review of a very wide nature has been accepted legislatively with little attention paid to the needs of the administrative process generally or to the particular functions exercised by individual

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<sup>122</sup> [1970] 2 O.R. 117; (1970), 10 D.L.R. (3d) 103 (Ont. C.A.).

<sup>123</sup> *Id.*, at p. 120 (106).

<sup>124</sup> *Supra*, note 3 at p. 315.

tribunals. Indeed, this is reflected not only in the objectives intended to be achieved by subsections (2) and (3) of the Judicial Review Procedure Act but perhaps also in subsection (1) of the same section (discussed earlier) which provides for the availability of the new judicial review remedy 'notwithstanding any right of appeal'.

As noted already,<sup>125</sup> the most vehement response to the McRuer Commission Report's recommendations came from Professor John Willis in his article, *The McRuer Report: Lawyers' Values and Civil Servants' Values*.<sup>126</sup> At this point, it is only fair to discuss the counter-arguments of McRuer, at least in the context of the recommendations for increasing the scope of judicial review. The very simple basis upon which McRuer proceeds in this area is contained in the following statement: —

The lack in the law in Ontario of any comprehensive principle for review of conclusions of law or findings of fact within the powers conferred on a tribunal deprives the individual whose rights may be affected of an essential safeguard against unjustified encroachment in his civil rights.<sup>127</sup>

Presumably this reasoning was behind the assertion made earlier in the Report concerning the *Nat Bell* principle as perceived by the Committee.

That it ought not continue to be the law is clear.<sup>128</sup>

Why the absence 'of any comprehensive principle for review of conclusions of law or findings of fact' is anti-civil liberterian is neither self-evident nor rationalised by the McRuer Commission Report. Perhaps the nearest one comes to understanding why the Commission felt this way is by studying the section of the Report advocating 'retention of full judicial review in matters of *ultra vires*'.<sup>129</sup> Here the Commission reveals itself as being somewhat sceptical about claims that, at least in matters affecting jurisdiction, administrative tribunals have any greater competence in deciding questions of law and fact than the courts.<sup>130</sup> The Commission also reports a fairly general satisfaction on the part of Ontario tribunals with the supervisory role of the courts in judicial review proceedings.<sup>131</sup> The one exception in this regard was the Ontario Labour Relations Board and the Commission dismissed its criticisms as being unfounded.<sup>132</sup> This satisfaction with the courts' past performance in matters of jurisdiction and, more particularly, a conviction as to the expertise possessed by the courts in matters of administrative law, seems to have led the Commission to the conclusion that there was little danger in increasing the scope of judicial review even further. The attitude seems to have been that, as the courts have shown themselves so capable in dealing with matters of jurisdictional fact as well as law, there

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<sup>125</sup> *Supra*, note 20.

<sup>126</sup> *Id.*, at p. 359.

<sup>127</sup> *Supra*, note 3 at pp. 308-309.

<sup>128</sup> *Id.*, at p. 263.

<sup>129</sup> *Id.*, at pp. 304-308.

<sup>130</sup> *Id.*, at pp. 305-306.

<sup>131</sup> *Id.*, at p. 306.

<sup>132</sup> *Id.*, at pp. 306-307.

was little reason to doubt that they would also adapt to dealing with intra-jurisdictional law and fact as well and all this under the guise of further protection of civil liberties, a very attractive argument in the selling of the commodity being marketed, as witness the *Globe and Mail* editorial cited at the outset of this chapter<sup>133</sup> and also the ringing speeches in the Ontario Legislative Assembly when the legislative package based on McRuer was being debated.<sup>134</sup>

Certain comments however deserve to be made in response. First, even McRuer's satisfaction with the performance of the courts in matters of jurisdictional law and fact is not beyond questioning. Allegations of too great a degree of interference and lack of sympathy with legislative purpose have been frequently made in the last few years.<sup>135</sup> Even assuming for the moment that matters of jurisdiction are easily separable from matters within jurisdiction (which, of course, they are not)<sup>136</sup> and also assuming that there are neutral factors involved in determining jurisdictional questions which make the courts equally or even more qualified to determine such matters than expert tribunals, it is a fairly large step to move from this point to a position that the courts are all well-qualified to move within an expert tribunal's area of particular competence and review both findings of fact and law in that area. Such extensive review authority would seem to negate the very reasons for the creation of such tribunals. Not only does it open the possibility of a greater number of challenges, thus putting more strain on the functioning of the administrative process, but it also provides the courts with a role which is so wide as to embrace virtually all the functions originally entrusted to the tribunal. Review begins to look more and more like a rehearing. Even an argument based on equality of competence in these matters (a dubious proposition at best) is of no avail here. Review can only really be justified if it is likely to lead to a better result.

One reservation should however be made. Statistically, review has not been that frequent in the past when considered in relation to the total number of matters disposed of by administrative tribunals and officials. This point was made forcefully by Professor W. H. Angus in a public lecture on February 15, 1973.<sup>137</sup> Indeed, he goes beyond this and establishes that the chances of an applicant being successful on judicial review are probably less

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<sup>133</sup> *Supra*, note 2.

<sup>134</sup> *Supra*, note 10.

<sup>135</sup> Of most recent vintage see P.C. Weiler, *The "Slippery Slope" of Judicial Intervention* (*supra*, note 17); P.W. Hogg, *The Jurisdictional Fact Doctrine in the Supreme Court of Canada: Bell v. Ontario Human Rights Commission* (*supra*, note 28) *The Supreme Court of Canada and Administrative Laws, 1949-71* (*supra*, note 31); J.N. Lyon, *Casenote* (*supra*, note 17); 365; Ian A. Hunter, *Judicial Review of Human Rights Legislation: McKay v. Bell* (*supra*, note 28); *The Development of the Ontario Human Rights Code: A Decade in Retrospect* (*supra*, note 28).

<sup>136</sup> The McRuer Commission Report at pp. 307-308, predicted that the recommended procedural and remedial reforms would have the effect of eliminating many of the difficulties of the jurisdiction concept. This is extremely difficult to accept. Certainly the reforms may make it easier to focus on these issues but the resolution will presumably be as difficult as ever.

<sup>137</sup> *Supra*, note 31.

than 50%.<sup>138</sup> To a certain extent this diminishes the arguments often raised against judicial review based on excessive and too frequent interference. Nevertheless as both Weiler<sup>139</sup> and Hogg<sup>140</sup> have pointed out the main fault of the courts in this area has been the quality, not the quantity of judicial review. Their studies of the Supreme Court of Canada have revealed a lack of any consistent and coherent approach to judicial review by that court. Such studies immediately raise doubts about the ability of the new Divisional Court to handle satisfactorily an increased range of judicial review applications. Of course, the appropriate answer to this problem may be a specialized administrative court. It still does however reveal a potential problem with a broader system of review and coupled with the strain that even two or three judicial review applications in important matters places on the smooth functioning of an administrative tribunal,<sup>141</sup> serious doubts are raised about the extension of review in the fact-law areas. Review for jurisdictional error at least has the redeeming feature that it is concerned with outer limits of authority created by the legislature and, accordingly, as McRuer also points out, is constitutionally of considerable importance.<sup>142</sup> Intra-jurisdictional review can make no such claims.

There are however four mitigating features about the ostensible increase in the scope of review for intra-jurisdictional error brought about by the Judicial Review Procedure Act.

(a) As already discussed at length, the provisions of subsections (2) and (3) of section 2 may not in fact have increased the scope of judicial review of administrative action in any material way.

(b) As will be discussed below, the subsections do not create complete review for all factual and legal matters but are statutorily limited in such a way as to suggest the need for a degree of judicial restraint in interfering on these bases (McRuer also supported this notion).

(c) The creation of the new remedy has also been accompanied by the creation of a new Division of the Supreme Court of Ontario and hopefully this will produce the situation of a body of judges more attuned to the needs of the administrative process. This will also be discussed in more detail below.

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<sup>138</sup> Professor Angus also points out that success in the courts does not always mean ultimate success. For example, the applicant may still lose on a rehearing or the legislature may amend the relevant legislation to defeat his cause.

<sup>139</sup> *The "Slippery Slope" of Judicial Intervention* (*supra*, note 17).

<sup>140</sup> *The Supreme Court and Administrative Law, 1949-71* (*supra*, note 31).

<sup>141</sup> For example, Professor Innis Christie, Chairman of the Nova Scotia Labour Relations Board, points out that a judicial review application relating to an important aspect of the certification procedure may not only create difficulties by delaying the particular certification proceedings but may also carry over and affect other applications for certification where the same question is relevant. Certainly, the Board is not obliged to await the ultimate outcome of judicial review but should it proceed and its initial ruling is upset, then chaos results.

<sup>142</sup> *Supra*, note 3 at p. 304.

(d) Unlike section 28 of the Federal Court Act, which provides for the availability of judicial review under that section notwithstanding any privative clause, the Judicial Review Procedure Act does accord recognition to privative clauses. Section 2(2), which deals with error of law on the face of the record, provides that such review is only available 'to the extent it is not limited or precluded by the Act conferring such power of decision'. This preserves the notion that in the face of a standard privative clause,<sup>143</sup> error of law is precluded as a possible ground of review unless the error is one of jurisdiction.<sup>144</sup> Section 12(1) of the Act confirms section 2(2) and also has the effect of preserving any further limitations on judicial review that might be brought about by wider privative clauses. This provides: —

(1) Subject to subsection 2, where reference is made in any other Act or in any regulation, rule or by-law to any of the proceedings enumerated in subsection 1 of section 2, such reference shall, after the coming into force of this Act be read and construed to include a reference to an application for judicial review.

In other words, the term 'application for judicial review' is inserted after '*quo warranto*' in section 97, the privative clause in the Ontario Labour Relations Act, which reads: —

No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

To this extent anyway, the new Act does recognize notions of limited review for particular statutory functions, though of course it does little more than confirm the very limited utility that standard privative clauses have had in the past as a means of restricting judicial review.<sup>145</sup>

### c) *Comparison With s. 28 of the Federal Court Act*

As noted at the outset of this discussion the provisions of the Judicial Review Procedure Act and the Federal Court Act relating to the extensions of judicial review cover the same basic areas but differ in their details.

<sup>143</sup> The word 'standard' is used to describe clauses such as section 97 of the Ontario Labour Relations Act, R.S.O. 1970, c. 232, set out below. They are to be contrasted with the limited number of wider privative clauses e.g. clauses that specifically exclude review for an absence of jurisdiction (*R. ex rel Sewell v. Morrell* [1944] 3 D.L.R. 710 (Ont. H.C.)) or clauses to which no meaning can be attributed unless they are read as preventing review for lack of jurisdiction (*Woodward Estate v. Minister of Justice* (1972), 27 D.L.R. (3d) 608 (S.C.C.)) or privative clauses which in effect substitute wide appeal rights to the courts for judicial review (*Pringle and the Minister of Manpower and Immigration v. Fraser* [1972] S.C.R. 821, (1972), 26 D.L.R. (3d) 28)). See also clause 33 of Bill 11 — Labour Code of British Columbia Act, now before the British Columbia legislature.

<sup>144</sup> See e.g. *Re Ontario Labour Relations Board, Bradley and Canadian General Electric Co.* (*supra*, note 109).

<sup>145</sup> *Viz.*, only restricting review for error of law on the face of the record and, that of course could be easily circumvented by classifying the error involved as jurisdictional. See e.g. *Anisminic v. Foreign Compensation Commission* [1969] 2 A.C. 147 at p. 171 (per Lord Reid) (H.L.) for a wide statement of the scope of judicial review for jurisdictional error, a statement also subsequently endorsed by the Supreme Court of Canada in *Metropolitan Life Insurance Co. Ltd. v. International Union of Operating Engineers* [1970] S.C.R. 425; (1970), 11 D.L.R. (3d) 336.

(i) *Intrajurisdictional Error of Law*

As far as intra-jurisdictional error of law is concerned, the Federal Court Act<sup>146</sup> dispenses with the need to establish the error of law from the record of the tribunal concerned. However, this ground of review is still restricted to tribunals exercising judicial or quasi-judicial functions, for mere error of law is only made a ground of review under section 28 (ignoring for present purposes possible arguments about the scope of the declaration under section 18). In contrast, section 2(2) of the Judicial Review Procedure Act retains the requirement of establishing the error from the record of the tribunal under review but dispenses with the requirement that the tribunal be one obliged to act in a judicial or quasi-judicial manner. The tribunal must nevertheless be exercising 'a statutory power of decision' as opposed to a 'statutory power'.

To a certain extent, the provisions of section 2(2) of the Judicial Review Procedure Act go somewhat further than was envisaged by the McRuer Commission Report. McRuer recommended that review for error of law on the face of the record only extend beyond judicial tribunals to administrative tribunals obliged to follow the minimum procedural code to be established in the Statutory Powers Procedure Act.<sup>147</sup> In contrast, section 2(2) applies to any person or body exercising a 'statutory power of decision'. Unless the term 'statutory power of decision' is given a particularly narrow definition, this would seem to extend far beyond the range of decision-making authorities envisaged by McRuer and certainly beyond those tribunals now actually subject to the Statutory Powers Procedure Act. Of course, the ability to review is restricted to errors of law which appear on the face of the record. Indeed this in itself raises an interesting problem. The definition of what constitutes the record for the purposes of error of law proceedings was at common law developed in the context of judicial or quasi-judicial proceedings<sup>148</sup> and, as far as such tribunals are concerned, the definition of what constitutes the record has now been codified in the Statutory Powers Procedure Act.<sup>149</sup> However, what constitutes the record when a Minister or departmental official not obliged to act judicially exercises a 'statutory power of decision' is something which is not dealt with by the legislation and will therefore have to be developed by the Divisional Court.<sup>150</sup>

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<sup>146</sup> See section 28 (1) (b).

<sup>147</sup> Volume 1 of the McRuer Commission Report only contemplated a limited extension of the ability of the courts to review for error of law on the face of the record. It envisaged extending this ground of review beyond quasi-judicial and judicial tribunals to those administrative tribunals which would be required by the Statutory Powers Procedure Act to observe the minimum procedural rules (*supra*, note 3 at pp. 310-314). As drafted section 2 (3) is not so limited, as it applies to any exercise of a 'statutory power of decision'. As noted below authorities other than tribunals in the normally accepted sense of the word exercise 'statutory powers of decision', though it is somewhat difficult to think of the concept of 'error of law in the face of the record' with respect to such bodies.

<sup>148</sup> Discussed *R. v. Nat Bell Liquors* (*supra*, note 113).

<sup>149</sup> Section 20, S.O. 1970, c. 47.

<sup>150</sup> McRuer obviously did not contemplate this as a possible basis for review for error of law on the face of the record. *Supra*, note 147.

Insofar as the Judicial Review Procedure Act dispenses with the classification process for the purposes of error of law proceedings, it does have something to commend it over the Federal Court Act, at least in the sense of avoiding one of the perennial trouble spots of judicial review of administrative action. Nevertheless, it does seem to introduce problems for the definition of what constitutes the record in certain areas and also encounters the difficulty discussed previously of ascertaining exactly which administrative powers come within the definition of 'statutory power of decision'. Once again in this regard perhaps the only satisfactory solution would have been a consideration of which decision-makers should be subject to error of law review or appeal on an individualised basis. After all, given the range of decision-making powers surveyed by McRuer and affected by the Civil Rights Statute Law Amendment Act,<sup>151</sup> such an additional consideration and the resulting statutory action would not have added greatly to the work of the Commission and the draftsmen of the legislation and a degree of certainty would have been assured in this area.

(ii) *Absence of Evidence*

When it comes to review on the basis of an absence of evidence the terminology used in the two Acts is somewhat different. The relevant provision<sup>152</sup> in the Judicial Review Procedure Act only applies to tribunals whose findings of fact

. . . are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice.

Under the Federal Court Act, the equivalent provision<sup>153</sup> applies to all decision-makers coming within the ambit of section 28 of the Federal Court Act — notably those possessing powers required to be exercised on a judicial or a quasi-judicial basis. As far as the substantive scope of the review powers are concerned, the Judicial Review Procedure Act allows for review where there is 'no' evidence or 'no' facts to support the findings of fact made by the tribunal. In contrast the Federal Court Act requires

. . . an erroneous finding of fact . . . made in a perverse or capricious manner without regard for the material before [the tribunal or statutory decision-maker].

The first question that arises is whether, despite the difference in the language used in the two sections, they in effect amount to the same thing? In terms of the decision-makers subject to this kind of review, some further elucidation of the meaning of the Judicial Review Procedure Act provision is required. The notion of a tribunal required to base its findings of fact 'exclusively on evidence admissible before it and on facts on which it may take notice' is one that is difficult to grapple with, at least in terms of the common law of judicial review. Are there tribunals required by 'law' (meaning 'the common law') to act in this manner? It may be argued that, at least as far as decision-makers obliged to act in a judicial or a quasi-judicial

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<sup>151</sup> S.O. 1970, c. 50.

<sup>152</sup> Section 2 (3).

<sup>153</sup> Section 28 (1) (c).



manner are concerned, it would be contrary to the rules of natural justice for them not to base their findings on either admissible evidence or facts of which they can take judicial notice.<sup>154</sup> However, this is in fact to say that there is no need for section 2(3) at all as there is an existing ground of review available already. In fact, this is the very kind of argument discussed earlier which has enabled some courts in the past to avoid the effect of *R. v. Nat Bell Liquors*,<sup>155</sup> namely the classification of an absence of evidence as a breach of the rules of natural justice.<sup>156</sup> By way of contrast, the supposed common law position alleged by McRuer<sup>157</sup> to have been established by *Nat Bell*, and which led to the enactment of section 2(3), would say that there was simply no obligation to act upon the evidence presented or tribunally-noticed facts. Within jurisdiction, this extreme statement of the *Nat Bell* rule would say that the tribunal can act at its whim without any regard to the evidence. From this point of view therefore the notion of a tribunal obliged by the common law to base its findings of fact on the evidence presented or judicially-noticed facts makes little sense. In other words, the use in section 2(3) of the words 'or law', in the phrase 'required by any statute or law', is probably gratuitous except perhaps as a codification of existing law as to the rules of natural justice.

In fact, the use of this whole limiting phrase in section 2(3) only begins to make sense when it is realised that the subsection is linked to a number of provisions in relation to specific tribunals contained in the Civil Rights Statute Law Amendment Act, provisions which obligate certain decision-makers to take decisions in this manner.<sup>158</sup> In other words section 2(3) would seem to apply only to those tribunals specially designated by the legislature and, in this sense, the section is probably more limited than the equivalent provision in the Federal Court Act which applies to all decision-makers obliged to act judicially or quasi-judicially. Here also there has been some attempt by the Ontario Legislative Assembly to tailor the limits of judicial review to the needs of particular tribunals, though the statutory machinery by which this has been achieved is somewhat confusing, at least in the terminology used.

As far as the actual scope of review for erroneous factual findings is concerned, there is once again room for argument that the ability to review afforded by the Judicial Review Procedure Act is somewhat narrower than that created in the Federal Court Act. In its recommendations the McRuer Commission Report emphasised that it did not want the courts to become

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<sup>154</sup> See *R. v. Schiff, Ex parte Trustees of Ottawa Civic Hospital* [1970] 1 O.R. 752; (1969) 9 D.L.R. (3d) 434 (Ont. H.C.); [1970] 3 O.R. 476; (1970), 13 D.L.R. (3d) 304 (Ont. C.A.) for a discussion of this problem.

<sup>155</sup> *Supra*, note 113.

<sup>156</sup> Discussed by D.W. Elliott (*supra*, note 116) at pp. 96-98.

<sup>157</sup> *Supra*, note 3 at pp. 261-263.

<sup>158</sup> See for example section 89 which repeals section 15 of the Wolf and Bear Bounty Act, R.S.O. 1960, c. 434, and substitutes another section 15 therefore. See particularly subsection 5. See also section 16 of the Statutory Powers Procedure Act which defines the extent to which decision-makers coming within the ambit of Part I of that Act can take judicial notice of matters outside the evidence.

involved in assessing the weight attributed by tribunals to evidence<sup>159</sup> (the narrow *ratio* of *Nat Bell*). Rather, it was concerned with the problem of whether there was *any* evidence to support the findings of fact that were made. This appears to have been accepted by the legislature in the use of the words 'no such evidence' and 'no such facts' in subsection (3). In contrast, the Federal Court Act talks about erroneous findings of fact 'made in a perverse or capricious manner or without regard to the material before it'. As pointed out in my discussion of the Federal Court Act, this wording could be tantamount to giving the Federal Court of Appeal virtually complete review authority over the factual findings of expert administrative decision-makers, for it is difficult to envisage the court, once having found factual error, refusing to review because the error was not made 'in a perverse or capricious manner or without regard to the material before it'.<sup>160</sup>

Of course, in this area, much depends on the attitude of the reviewing court and the language of the two respective subsections is sufficiently flexible as to allow for varying degrees of interference. For example, the terms 'without regard' and 'no such evidence' are susceptible of different interpretations. Does 'no evidence' really mean 'no evidence at all' or does it mean 'no reasonably cogent evidence' or 'no evidence of probative value'? Does 'without regard' mean 'without any regard at all' or 'without reasonable regard'?<sup>161</sup> The latter alternatives in each of these hypotheticals clearly involve the particular court in a wider-ranging course of review and begin to appear very like actual assessment of the weight of evidence which McRuer and also the federal legislature were anxious to avoid. Furthermore, the chronology of dealing with issues under each of the sections will have some influence on the scope of review powers arrogated by the courts. This is particularly true in relation to section 28(3) of the Federal Court Act. Will the Court of Appeal first ascertain whether there is a factual error or will the judges first look for a perverse or capricious handling of the evidence or, alternatively, an absence of consideration for the evidence? As pointed out above the former order of approach will conceivably make review much harder to resist once a factual error has been found. Under the latter approach, the Court may never even have to consider whether there was a factual error for, insofar as perverse or capricious action or lack of regard for the evidence proximates bad faith in the decision-maker, there will be a natural reluctance in the Court to make such a finding without being reasonably assured that it can be linked definitely to an actual error.

Accordingly, it seems that the only conclusion that can be drawn fairly from the two provisions in the respective Acts is that the Judicial Review Procedure Act superficially seems to afford a narrower scope for judicial

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<sup>159</sup> *Supra*, note 3 at pp. 312-313.

<sup>160</sup> See, however, *Re State of Wisconsin and Armstrong (No. 2)* (1972), 32 D.L.R. (3d) 266 (F.C.A.) where the Court took a rather restricted review of its ability to review on this basis.

<sup>161</sup> Problems of this nature are discussed in greater detail by D.W. Elliott (*supra*, note 116) at pp. 67-80. See also Robert F. Reid's discussion (*supra*, note 53) at pp. 337-341.

review of intra-jurisdictional factual questions but that much will depend upon the manner in which the two courts respectively react to the particular sections.

## 8. *The Statutory Powers Procedure Act and Judicial Review*

### a) *Introduction*

Intimately connected with the Judicial Review Procedure Act is the Statutory Powers Procedure Act,<sup>162</sup> which was passed and came into force at the same time. Indeed, when the *Globe and Mail* heralded the arrival of the new 'Magna Carta' in its editorial pages,<sup>163</sup> it was referring more specifically to the Statutory Powers Procedure Act rather than to the Judicial Review Procedure Act. The main thrust of this Act is the creation of a procedural code which is to govern the activities of a great number of tribunals in Ontario. The so-called rules of natural justice have been given explicit statutory recognition for a wide range of decision-makers.

It is not my purpose at this time to analyse and comment on the substance of the various mandatory rules imposed on certain tribunals by this legislation. Rather, in the context of this discussion of the Judicial Review Procedure Act, I want to consider the effect of the Act on the availability of judicial review of administrative action. In particular, I will be dealing with the circumstances in which Part I of the Act applies and the consequences of failure to adhere to the provisions of that Part.

### b) *Application of the Act*

The procedural code is contained in Part I of the Act and the key section as far as the applicability of the code is concerned is section 3. This is divided into two subsections, the first of which provides generally when the Part applies and the second of which exempts certain decision-making functions from the ambit of the Part, irrespective of whether they come within the first subsection. It provides as follows: —

3. (1) Subject to subsection 2, this Part applies to proceedings by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceedings an opportunity for a hearing before making a decision.

(2) This Part does not apply to proceedings,

(a) before the Assembly or any committee of the Assembly;

(b) in or before,

(i) the Supreme Court,

(ii) a county or district court,

(iii) a surrogate court,

(iv) a provincial court established under *The Provincial Courts Act, 1968,*

(v) a small claims court,

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<sup>162</sup> S.O. 1971, c. 47.

<sup>163</sup> *Supra*, note 2.

- (vi) a justice of the peace,
- (vii) an election court under *The Controverted Elections Act*;
- (c) to which the Rules of Practice and Procedure of the Supreme Court apply;
- (d) before an arbitrator to which *The Arbitrations Act* or *The Labour Relations Act* applies;
- (e) at a coroner's inquest;
- (f) of a commission appointed under *The Public Inquiries Act*, 1971;
- (g) of one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information or advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he may have power to make;
- (h) of a tribunal empowered to make regulations, rules or by-laws in so far as its power to make regulations, rules or by-laws is concerned.

The salient feature of subsection 1 is that it uses the common law as to the applicability of the rules of natural justice as the basis of the applicability of the new code. At common law, the position has generally been taken that the rules of natural justice only apply to a decision-maker who is either expressly required by the empowering statute to hold a hearing or, alternatively, is exercising a power, the nature of which is such that the courts are willing to imply an obligation to follow those rules despite the silence of the empowering statute.<sup>164</sup> Thus the subsection speaks of tribunals 'required by or under such Act or otherwise by law to hold or to afford to the parties to the proceedings an opportunity for a hearing before making a decision.'

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<sup>164</sup> Note, however, that the English courts have in a number of recent decisions begun to develop the notion of a duty to act fairly. This is an obligation which they say is imposed on all statutory decision-makers, irrespective of whether they are classified as judicial or administrative and, while somewhat akin to the obligation to act in good faith, nevertheless also extends to imposing some requirements of procedural fairness or a limited form of the rules of natural justice. See e.g. *R. v. Gaming Board of Great Britain, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417 (C.A.); *Re H.K.* [1970] 2 Q.B. 617 (C.A.); *R. v. Birmingham City Justice, Ex parte Chris Foreign Foods Ltd.* [1970] 1 W.L.R. 1428 (D.C.); *In re Pergamon Press* [1971] Ch. 388 (C.A.). *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149 (C.A.); *Breen v. Amalgamated Engineering Union* [1971] 2 Q.B. 175 (C.A.).

Indeed, there has been some limited acceptance of this notion in Canada. See e.g. *Ex parte Beauchamp* [1970] 3 O.R. 607 (Ont. H.C.) where Pennell J. speaks about requirements of procedural fairness in relation to parole revocation, despite the fact that he classified the power in issue as being administrative rather than judicial or quasi-judicial. See also *St. John v. Fraser* [1935] S.C.R. 441, [1935] 3 D.L.R. 465.

Developments in this area are not of course precluded by the Statutory Powers Procedure Act. In fact, the Act may very well encourage greater use of this concept. If a statutory decision-making power does not come within the ambit of Part I of the Act, with its fairly rigid natural justice requirements, it may nevertheless be attractive to argue that the decision-making function in issue is still subject to a degree of procedural requirements, albeit not as stringent as those imposed by the Act. Indeed, this would be a desirable development in the sense that certain decision-making functions are clearly not suited for the full panoply of rights enshrined by the Act yet nevertheless, do call for certain procedural safeguards. The duty to act fairly notion may in this respect supply the flexibility that the Courts could be looking for.

The principal difficulty with this approach is that over the years this very question has been the nightmare of the common law of judicial review of administrative action. However, there are two factors which will tend to mitigate this in relation to the Statutory Powers Procedure Act. First, at a general level, the Judicial Committee of the Privy Council in *Durayappah v. Fernando*<sup>105</sup> has exhibited quite recently an enlightened functional approach to this classification problem and there are signs of judicial acceptance of this in Canada.<sup>106</sup> Secondly, and related specifically to the Statutory Powers Procedure Act, the occasions on which it will be necessary to play the classification game in the future will be extremely rare. Already, in the Civil Rights Statute Law Amendment Act, the extent of the application of the Statutory Powers Procedure Act to a great number of decision-making functions has been made clear<sup>107</sup> and the law draftsmen of the province seem to be committed for the future to an obligation to make it clear in the context

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<sup>105</sup> [1967] 2 A.C. 337 (J.C.).

<sup>106</sup> See e.g. *In re North Coast Air Services Ltd.* [1972] F.C. 390, (1972), 32 D.L.R. (3d) 695 (F.C.A.), where this aspect of *Durayappah v. Fernando* was cited with approval by the Federal Court of Appeal (at p. 404 and p. 709, respectively). Also see *Re Cloverdale Shopping Centre Ltd. and Township of Etobicoke* [1966] 2 O.R. 436; (1966), 57 D.L.R. (2d) 206 (Ont. C.A.), where the Ontario Court of Appeal in many ways adopted the same kind of functional approach that the Judicial Committee was to accept a year later in *Durayappah*. Despite these commendable trends, there are nevertheless instances where the courts still revert to the old and confusing 'verbal gymnastics' of the classification approach. See e.g. *Dowhopoluk v. Martin* [1972] 1 O.R. 311, (1971) 23, D.L.R. (3d) 42 (Ont. H.C.); *Re Ward and Board of Blaine Lake School Unit No. 57* (1971), 20 D.L.R. (3d) 651 (Sask. Q.B.); *Chakravorty v. Attorney-General (Alberta)* (1972), 28 D.L.R. (3d) 78 (Alb. S.C.).

<sup>107</sup> See for example section 62(4) which adds a new section 17 (a) to the Ontario Highway Transport Board Act, R.S.O. 1960, c. 273. Subsection 1 of this section provides as follows: —

- (1) Sections 4 to 24 of *The Statutory Powers Procedure Act, 1971* apply with respect to any hearing by the Board and the proceedings relating thereto.

Sections 4-24 are the operative procedural sections of the Statutory Powers Procedure Act. On other occasions, however, the Civil Rights Statute Law Amendment Act has made provision for only the limited application of the Act. See e.g. section 16 which repeals section 10 of the Charitable Institutions Act, 1962-63 and substitutes a new section 10. Subsection (3) of the new section 10 provides as follows: —

- (3) Section 4 to 16 and 21 to 24 of *The Statutory Powers Procedure Act, 1971* apply with respect to a hearing under this section.

Of the excluded sections, section 17 obliges the tribunal to give reasons in writing if requested by a party and section 20 obliges the compilation of a record consisting of a defined set of documents. Presumably in such cases the common law continues to apply and there is no obligation (absent, any statutory requirement) to give reasons or compile a record (*R. v. Northumberland Compensation Appeal Tribunal, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417 (C.A.) at p. 431. See also Robert F. Reid (*supra*, note 53) at pp. 253-254) and the record, in so far as there is one, is confined to the documents as defined by the common law.

of all future statutes whether the Act applies.<sup>168</sup> In other words, in the face of such express provisions in empowering statutes, there will be little room for the implication of a duty to give a hearing from common law principles. If this in fact holds good, one of the major difficulties in this whole area of the law will have been practically eliminated in Ontario.

The second feature of subsection one is that the application of Part I is limited not only by the concept of a duty to give a hearing but also by the term 'statutory power of decision'. The definition of this term in the Statutory Powers Procedure Act is the same as that contained in the Judicial Review Procedure Act and is therefore subject to the same criticisms already made in this chapter in relation to the use of this term in the Judicial Review Procedure Act. Basically, the extent of the powers embraced by this definition is by no means made clear in either Act. It is, however, relatively clear that the definition does not extend to powers of a merely recommendatory nature but rather contemplates final, binding decisions affecting 'rights'.<sup>169</sup> This has already been confirmed by one of the early cases under the Act<sup>170</sup> and, indeed, there is something to be said for excluding purely investigatory functions from the full panoply of procedural rights created by the new Act, provided, as has been done, that the possibility of arguing at common law for limited procedural protections is still left open.<sup>171</sup>

In general, the decision-making powers specifically exempted by subsection two do not evoke much comment. However, the point does deserve to be made that, merely because certain decision-making functions are excluded from Part I of the Statutory Powers Procedure Act, does not mean that they may not be subject to the implication by the courts of a common

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<sup>168</sup> The Mundell Manual (*supra*, note 55) makes the following statement (at p. 4): —

It is intended that future statutes will expressly specify that a hearing is required where appropriate. The object is to replace the present uncertainties as to the tribunals to which the procedural rules of natural justice apply and their requirements with an expressly defined class of tribunals and a defined fair procedure.

Of course, merely because a future statute may not specifically impose an obligation to follow the Act will not prevent an applicant for relief from arguing that the common law imposes a duty to act judicially or hold a hearing and that the Act therefore applies. *Quaere*, however, whether a judge will attribute any greater weight to the legislature's silence in future than the courts did under the common law.

<sup>169</sup> *Supra*, note 89.

<sup>170</sup> See *Re Florence Nightingale Home and Scarborough Planning Board* (*supra*, note 70), where the Divisional Court rejected the application of the Act to a Planning Board recommendation to the Scarborough Municipal Council, despite considerable sympathy for the applicant's allegations of procedural unfairness.

<sup>171</sup> In this respect, it is somewhat surprising that counsel in the *Florence Nightingale Home case* (*Id.*) did not argue as an alternative that even if the power being exercised was not a 'statutory power of decision' (as, in fact, the Court decided) there was nevertheless a common law duty to follow the rules of natural justice. Perhaps such cases as *Guay v. Lafleur* (*supra*, note 75) and *Re Wolfe and Robinson* (*supra*, note 75) deterred them. Note also that the Public Inquiries Act, S.O. 1970, c. 49 provides its own procedural requirements for investigations conducted by commissions appointed under that Act. Such investigations are specifically excluded from Part I of the Statutory Powers Procedure Act by section 3(f).

law duty to follow the rules of natural justice. This applies more particularly to subsections (g) and (h) which cover investigatory functions and subordinate legislation-making powers respectively. At times it has been suggested that certain investigatory roles are subject to an obligation to comply with the rules of natural justice.<sup>172</sup> Similarly, in rare instances the making of subordinate legislation may be attended by such a duty.<sup>173</sup> Indeed, one of the first cases dealt with by the Divisional Court under the Judicial Review Procedure Act concerned this very problem and the Court held that a municipality was under a duty to comply with the rules of natural justice in making certain zoning by-laws.<sup>174</sup> Thus, to this extent, the common law relating to a duty to act judicially continues to have relevance and this possibility is not precluded merely because a function is excluded from the ambit of Part I of the Statutory Powers Procedure Act.<sup>175</sup>

A related point lies in the fact that the Statutory Powers Procedure Act is not intended to be exhaustive of the rules of natural justice for decision-making functions to which it applies. Part I of the Act is headed 'Minimum Rules for Proceedings of Certain Tribunals' and, though there is no other express provision stating that the rules are a minimum requirement, neither is the possibility of arguing for procedural rights over and above those specified by the Act precluded. In other words, the Act is not determinative of the extent of the rules of natural justice and in particular instances common law principles may be invoked to assert greater procedural rights. Section 8 provides a good example of where this could be relevant. This provides: —

8. Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

It is to be noted that the section only applies where 'good character, propriety of conduct or competence' are issues in any proceedings, yet it is

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<sup>172</sup> See e.g. *Bell v. Ontario Human Rights Commission* (*supra*, note 28); *Re Ontario Crime Commission, Ex parte Feeley and McDermott* [1962] 2 O.R. 872, (1962), 34 D.L.R. (2d) 451 (Ont. C.A.); *R. v. Botting* [1966] 2 O.R. 121, (1966), 56 D.L.R. (2d) 25 (Ont. C.A.). However, compare this decision with *R. v. Ontario Labour Relations Board, Ex parte Kitchener Food Market Ltd.* [1966] 2 O.R. 513; (1966), 57 D.L.R. (2d) 521 (Ont. C.A.). See also notes 75 and 171, for other examples of cases where such arguments have been rejected by Canadian courts.

<sup>173</sup> See e.g. *Wiswell v. Metropolitan Corporation of Greater Winnipeg* [1965] S.C.R. 512, (1965), 51 D.L.R. (2d) 754. (Change in zoning by-law held to be attended by a duty to give sufficient notice in accordance with the rules of natural justice to affected landowners.)

<sup>174</sup> See *Zadrevac and the Town of Brampton* [1972] 3 O.R. 514; (1972), 28 D.L.R. (3d) 641 (Div. Ct.). On appeal, this decision was reversed, not because of disapproval of the general principle, but rather because the affected parties had a statutory right to a hearing before the Ontario Municipal Board. See [1973] 3 O.R. 498; (1973), 37 D.L.R. (3d) 327 (Ont. C.A.).

<sup>175</sup> Presumably this possibility is open whether the tribunal is excluded from Part I of the Act because it does not exercise a 'statutory power of decision' or, alternatively, because it comes within the list of statutory decision-makers specifically excluded by section 3(2). See, however, note 171.

quite clear that at common law prior notice of matters in issue in proceedings may be required in circumstances other than this.<sup>176</sup> In such cases, these procedural protections could and would have to be asserted on common law principles rather than on the basis of the Statutory Powers Procedure Act.

c) *Error of Law on the Face of the Record*

One final point in relation to the law of judicial review is raised by section 20, already noted previously. At common law there have always been doubts as to what constituted the record for the purposes of challenges on the basis of error of law on the face of the record.<sup>177</sup> More specifically, the extent to which the evidence, both documentary and oral, was part of the record was open to question.<sup>178</sup> At least as far as decision-makers coming within Part I of the Statutory Powers Procedure Act are concerned, these doubts have been resolved by the statutory definition of the record in section 20. This provides: —

20. A tribunal shall compile a record of any proceedings in which a hearing has been held which shall include,
- (a) any application, complaint, reference or other document, if any, by which the proceedings were commenced;
  - (b) the notice of any hearing;
  - (c) any intermediate orders made by the tribunal;
  - (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceedings;
  - (e) the transcript, if any, of the oral evidence given at the hearing, and
  - (f) the decision of the tribunal and the reasons therefor, where reasons have been given.

Not only does this definition resolve previous doubts in favour of a wide definition but also compels the compilation of such a record by all tribunals coming within the ambit of the section. When read together with section 17, which obliges such decision-makers to give written reasons on the request of any party, this section achieves both a desirable clarification in the existing law and also a significant guarantee of openness in tribunal decision-making. The discipline of having to justify a decision by written reasons can only lead to better and more rational decision-making, a justification which clearly outweighs any claims of administrative inconvenience.

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<sup>176</sup> See e.g. *Denton v. Auckland City* [1969] N.Z.L.R. 256 (N.Z.S.C.). The Canadian authorities are listed in *R. v. Schiff, Ex parte Ottawa Civic Hospital* (*supra*, note 154) by Lacourciere J. of the Ontario High Court. Though this decision was reversed on the facts (*supra*, note 154) by the Ontario Court of Appeal, this was without challenge to the basic principle.

<sup>177</sup> Discussed by Robert F. Reid (*supra*, note 53) at pp. 367-377. See also De Smith (*supra*, note 57) at pp. 353-356.

<sup>178</sup> Generally the evidence is not considered to be part of the record. However, if certain evidence is referred to in the decision it may become part of the record by incorporation or reference. See once again Robert F. Reid (*Id.*) particularly at pp. 370-377 where the various positions and authorities are discussed in detail.



Indeed, the openness which sections 17 and 20 encourage may lead to a decrease rather than an increase in judicial review. The greater the amount of information available to an individual about the process by which the decision was reached, the less likely will there be questions about the good faith of the decision-maker and the methods used for determining issues. As well, the compilation of an extensive record, including reasons for particular decisions, will make the role of the courts easier in review applications and arguably will decrease the incidence of review. Faced by such a full record, the courts may well be less willing to substitute their views for those of the expert tribunals.

It should be noted, however, that outside of tribunals coming within the ambit of Part I of the Statutory Powers Procedure Act, the common law, with its attendant problems as to what constitutes the record, will continue to apply. Also in this respect, it should be kept in mind that section 2(2) of the Judicial Review Procedure Act has liberated review for error of law on the face of the record from the requirement that the statutory decision-maker be acting in a judicial or quasi-judicial manner, so that to this extent anyway the common law definition of the record assumes a greater importance.

#### d) *Consequences of Non-Compliance*

Surprisingly, there is no provision in either the Statutory Powers Procedure Act or the Judicial Review Procedure Act to the effect that non-compliance with the provisions of Part I of the Act amounts to a ground of judicial review. However, a failure to adhere to statutory procedural requirements has always been accepted as a basis for judicial review<sup>179</sup> and, against this background, the availability of relief under section 2 of the Judicial Review Procedure Act probably goes without saying.

One interesting question does arise however, about the availability of judicial review. Section 3 of the Judicial Review Procedure Act, discussed previously, provides that on an application for judicial review the Court can refuse a remedy if,

. . . the sole ground for relief established is a defect in form or a technical irregularity, if the court finds that no substantial miscarriage of justice has occurred.

Can a failure to comply with the provisions of Part I of the Statutory Powers Procedure Act amount to 'a defect in form or a technical irregularity' for the purposes of that section or is strict compliance with Part I mandatory in all cases absent agreement, waiver or a consent order? As a matter of policy it would seem desirable that such a discretion exist in the Court and, indeed, the structure of the Judicial Review Procedure emphasises the necessity for the Divisional Court to retain a discretion in relation to the grant

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<sup>179</sup> See once again Robert F. Reid (*Id.*) at pp. 251-253 for an authoritative statement of the Canadian position.

of judicial review.<sup>180</sup> However, there are indications to the contrary in the Statutory Powers Procedure Act. All the sections are expressed in the mandatory 'shall' and by virtue of section 30(34) of the Ontario Interpretation Act,<sup>181</sup>

. . . 'shall' shall be construed as imperative.

Secondly, while section 4 of the Act makes express provision for non-compliance with Part I by waiver, agreement or where there is a consent order, there is no provision expressly excusing non-compliance which does not result in a substantial miscarriage of justice. Finally, section 32 provides as follows: —

32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply notwithstanding anything in this Act, the provisions of this Act and of rules made under section 33 prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith.

One interpretation of this section in the present context is that the obligation to comply with Part I applies invariably notwithstanding section 3 of the Judicial Review Procedure because section 3 is not expressed to prevail over the obligations created by Part 1.<sup>182</sup> As against this however it could be argued that section 3 does not really address itself to the issue of the obligation to comply with Part I but really concerns an after-the-event remedial discretion of the court in the face of such non-compliance and to which section 33 has no relation. Hopefully, the Divisional Court will accept this latter approach if the question ever arises in litigation. To do otherwise would be to deprive the Court of an important discretion to refuse relief where none is really justifiable despite a technical breach.

#### e) Summary

The application of Part I of the Statutory Powers Procedure Act is

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<sup>180</sup> Section 2 (1) bases the new remedy on the common law judicial review remedies and section 2 (5) specifically preserves discretions which the courts possessed at common law to refuse relief in certain circumstances, even where a ground for relief has been established. Finally, section 3 allows for the refusal of relief where the defect complained of is 'a defect in form or a technical irregularity' provided 'no substantial wrong or miscarriage of justice has occurred.'

<sup>181</sup> R.S.O. 1970, c. 225.

<sup>182</sup> For a strict interpretation of section 32 see *Re Thompson and Lambton County Board of Education* (*supra*, note 70) and *Re Thompson and Lambton County Board of Education (No. 2)* (*supra*, note 70) where both Courts held that, despite an express provision to the contrary in the empowering statute, the relevant hearing was required to be open to the public by virtue of section 9 (1) of the Statutory Powers Procedure Act. Despite the fact that the empowering statute was assented to after the Statutory Powers Procedure Act and that the statute had been subsequently substantially amended without any alteration of the *in camera* provision, section 32 was held to make the provisions of Part I of the Statutory Powers Procedure Act paramount.

founded on the rather uncertain basis of the term 'statutory power of decision' and partly on the common law relating to the implication of a duty to give a hearing. However, the second problem is, as noted, more apparent than real given the provisions of the Civil Rights Statute Law Amendment Act and the intention to make the extent of the application of the Act clear in future statutes. In another respect, the Act makes a contribution to the present law of judicial review by clarifying the common law definition of the 'record'.

Finally, a liberal interpretation of the extent of the Court's discretion to refuse relief under section 3 of the Judicial Review Procedure Act will probably result in a situation where the Statutory Powers Procedure Act will operate as an important procedural guarantee to individuals affected by tribunal decision-making but, at the same time, will not lead to administrative tribunals being plagued by a multitude of judicial review applications with respect to minor and inconsequential deviations from Part I. Indeed, ultimately, the type of protection afforded to individuals by the Statutory Powers Procedure Act may result in better decision-making rather than increased review. The type of guidance that the Act gives to statutory decision-makers as to the procedures to be used, while perhaps causing some administrative inconvenience, at least has something to be said for it over a situation where the rules of natural justice were applied or devised on a variable basis by the courts after the decision had been taken.

### 9. *The Divisional Court*

In the course of my article on the Federal Court Act I commented on the desirability of moving towards the French notion of a separate administrative court and in some respects this has been achieved by the McRuer package of legislation.<sup>183</sup> One of the five pieces of legislation which came into effect on April 17, 1972 was the Judicature Amendment Act, passed originally in 1970<sup>184</sup> but substantially amended in 1971.<sup>185</sup> This Act established a new division of the Ontario Supreme Court called the Divisional Court and gave the new Court jurisdiction under six heads. For present purposes the most important of these are: —

- (b) applications for judicial review under The Judicial Review Procedure Act, 1971;
- (c) all appeals from judgments or orders of judges of the High Court on applications for judicial review under the Judicial Review Procedure Act, 1971

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<sup>183</sup> *Supra*, note 13 at pp. 51-52. Actually the McRuer Commission Report specifically rejected acceptance of the French *Conseil d'état* system for Ontario. Nevertheless, the compromise that has been accepted of a separate division of the Supreme Court for matters of administrative law has the potential for achieving some of the advantages of the French system. For McRuer's discussion of this whole issue see Report No. 2 Volume 4.

<sup>184</sup> S.O. 1970, c. 97.

<sup>185</sup> S.O. 1971, c. 57.

It is also significant that the section provides for all appeals to the Supreme Court (except those provided under the Judicature Act itself and also the County Courts Act) to go to the Divisional Court, as well as all applications by way of case stated to the Supreme Court (except under the Summary Convictions Act). This ensures that not only will the Divisional Court be handling all judicial review applications but will also deal with all appeals from administrative tribunals to the Supreme Court as well as applications from tribunals by way of case stated. This degree of saturation with administrative law matters seems vital if the Divisional Court is to achieve the degree of specialized knowledge and expertise obviously hoped for by the draftsmen of the legislation.

The provisions of the Judicature Amendment Act are naturally tied to sections in the Judicial Review Procedure Act. Section 6 is the governing provision in this regard. This provides, that, with very limited exceptions, all applications for judicial review made under the Act must be made in the Divisional Court. The limited exception is set out in subsection (2): —

- (2) An application for judicial review may be made to the High Court with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice.

If a judge refuses an order under subsection (2) he can in his discretion, instead of forcing the applicant to recommence his proceedings again, direct that the application be transferred to the Divisional Court. It is also significant that, where the High Court takes jurisdiction to deal with a judicial review application under subsection (2), there is an automatic right of appeal to the Divisional Court, a provision which further emphasises the intended place of the Divisional Court as the specialist judicial body in administrative law matters. In fact, aside from subsection (2) matters, the only judicial review of administrative action proceedings which will not go to the Divisional Court are situations where a declaration or an injunction is sought from the High Court with respect to a statutory power and no application is made by a party to have the matter transferred to the Divisional Court. Why this possibility has been retained is, as noted earlier, difficult to rationalise.

The only problem that I can visualize with the development of the Divisional Court as a specialised administrative court concerns the staffing of the Court. Rather than provide that there are to be special judges who serve only in the Divisional Court, the Judicature Amendment Act constitutes all judges of the High Court as judges of the Divisional Court and then provides for the Chief Justice of the Ontario High Court, as president of the Court, to designate which judges will serve on the Court 'from time to time'. If this discretion is used to rotate all or a majority of High Court judges in the Court on a regular basis, then much of the benefit of having a separate court could be lost for the level of specialisation in the judges of

the Court would almost necessarily be diluted by such a system of rotation.<sup>186</sup> Hopefully, therefore, the discretion will not be exercised in this way.

Finally, a comment that I made in relation to the Federal Court Act<sup>187</sup> should perhaps be reiterated in this context. In establishing the Divisional Court the Legislative Assembly may have been advised to have included a provision such as appears in the equivalent New Zealand legislation to the effect that the Court could appoint lay advisers to sit with them in particular matters.<sup>188</sup> This would presumably help lessen criticism of the kind which is directed against the ordinary courts' lack of appreciation of the functioning of the administrative process.

In summary, the establishment of the new Divisional Court must be seen as an integral part of the new legislative package. It is a development that theoretically circumvents many of the complaints made about judicial intervention in the affairs of the executive branch of government. What does however remain to be seen is whether the Court will succeed in achieving a high degree of sensitivity towards the competing claims of private rights and the administrative process.

## 10. *Conclusions*

The legislative reforms in Ontario resulting from the McRuer Commission Report have advanced the law of judicial review of administrative action in three significant respects. First, a new and simplified form of judicial review remedy has been created. Secondly, a separate division of the Supreme Court of Ontario has been established with primary jurisdiction over the new remedy and also appeals from administrative authorities. Thirdly, a mandatory code of procedure has been imposed on the proceedings of a number of tribunals. It has not been my purpose in the course of this article to discuss the value or otherwise of a code of administrative

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<sup>186</sup> Much of the same sort of problem exists under the New Zealand legislation establishing an Administrative Division of the Supreme Court. Section 25 (2) of the Judicature Act 1908, as inserted by section 2 of the Judicature Amendment Act 1968 gives the Chief Justice a discretion as to which judges of the Supreme Court will sit in the Administrative Division. This flexibility, the Chief Justice has contended, is necessary for administrative purposes (See H.R.C. Wild, *The Administrative Division of the Supreme Court of New Zealand* (1972), 22 U. of T.L.J. 258). However it arguably has contributed to the identity crisis which the Division seems to have encountered (See J.A. Farmer, *Administrative Division of the Supreme Court — An Experiment in Administrative Suicide* [1969] N.Z.L.J. 109). It is my understanding however, that as from September 1973 it is the intention of the Chief Justice of the High Court of Ontario to have a fixed panel of judges to serve on the Divisional Court. This is a commendable step.

<sup>187</sup> *Supra*, note 13 at p. 52.

<sup>188</sup> Section 20A, Judicature Act 1908. It should be noted, however, that this section does not as yet appear to have been used by the New Zealand Administrative Division.

procedure. Views differ sharply on that point.<sup>189</sup> However, as far as the first two reforms are concerned, they constitute in my view considerable improvements over the previous situation. Indeed, it is perhaps in the light of these major accomplishments that the work of the Ontario Legislative Assembly should be judged.

Most of my comments in this article have been of a technical and detailed nature and this may have tended to downplay the real accomplishments of the reforms. Nevertheless, it is the detail of the legislation with which tribunals, lawyers and judges will have to work in the future and, in this respect, there are clearly a number of potentially difficult problems. The terms 'statutory power' and 'statutory power of decision' lack precision and have already caused difficulties in the decided cases. The place of an action against the Crown under the Judicial Review Procedure Act is by no means clear, neither is the precise effect of the Act on the previous common law of judicial review. The creation of the new remedy by reference to the old writs and the limited retention of the old remedies can also be criticized as can the provision in section 2(1) which seems to direct the Divisional Court to ignore existing statutory appeals when deciding whether or not to grant review. In all of these places, the legislation deserved possibly more thought and certainly better drafting.

The Judicial Review Procedure Act, as with the Federal Court Act, purportedly increases the scope of judicial review in the areas of error of law and factual error. Serious doubts can be raised about the wisdom of such increases in the judicial review authority of the courts. Not only this, but the manner in which this has been accomplished by the Judicial Review Procedure Act is quite confusing. However, it can at least be said that the Judicial Review Procedure Act, unlike section 28 of the Federal Court Act, recognizes the limited efficacy of privative clauses in statutes. To this extent anyway there has not been the same imposition of a uniform standard of review on all tribunals as was brought about by section 28 of the Federal Court Act. Ultimately, though, this does not go very far towards achieving what has been my major argument in this article — the attuning of the scope of judicial review and appellate authority to the needs and functions of individual statutory decision-makers.

In another respect also the new Ontario legislation superficially resembles the Federal Court Act. Under the Federal Court Act, the problematic judicial/administrative classification process has been given increased emphasis because on that classification depends the question of which is the appropriate court in which to commence proceedings — the Trial Division

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<sup>189</sup> For a criticism of this aspect of the new legislation, see once again Willis, *Lawyers Values and Civil Servants' Values* (*supra*, note 20) at pp. 357-359. See also J.A. Farmer, *A Model Code of Procedure for Administrative Tribunals — An Illusory Concept* (1970), 4 N.Z.U.L.R. 105, where it is urged that New Zealand not follow Ontario's lead in enacting a uniform procedural code, an urging which was heeded by the New Zealand Public and Administrative Law Reform Committee. See *Sixth Report — Administrative Tribunals — Constitution, Procedure and Appeals* (Wellington: Government Printer) at pp. 5-9.

or the Court of Appeal. In Ontario, the application of the procedural rules imposed by the Statutory Powers Procedure Act has been made to depend on this process also. However, fortunately, the legislature has already made specific in particular statutes the extent of the application of the Act and evidently intends to continue to do so in future. If this in fact turns out to be the case, one of the most frequently litigated issues in the whole area of judicial review will have been virtually eliminated in Ontario.

On balance, therefore, the McRuer package of reforms, while confusing in a lot of its detail and proceeding from a philosophical base of dubious validity, seems preferrable at least to the Federal Court Act and indeed has the potential for eliminating some of the major trouble areas in judicial review of administrative action.