# WHILE *CERTIORARI* MAY LIVE IN THE TRIAL DIVISION OF THE FEDERAL COURT, THE FAIRNESS CONCEPT HAS SUFFERED A SERIOUS BLOW: THE RECENT *MARTINEAU* DECISIONS

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## I. INTRODUCTION

During the non-winter months of 1977, Professor John Evans and I were involved in a public "debate" concerning the availability and issuance of *certiorari* in the Trial Division of the Federal Court. In an *Addendum*[1] to my published article[2] assessing the work of the Trial Division, Professor Evans wrote: "Mr. Fera's statement, that *certiorari has issued* from the Trial Division only against decisions made during the transitional period, requires some qualification."[3]

After reviewing the cases set out in the *Addendum* (and one or two others), I was, however, again compelled to conclude in the spring of 1977 that:

> while various members of the Bar on behalf of their clients have suggested novel uses for *certiorari* in the Trial Division, it cannot be said that the Court itself, with reference to decisions made after June 1, 1971,[4] *has ever issued*

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[1] Evans, *The Trial Division of the Federal Court: An Addendum*, 23 McGILL L.J. 132 (1977).

[2] Fera, *Conservatism in the Supervision of Federal Tribunals: The Trial Division of the Federal Court Considered*, 22 McGILL L.J. 234 (1976).

[3] *Supra* note 1, at 137 (emphasis added).

[4] As a result of s. 61 of the Federal Court Act, R.S.C. 1970 (2d Supp.), c. 10, the supervisory jurisdiction of the Federal Court of Appeal was limited to decisions or orders made after the Act came into force. *Certiorari*, therefore, was available from the Trial Division with respect to pre-June 1, 1971 decisions or orders. *See, e.g.*, Medi-Data Inc. v. Attorney-General of Canada, [1972] F.C. 469, 26 D.L.R. (3d) 1 (App. D.); M.N.R. v. Creative Shoes Ltd., [1972] F.C. 993, 31 D.L.R. (3d) 330 (App. D.); *In re* Anti-dumping Tribunal, [1972] F.C. 1078, at 1122-24, 30 D.L.R. (3d) 678, at 716-18 (Trial D.).

> *certiorari per se*, or shown an inclination to do so either on traditional grounds or on innovative ones. Indeed, so far the Court has avoided meeting the issue head on and has certainly not encouraged possible future developments.[5]

That assertion no longer seems to accord fully with a decision of the Trial Division rendered a short time after my writing. In *In re the Penitentiary Act and in re Martineau*,[6] Mahoney J. wrote:

> The circumstances disclosed in this application would appear to be appropriate to the remedy sought [namely *certiorari*]. I am not, of course, deciding whether the remedy should be granted but merely whether it could be granted by the Federal Court of Canada, Trial Division. *In my view it could.*[7]

## II. CERTIORARI IN THE FEDERAL COURT

Before getting into a full discussion of that decision, it is perhaps convenient at this point to consider the reason(s) for the lingering doubts as to the availability of *certiorari* in the Trial Division. According to the unequivocal language in section 18 of the Federal Court Act:[8]

> The Trial Division has exclusive original jurisdiction
> (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a) . . . .

However, section 28(3)[9] of the same Act deprives the Trial Division of its supervisory role where the Appeal Division of the Federal Court has jurisdiction under the same section.[10] And, "[w]hile to a certain extent . . . [section 28] is a substitute for previously existing remedies before other courts, it is . . . [also] much broader in scope".[11] That

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[5] Fera, *Certiorari in the Federal Court and Other Matters: A Reply to the "Addendum"*, 23 McGILL L.J. 497, at 505 (1977) (emphasis added).

[6] [1978] 1 F.C. 312, 37 C.C.C. (2d) 58 (Trial D.) [hereinafter cited as *Martineau (No. 2)*].

[7] *Id.* at 319, 37 C.C.C. (2d) at 64 (emphasis added).

[8] R.S.C. 1970 (2d Supp.), c. 10.

[9] S. 28(3) reads:
> Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

[10] In Howarth v. National Parole Bd., [1976] 1 S.C.R. 453, at 458, 50 D.L.R. (3d) 349, at 356 (1974) Dickson J. wrote: "[T]he Trial Division has only such jurisdiction in respect of the prerogative writs as is not conferred by s. 28(1) upon the Appeal Division."

[11] Puerto Rico v. Hernandez, [1975] 1 S.C.R. 228, at 237, 41 D.L.R. (3d) 549, at 556 (Pigeon J. for the majority). Prior to the Federal Court Act, federal tribunals were subject to the common law remedies in the provincial superior courts.

assertion, certainly as it applies to the enumerated grounds of review,[12] appears to be generally accepted.[13] On the other hand, it must also be noted that the Court of Appeal has jurisdiction to "review and set aside a *decision* or *order* . . . [of] a federal board" only if it is not one "of an administrative nature not required by law to be made on a judicial or quasi-judicial basis".[14] In other words, if the "determination" of a federal tribunal cannot be characterized as a "decision or order",[15] or if the decision or order is of an administrative nature and need not be made on a judicial or quasi-judicial basis,[16] then the Court of Appeal has no jurisdiction under section 28 of the Federal Court Act.

It would appear, therefore, that there may be a significant group of determinations, decisions and orders which may be reviewed under the traditional remedies in the Trial Division. Indeed, judicial construction of what is a "decision or order" and of the classification terminology in section 28(1) is vital in determining the respective jurisdictions of the two-tier Federal Court.

In *Howarth v. National Parole Board*,[17] the Supreme Court of Canada, in deciding whether the Federal Court of Appeal might review a decision of that Board, found it necessary to consider the double negative phrase in section 28(1) of the Federal Court Act. Dickson J., in his

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[12] Under s. 28(1) of the Federal Court Act, certain decisions or orders of federal tribunals may be set aside if the tribunal:

(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[13] *See, e.g.*, the comment of Laskin C.J.C. in *Hernandez*, *supra* note 11, at 247, 41 D.L.R. (3d) at 563-64, or the remarks of Thurlow J. in Blais v. Basford, [1972] F.C. 151, at 162 (App. D.). *See also* the remarks of Evans, *supra* note 1, at 140.

[14] *See* s. 28(1) of the Federal Court Act (emphasis added).

[15] It appears that purely reporting or recommendatory bodies do not make decisions or orders and therefore are not subject to s. 28 review. *See, e.g.*, Lingley v. New Brunswick Bd. of Review, [1976] 1 F.C. 98, 41 D.L.R. (3d) 259 (App. D. 1975). Interlocutory rulings also appear not to fall into the category of "decisions or orders". *See, e.g.*, Attorney-General of Canada v. Cylien, [1973] F.C. 1166, 43 D.L.R. (3d) 590 (App. D.); *In re* Anti-dumping Act and *in re* Danmour Shoe Co., [1974] 1 F.C. 22, 1 N.R. 442 (App. D.); B. C. Packers Ltd. v. Can. Labour Rel. Bd., [1973] F.C. 1194, 45 D.L.R. (3d) 372 (App. D.); Center for Public Interest Law v. C.T.C. (No. 2), [1974] 1 F.C. 322, 2 N.R. 336 (App. D.).

[16] Dickson J. (dissenting) in *Howarth*, *supra* note 10, at 458, 50 D.L.R. (3d) at 356, said about the double negative phrase in s. 28(1) of the Federal Court Act: "The two faces of the exception are not disjunctive: both have to be present. Decisions and orders of an administrative nature are indeed reviewable, the only exception being those which are 'not required by law to be made on a judicial or quasi-judicial basis'."

Under s. 28(1), the Court of Appeal is authorized "to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis".

[17] *Supra* note 10.

dissenting judgment,[18] accepted the ruling in *Ex parte McCaud*[19] that the Parole Board exercised administrative functions, but he went on to find that under section 28(1) "novel type[s] of decisions"[20] could now be supervised. He said: "Decisions and orders of an administrative nature are indeed reviewable [under section 28], the only exception being those which are 'not required by law to be made on a judicial or quasi-judicial basis'."[21] He found, too, that the function of the National Parole Board, having regard to the nature of its duties and the disciplinary effect of its order, possessed "identifiable judicial features".[22]

If that view were to prevail, the jurisdiction of the Trial Division in respect of *certiorari* and the other remedies would indeed be rather narrow.[23] However, the majority judgment in *Howarth* seems to point in another direction. Speaking for himself, Martland and de Grandpré JJ., Pigeon J. wrote:

> [W]hile supervisory jurisdiction over federal boards is conferred generally upon the Trial Division *without any restriction as to the nature of the decision* . . . the new remedy created by s. 28 is restricted . . . *to* . . . *[t]hose that, for brevity, I will call judicial or quasi-judicial* . . . . The other class of decisions comprises those of an administrative nature not required by law to be made on a judicial or quasi-judicial basis. With respect to that second class, the new remedy of s. 28 . . . is not available, but *all* . . . *the common law remedies remain unchanged* by the *Federal Court Act*. The only difference is that the jurisdiction is . . . [now solely in] the Trial Division of the Federal Court.[24]

The majority approved also of the decision in *Calgary Power*[25] which rejected the contention that the duty to act judicially arose simply whenever private rights were affected. Having found the decision to revoke parole "not in any way a judicial determination",[26] it held that section 28 of the Federal Court Act was inapplicable.

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[18] Laskin C.J.C. and Spence J. concurring.

[19] R. v. Institutional Head of Beaver Creek Correctional Camp, *Ex parte* McCaud, [1969] 1 C.C.C. 371, 2 D.L.R. (3d) 545 (Ont. C.A.).

[20] In *Howarth*, *supra* note 10, at 469, 50 D.L.R. (3d) at 364.

[21] *Id.* at 458, 50 D.L.R. (3d) at 356.

[22] *Id.* at 469, 50 D.L.R. (3d) at 363.

[23] It would be rather narrow in that: (a) the Court of Appeal would have jurisdiction to review novel types of decisions; (b) decisions classified as "administrative" would not as a result of that finding be automatically excluded from review; (c) Parole Board decisions, traditionally resistent to judicial supervision, would now be reviewable under s. 28; and (d) decisions such as those made by the Parole Board and previously found unreviewable would not be seen as having identifiable judicial features. Thus, if the Federal Court of Appeal were to have jurisdiction with respect to those kinds of decisions, the Trial Division, as a result of s. 28(3) of the Federal Court Act, would not.

[24] *Supra* note 10, at 471-72, 50 D.L.R. (3d) at 351-53 (emphasis added).

[25] Calgary Power Ltd. v. Copithorne, [1959] S.C.R. 24, 16 D.L.R. (2d) 241.

[26] In *Howarth*, *supra* note 10, at 472, 50 D.L.R. (3d) at 352, the majority could "perceive no material difference between the expression 'not in any way a judicial determination' and 'not required by law to be made on a judicial or quasi-judicial basis' [as it appears in s. 28]".

The interpretation given the *Howarth* decision is obviously quite important for the purpose of determining whether or not there is much substance upon which the Trial Division's jurisdiction to issue *certiorari* can bite.[27] In *Martineau (No. 2)*,[28] Mahoney J. made use of the majority opinion in *Howarth* to support his decision that *certiorari* is indeed still available in certain instances in the Trial Division of the Federal Court. Besides citing the passage of Pigeon J. quoted above, Mr. Justice Mahoney also noted another part of that judgment, this time dealing with the duty to act fairly. On that point, Pigeon J. wrote:

> [C]ounsel for the appellant relied mainly on cases dealing with the duty of fairness lying upon all administrative agencies, in the context of various common law remedies. These are, in my view, completely irrelevant in the present case because a s. 28 application is an exception to s. 18 and *leaves intact all the common law remedies in the cases in which it is without application.*[29]

In the same passage Pigeon J. also stated (and this, too, did not escape the attention of Mr. Justice Mahoney):

> The Federal Court of Appeal did not consider [in *Howarth*], in quashing the [section 28] application, whether the Parole Board order could be questioned in proceedings before the Trial Division.[30]

In at least two other cases, however, the Federal Court of Appeal did consider whether or not, with referance to administrative decisions, the "duty to act fairly" might be said to arise from the provisions of section 28 of the Federal Court Act. Indeed, both in *Blais*[31] (where the licence of a trustee in bankruptcy was restricted) and *Lazarov*[32] (involving a refusal to grant a certificate of citizenship), the Court of Appeal held that the decision-makers, though exercising an administrative function, must act fairly[33] and impartially[34] and their decisions were accordingly reviewable under section 28.[35]

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[27] *See* Evans, *supra* note 1, at 133.

[28] *Supra* note 6.

[29] *Howarth*, *supra* note 10, at 472, 50 D.L.R. (3d) at 352 (emphasis added).

[30] *Id.*

[31] Blais v. Basford, *supra* note 13.

[32] Lazarov v. Secretary of State, [1973] F.C. 927, 39 D.L.R. (3d) 738 (App. D.).

[33] David Mullan, in *Fairness: The New Natural Justice*, 25 U. TORONTO L.J. 281, at 294 (1975) suggests that in those two cases the court saw fairness as being another name for natural justice, or a part of natural justice.

[34] In *Blais*, *supra* note 13, the court applied St. John v. Fraser, [1935] S.C.R. 441, [1935] 3 D.L.R. 465. Wiswell v. Greater Winnipeg, [1965] S.C.R. 512, 51 D.L.R. (2d) 754 and Bd. of Education v. Rice, [1911] A.C. 179, [1911-13] All E.R. Rep. 36 (H.L.) were referred to.

In *Lazarov*, *supra* note 32, the court discussed Durayappah v. Fernando, [1967] 2 a.c. 337, [1967] 2 All E.R. 152 P.C.); R. v. Gaming Bd., [1970] 2 Q.B. 417, [1970] 2 All E.R. 528 (C.A.) and *In re* H.K., [1967] 2 Q.B. 617, [1967] 1 All E.R. 226 (C.A.).

[35] It would appear from those two decisions that the Federal Court of Appeal had accepted the view that, under s. 28 of the Federal Court Act, "administrative decisions" were reviewable if they were required by law (common law or statute law) to be made on a judicial or quasi-judicial basis. (In *Blais*, *supra* note 13, at 162, Thurlow J. refers to

In subsequent cases, while the Court of Appeal does not seem to have ignored or rejected the concept of fairness, it appears to have proceeded very carefully to avoid any finding or suggestion that the "duty to act fairly", as it might relate to "purely administrative decisions",[36] is now part of the new review provision in section 28. For example, in *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board*,[37] Ryan J. (in the Federal Court of Appeal), expressing a dissenting opinion, noted that while the effect of the Commissioner's Directive on an inmate may not of itself require the Disciplinary Board to act in a judicial or quasi-judicial manner, neither would it necessarily free the Board from the obligation to act with fairness. But since the court was considering a section 28 application, Mr Justice Ryan felt that that was "another matter"[38] and in so concluding referred to a portion of the judgment of Pigeon J. in *Howarth*.[39]

In the same case, *Martineau (No. 1)*, Chief Justice Jackett (MacKay J. concurring) seemed less certain as to the existence of any form of judicial supervision with reference to "disciplinary decisions". He wrote:

> *As a matter of sound administration*, as such decisions touch in an intimate way the life and dignity of the individuals concerned, they must be, and must appear

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Cooper v. Wandsworth Bd. of Works, 14 C.B.N.S. 180, [1861-73] All E.R. Rep. 1554 (1863). In that case, Byles J. drew upon the authority of older cases and held that where a statute authorizing interference with property or civil rights was silent on the question of notice and a hearing, the courts would invoke the justice of the common law and supply the omission of the legislature. *See Cooper* at 194, [1861-73] All E.R. Rep. at 1557.)

Also, *Blais* and *Lazarov* seem to equate decisions of an administrative nature which must be made on a judicial or quasi-judicial basis with those where the common law has found an obligation of procedural fairness to exist (something *perhaps* less onerous than the rules of natural justice). In *Lazarov*, *supra* note 32, at 940, 39 D.L.R. (3d) at 749-50, Thurlow J. said:

> In my opinion . . . the rule *audi alteram partem* applies whenever the Minister proposes to exercise his discretion [and perform a function plainly administrative in nature] to refuse an application on the basis of facts pertaining to the particular applicant or his application and where he has not already had an opportunity in the course of proceedings . . . he must be afforded a fair opportunity in one way or another of stating his position with respect to any matters which in the absence of refutation or explanation would lead to the rejection of his application.

[36] That term, as used in this paper, refers to administrative decisions not required by law to be made on a judicial or quasi-judicial basis. It appears that Chief Justice Laskin used the term in the same way in Martineau v. Matsqui Institution Inmate Disciplinary Bd., 33 C.C.C. (2d) 366, at 369, 74 D.L.R. (3d) 1, at 5 (S.C.C. 1977), *aff'g* [1976] 2 F.C. 198, 12 N.R. 150 (App. D.) [hereinafter cited as *Martineau (No. 1)*].

[37] *Id.*

[38] *Id.* at 214, 12 N.R. at 174. In the end, however, Ryan J. "formed the opinion that the Penitentiary Service Regulations [ss. 2.28, 2.29, 2.29(g) and (h)]... and the Commissioner's Directive No. 213, both infused with legality by their enactment pursuant to section 29 of the *Penitentiary Act* [R.S.C. 1970, c. P-6], establish a structure for the administration of inmate discipline imposing a legal requirement that disciplinary decisions, in relation to serious and flagrant offences, must be made on quasi-judicial basis" and were therefore reviewable under s. 28 of the Federal Court Act. *Id.* at 216, 12 N.R. at 176.

[39] *Supra* note 10. Pigeon J.'s statement appears at note 29, *supra*.

> to be, as *fair* and *just* as possible.... Nevertheless, in my view, disciplinary decisions are essentially different in kind from the class of administrative decisions that are impliedly required, in the absence of express indication to the contrary, to be made on a judicial or quasi-judicial basis in such a way that they can be *supervised by judicial process*.... For that reason, I conclude that the disciplinary decisions here in question, even though of a penal nature and even though they are *required by administrative rules* to be made fairly and justly, are not decisions that are required to be made on a judicial or quasi-judicial basis within the meaning of those words in section 28 of the *Federal Court Act*.[40]

Those remarks, given the above emphasis, may suggest, at least with respect to a certain group of purely administrative decisions, that while they must be exercised fairly and justly, such a "duty" cannot be enforced by judicial process in any forum.[41] If that conclusion were to prevail, then a serious blow will have been rendered to the fairness concept as it has been developing in the United Kingdom and to a more limited extent in Canada. That possibility will be considered shortly in more detail, but at this point the recent decision of the Federal Trial Court in *Martineau (No. 2)* will be fully examined.

## III. MARTINEAU (NO. 2)

### A. *Background*

In one of the ever-decreasing judicial pronouncements upholding civil rights, Mahoney J. wrote:

> I take it that in Canada, in 1975, a public body, such as the respondent, authorized by law to impose a punishment, that was more than a mere denial of privileges, had a *duty to act fairly* in arriving at its decision to impose the punishment. *Any other conclusion would be repugnant*.[42]

Martineau, an inmate at the Matsqui Institution,[43] was convicted by the penitentiary's Disciplinary Board[44] of a "serious and flagrant" offence and punished by dissociation for fifteen days and placement on a restricted diet. He alleged that neither he nor a representative was permitted to be present when the Board received evidence of the person alleged to have participated with him in the prohibited conduct.[45]

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[40] *Supra* note 36, at 210-11, 12 N.R. at 171 (App. D.) (emphasis added).

[41] In *Martineau (No. 1)*, *supra* note 36, at 369, 74 D.L.R. (3d) at 5 (S.C.C.), Laskin C.J.C. (dissenting) wrote: "This . . . does not mean that all directives must necessarily be characterized as purely administrative or, as was said [in the court] below, as rules of management as to which no duty of compliance can be enforced by inmates."

[42] *Supra* note 6, at 318-19, 37 C.C.C. (2d) at 64 (emphasis added).

[43] This institution is constituted under the Penitentiary Act, R.S.C. 1970, c. P-6.

[44] It was not disputed that the Inmate Disciplinary Board is "a federal board, commission or other tribunal" within the meaning of s. 18 of the Federal Court Act.

[45] A complete account of the alleged misconduct appears in the Appeal Division judgment in *Martineau (No. 1)*, *supra* note 36, at 199-200, 12 N.R. at 152-53, where the Chief Justice quoted from the Incident and Offence Reports prepared by an officer of the Matsqui Institution in June of 1975.

The material provisions of the Penitentiary Act[46] and the regulations and directives made by its authority are elaborately set out in the judgment of Jackett C.J. in *Martineau (No. 1)*.[47] Briefly, under sections 29(1) and (2) of the Penitentiary Act the Governor-in-Council is authorized to make regulations in a number of enumerated areas including training, custody, treatment and generally for carrying into effect the purposes and provisions of the Act. The disciplinary offences of which Martineau was found guilty were created by section 2.29[48] of the Penitentiary Service Regulations.[49] Those regulations envisage that the listed offences may or may not be "serious or flagrant". "Indecent or disrepectful" offences are included as serious or flagrant offences under a Commissioner's Directive of 1974;[50] however, the same Directive makes it clear that the guidelines defining an offence as either major or minor were not intended to restrict the discretion of the Director or his delegate when assessing each case on its merits and determining the nature of the offence.[51]

If the offence is categorized as "serious or flagrant", the punishment is prescribed by subsection 2.28(4) of the Regulations and:

> shall consist of any one or more of the following:
> (a) forfeiture of the statutory remission;
> (b) dissociation for a period not exceeding thirty days
> (i) with a diet, during all or part of the period, that is monotonous but adequate and healthful, or
> (ii) without a diet;
> (c) loss of privileges.[52]

Recognizing the severity of the consequences upon conviction of such a disciplinary offence, the Commissioner in one of his Directives[53] set out a procedure for the hearing of such charges.[54] Among other things, the inmate is to be entitled to notice of the charges, a hearing, and an opportunity to make full answer and defence. Moreover, the decision as to

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[46] R.S.C. 1970, c. P-6.

[47] *Supra* note 36, at 199-210, 12 N.R. at 152-70.

[48] S. 2.29 reads in part:

> Every inmate commits a disciplinary offence who . . .
> (g) is indecent, disrespectful or threatening in his actions, language or writing toward any other person,
> (h) wilfully disobeys or fails to obey any regulation or rule governing the conduct of inmates.

[49] S.O.R./62-90 (96 Can. Gazette, Pt. II, 295).

[50] Commissioner's Directive No. 213, May 1, 1974. S. 7 of that Directive deals with "Serious and Flagrant Offences". The Commissioner's authority for issuing Directive No. 213 was said to be derived from sub. 29(3) of the Penitentiary Act and ss. 2.28, 2.29, 2.30 and 2.31 of the Penitentiary Service Regulations. That authority was not challenged in *Martineau (No. 1)* either in the Federal Court of Appeal or the Supreme Court of Canada.

[51] S. 9.

[52] S.O.R./62-90 (96 Can. Gazette, Pt. II, 295).

[53] Directive No. 213. S. 13 is entitled "Hearing of Charges for Serious and Flagrant Offences".

[54] As is evident, the phraseology of criminal proceedings is imported into the Regulations and Directives dealing with disciplinary offences.

guilt or innocence in all cases is to be based "solely on the evidence produced at the hearing and, if a conviction [is] . . . registered, it can only be on the basis that after a fair and impartial weighing of the evidence, there is no reasonable doubt"[55] as to the inmate's guilt.

In the Supreme Court of Canada, Pigeon J. (supported by three other Justices) found in *Martineau (No. 1)*[56] that while the detailed procedural provisions set out in Directive No. 213 require at least[57] that the decision of the Board be made fairly and justly, the Commissioner's Directive could not be considered as "law" within the wording of section 28 of the Federal Court Act.[58] Thus when a narrow majority of the Supreme Court affirmed the Federal Court of Appeal's lack of jurisdiction to supervise the disciplinary decision,[59] Martineau looked to the Trial Division of the same court for relief. He applied under Rule 474[60] for a preliminary determination of law, namely "whether or not the . . . Trial Division has jurisdiction to grant relief by way of *certiorari* in the circumstances".[61]

B. *In the Trial Division*

In rendering his decision, Mahoney J. first put his mind to examining the circumstances of the case and considered whether, as a result of the "sentence" imposed, any civil rights of the inmate as a person had been

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[55] *See* Directive No. 213, s. 13(d).

[56] *Supra* note 36.

[57] Note the comment of Pigeon J., *id.* at 373, 74 D.L.R. (3d) at 8: "I find it difficult to agree with the view that Directive No. 213 merely requires that a disciplinary decision such as the impugned order be made fairly and justly."

[58] *Id.* at 374, 74 D.L.R. (3d) at 9-10. In making that determination, Pigeon J. was examining the double negative phrase in s. 28(1) of the Federal Court Act and found that the disciplinary order made against the appellants was not "required by *law* to be made on a judicial or quasi-judicial basis". And in arriving at that conclusion Pigeon J. (three other Justices concurring) attached considerable significance to the fact that s. 29 of the Penitentiary Act authorizes penalties for the violation of regulations but not the Commissioner's Directives and that, while authorized by statute, the directives were clearly administrative, not legislative, in nature. Compare the views of Laskin C.J.C. (dissenting) in the same case: *id.* at 370, 74 D.L.R. (3d) at 5-6.

[59] In *Martineau (No. 1)*, *supra* note 36, Pigeon, Ritchie, Beetz and de Grandpré, JJ. concurred in the view that the Commissioner's Directives were made in his administrative capacity and that the disciplinary decision was not required by law to be made on a judicial or quasi-judicial basis and that accordingly the Federal Court of Appeal had no original supervisory jurisdiction. Judson J. agreed with the reasons delivered by Jackett C.J. in the Federal Court of Appeal and the conclusion that the Court of Appeal lacked jurisdiction in the circumstances.

[60] Federal Court Rule 474 reads as follows:

1. The Court may, upon application, if it deems it expedient to do so,
   a) determine any question of law that may be relevant to the decision of a matter . . .

and any such determination shall be final and conclusive for the purposes of the action subject to being varied on appeal.

[61] *Supra* note 6, at 313, 37 C.C.C. (2d) at 60.

abridged.[62] He noted, for example, that the Ontario Court of Appeal[63] had expressed the view that an inmate's right to liberty during his period of sentence on a criminal charge was essentially non-existent.[64] Mr. Justice Mahoney, however, had considerable difficulty accepting that proposition, at least in those instances where the decision as to place and manner of confinement had been made with a view to punishing the inmate for something other than the crime for which he was originally imprisoned. At the same time, he recognized that the law relating to prisoner misconduct — that is, the statute and regulations prescribing both the offence and punishment — was silent as to procedure. Nonetheless, he wrote, "it is manifest that the law envisages some process by which an inmate is to be determined to have committed a disciplinary offence, prescribed by law, as a condition precedent to the imposition of a punishment, also prescribed by law".[65]

Having reached that point in his reasoning, Mahoney J. then turned to the *Howarth* decision[66] and the comment made therein by Pigeon J.[67] that administrative decisions not required by law to be made on a judicial or quasi-judicial basis are still subject to the common law remedies and that in that regard, the only change made by the Federal Court Act was to put such jurisdiction in the Trial Division and to remove it from the provincial superior courts. Mahoney J. also seemed to infer from the judgment of Pigeon J. that a duty of fairness lies upon all administrative agencies in the context of the traditional remedies. In conclusion, he found that the decision to impose punishment affected the inmate's rights — at least, it involved more than a mere denial of privileges[68] — and that in rendering such a decision there was a duty upon the Disciplinary Board to act fairly. Accordingly, *certiorari* was indeed the appropriate remedy for breach of that duty.

Without commenting on the appropriateness of that decision from the point of view of what might be considered fair and just in a free society, it appears to have been derived from a reasonable interpretation of the

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[62] Mahoney J. expressed it this way: "[Whether] the sentence imposed deprived the inmate, in whole or part, of any civil right which, as a person, he continues to enjoy notwithstanding that he is an inmate and that some impairment and deprivation of his civil rights is necessarily incidental to that status." *Id.* at 316, 37 C.C.C. (2d) at 62.

From the outset, Mahoney J. recognized that it was no longer open to him to consider forfeiture of statutory remission as an example of a sentence depriving the inmate of a statutory civil right. It had been suggested in the Ontario Court of Appeal in *Ex parte McCaud*, *supra* note 19, that the decision of an institutional head to impose such a sentence without proper procedure would make it amenable to *certiorari*. However, in the Supreme Court, *supra* note 36, at 375, 33 C.C.C. (2d) at 11, Pigeon J. disagreed that the possibility of reduction of statutory remission by disciplinary decisions would imply a duty to act judicially.

[63] In *Ex parte McCaud*, *supra* note 19.

[64] *Id.* at 377, 2 D.L.R. (3d) at 551.

[65] *Supra* note 6, at 317, 37 C.C.C. (2d) at 63.

[66] *Supra* note 10.

[67] *See* quote at note 29, *supra*.

[68] *Supra* note 6, at 318, 37 C.C.C. (2d) at 64.

majority opinion in *Howarth*. Further, it seems also to be in accord with a comment made by Pigeon J. in *Martineau (No. 1)*: "With respect, I find it difficult to agree with the view that Directive No. 213 *merely* requires that a disciplinary decision such as the impugned order be made fairly and justly."[69]

While the decision of Mahoney J. in *Martineau (No. 2)* may be said to find support from inferences appropriately drawn from *dicta* in the Supreme Court of Canada, the Federal Court of Appeal does not appear to be moving in the same direction.

C. *In the Court of Appeal*

On appeal[70] from the judgment of Mahoney J., Chief Justice Jackett, speaking for a unanimous court, held that disciplinary convictions *cannot* be attacked under section 18 of the Federal Court Act by a writ of *certiorari* or proceedings in the nature of that contemplated by such a writ. He reasoned that:

> [w]hile the ambit of *certiorari* has expanded, . . . it continues to have application only where the decision attacked is either judicial in character or is required by law to be made on a judicial or quasi-judicial basis. *We have not been referred to any decision to the contrary.*[71]

In making those remarks, the Court of Appeal made it clear that it did not overlook the respondent's argument based on Lord Reid's statement in *Ridge v. Baldwin*[72] that there is no authority in *Rex v. Electricity Commissioners*[73] for the requirement of a duty "to act judi-

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[69] *Supra* note 36, at 373, 74 D.L.R. (3d) at 8 (emphasis added). Those remarks appear in the judgment of Pigeon J. following that Justice's reference to the judgment of Jackett C.J. in the same case at the Court of Appeal level, where the latter indicated that disciplinary decisions, though penal in nature and required by administrative rules to be made fairly, could not be supervised by judicial process and certainly not under s. 28 of the Federal Court Act.

[70] Martineau v. Inmate Disciplinary Bd., Matsqui Institution (No. 2), 22 N.R. 250, 40 C.C.C. (2d) 325 (F.C. App. D. 1978). Appeal to the Supreme Court of Canada will be heard on or about May 3, 1979.

[71] *Id.* at 252, 40 C.C.C. (2d) at 327 (emphasis added).

[72] [1964] A.C. 40, [1963] 2 All E.R. 66 (H.L.).

[73] [1924] 1 K.B. 171, [1923] All E. R. Rep. 150 (C.A.). In this judgment, Atkin L.J. said, at 205, [1923] All E.R. Rep. at 161:

> [T]he operation of the writs [of prohibition and *certiorari*] has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, courts of justice. Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, *and* having the duty to act judicially, act in excess of their legal authority, they are subject to . . . these writs. (emphasis added)

In R. v. Legislative Committee of the Church Assembly, *Ex parte* Haynes-Smith, [1928] 1 K.B. 411, at 415, [1927] All E.R. Rep. 696, at 699, Lord Hewart said:

> It is to be observed that in the last sentence . . . from the judgment of Atkin L.J. the word is not 'or', but 'and'. In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be *superadded* to that . . . the further characteristic that the body has a duty to act judicially. (emphasis added)

cially".[74] The court, however, put its emphasis on a more recent case, *Ex parte Royco Homes Ltd.*,[75] where reference was made to the same discussion[76] and which specifically concerned the issuance of *certiorari*.[77]

But, as Professor Mullan has observed, the *Royco* case states "specifically that classification is now irrelevant for remedial purposes".[78] Indeed, in that case, *certiorari* did issue to control the exercise by a planning authority of its jurisdiction under the Planning Acts, 1947-1971.[79] In *Royco*, Lord Widgery C.J. reasoned that, as a result of *Ridge v. Baldwin*, *certiorari* and the other prerogative remedies were now available where the tribunal had authority to determine questions affecting rights and that no other super-added requirement had to be met.[80]

However, as Chief Justice Jackett correctly noted,[81] in arriving at his decision Lord Widgery relied to a large extent on *Ex parte Chorley*,[82] where Lord Hewart C.J. queried whether the "proceeding was sufficiently near a judicial [one] to be the subject of *certiorari*. . .".[83] Ironically in that case, it was Lord Hewart himself who, after quoting the famous passage of Atkin L.J. in *Rex v. Electricity Commissioners*,[84] and finding

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[74] *Supra* note 70, at 254, 40 C.C.C. (2d) at 327. In Ridge v. Baldwin, *supra* note 72, at 75, [1963] 2 All E.R. at 77, Lord Reid said that Lord Hewart C.J. had put a gloss on the much-quoted passage of Atkin L.J. He said further:

> If Lord Hewart meant that it is never enough that a body simply has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially before it can be found to observe the principles of natural justice, then that appears to me impossible to reconcile with the earlier authorities.

[75] R. v. Hillingdon London Borough Council, *Ex parte* Royco Homes Ltd., [1974] 1 Q.B. 720, [1974] 2 All E.R. 643.

[76] In *Ex parte Royco Homes*, *id.*, Lord Widgery C.J. wondered why, in view of the clear *dictum* of Atkin L.J. in the *Electricity Commissioners* case, so little use had been made of the prerogative orders in this area of law. He agreed that previous efforts to use *certiorari* in this field may have been deterred by Atkin L.J.'s reference to it being necessary for the body affected to have the duty to act judicially. But he added, *id.*, at 728, [1974] 2 All E.R. at 648:

> If that is so, that reason for reticence on the part of the applicants was . . put an end to in . . . *Ridge v. Baldwin* [when] Lord Reid . . . pointed out that the additional requirement of the body being under a duty to act judicially was not supported by authority. Accordingly it seems to me now that that obstacle, if obstacle it were, has been cleared away. . . .

Again, it is noted that the Federal Court of Appeal in *Martineau (No. 2)* specifically refers to the *Royco* decision to assist it.

[77] Ridge v. Baldwin, *supra* note 72, was a case involving natural justice. It was not one of *certiorari* but of declaratory judgment.

[78] *Supra* note 33, at 287.

[79] Town and Country Planning Act 1971, U.K. 1971, c. 78.

[80] *See* discussion in note 76, *supra*. In *Royco*, Melford Stevenson J. was in full agreement with the judgment of Widgery C.J., and Bridge J. agreed with the discussion of the Chief Justice on the effect of Ridge v. Baldwin.

[81] *Supra* note 70, at 254, 40 C.C.C. (2d) at 327.

[82] R. v. Hendon Rural District Council, *Ex parte* Chorley, [1933] 2 K.B. 696, [1933] All E.R. Rep. 20.

[83] *Id.* at 702, [1933] All E.R. Rep. at 22.

[84] *Supra* note 73.

that the "decision . . . [in the instant case] affected the rights of subjects",[85] held that the order *nisi* for *certiorari* should be made absolute.[86] Arriving at the same conclusion, Avory J. also focused on the effect of the impugned decision on the rights of the subject.[87] He wrote simply: "[A]s council was therefore dealing with a matter which affected the rights of an individual, I think the case comes within the principles laid down in *Rex v. Electricity Commissioners*."[88]

Thus, while Lord Hewart in *Chorley* probed to discover whether or not the proceeding was "sufficiently near a judicial [one] to be the subject of *certiorari*", at least two of the three judges appear to have made positive determinations in that regard on the basis that rights were affected. As found by Mahoney J. in *Martineau (No. 2)*,[89] the inmate's civil rights as a person had been affected by the convictions. That determination does not appear to have been overturned on appeal. Accordingly, on the basis of *Chorley*, one might well expect the aggrieved party in *Martineau (No. 2)* to be equally entitled to *certiorari* relief.

That argument, however, seems to conflict with the Supreme Court's repeated rejection[90] of the view that simply because a decision affects the

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[85] *Supra* note 82, at 702, [1933] All E.R. Rep. at 22. Specifically, he said: "[T]he decision at which the Hendon Rural District Council arrived was a decision which conferred, contingently at any rate, a legal right, and affected the rights of subjects."

In *Chorley*, the council had passed resolutions for the preparation of a town planning scheme and the scheme was awaiting approval of the Minister of Health who, under appropriate statutory authority, had made an Interim Development Order under which persons could apply to council for permission to build pending the Minister's approval. This permission, if granted, would safeguard the applicants' statutory right to compensation in the event their property was injuriously affected by the making of the town planning scheme. Hence Lord Hewart's remarks that the decision of council to permit the development conferred a legal right to compensation in certain circumstances.

[86] *Compare* the judgment of Lord Hewart in *Chorley* with that rendered by him in R. v. Legislative Committee of the Church Assembly, *supra* note 73.

[87] *Supra* note 82, at 704, [1933] All E.R. Rep. at 23. He wrote:

> I think we ought to apply the principle which was laid down by Brett L.J. . . . in *Reg. v. Local Government Board* [10 Q.B.D. 309, at 321, 48 L.T. 173, at 182 (1882)] where he said that the jurisdiction of the Court ought to be exercised widely when dealing with matters which are not perhaps strictly judicial, but in which the rights and obligations of persons may be affected. . . .

[88] *Id.* In the same case, Humphreys J. specifically referred to the phrase "to act judicially" in the passage of Atkin L.J. in the *Electricity Commissioners* case, *supra* note 73. For assistance as to the meaning of those words, he looked to the judgment of Fletcher Moulton L.J. in R. v. Woodhouse, [1906] 2 K.B. 501, at 535, 95 L.T. 367, at 378, where the Lord Justice said: "There must be the exercise of some right or duty to decide in order to provide scope for a writ of *certiorari* at common law." In the end, Humphreys J. concluded that it was "impossible to say in this case that the Hendon Rural District Council was not acting in a quasi-judicial manner in hearing and determining the application for permission to develop and the objections which were made to it". *Id.* at 706, [1933] All E.R. Rep. at 24.

[89] *Supra* note 6.

[90] Note the reference of Pigeon J. to *Calgary Power* (*supra* note 25) in *Howarth*, *supra* note 10, at 474, 50 D.L.R. (3d) at 353-54. In *Martineau (No. 1)*, *supra* note 36, at 377, 74 D.L.R. (3d) at 12, Pigeon J. wrote: "At the risk of repetition I will stress that this

rights of an individual it gives rise to a duty to act judicially.[91] However, that view of the Court has usually been asserted in the context of determining procedural standards and not, strictly speaking, as to when *certiorari* might issue.[92] Still, the judgment of the Supreme Court of Canada in *Martineau (No. 1)*[93] must be considered. In that case it was held that the decisions of the Disciplinary Board were not required by "law" to be made on a judicial or quasi-judicial basis (and that the Court of Appeal had no jurisdiction to review such decisions at first instance). But it must be emphasized again that under the Federal Court Act "the new remedy created by s. 28 is restricted in its application"[94] by, among other things,[95] the nature of the decision. *Certiorari* is another matter. As stated by de Smith:

> [While judges occasionally] . . . still speak as if the availability of *certiorari* or prohibition depends on whether the act impugned is judicial or imports an implied duty to act judicially . . . it has also been held that it is enough for the competent authority to be under a "duty to act fairly".[96]

Thus, for example, we find that in *Ex parte Chris Foreign Foods*,[97] Lord Parker C.J. in issuing *certiorari* made it clear that it was "quite unnecessary"[98] to come to any conclusion as to whether the tribunal was

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does not mean that whenever the decision affects the right of the applicant, there is a duty to act judicially."

[91] Martland J., in Calgary Power Ltd. v. Copithorne, *supra* note 25, at 30, 16 D.L.R. (2d) at 246-47, wrote:

> [T]he respondent submitted that a function is of a judicial or quasi-judicial character when the exercise of it effects . . . private rights. . . . This proposition . . . goes too far. . . . In determining whether or not a body . . . is exercising judicial or quasi-judicial duties, it is necessary to examine the defined scope of its functions *and then* to determine whether or not there is imposed a duty to act judicially. (emphasis added)

[92] *See Calgary Power, id.* In this case the appropriate procedural standards of the agency were in issue. On its facts, the case did not require any decision as to the scope of *certiorari*. However, the Court did rely on Nakkuda Ali v. Jayaratne, [1951] A.C. 66, 66 T.L.R. 214 (P.C.) and that case does seem to predicate the availability of *certiorari* on any ground where the rules of natural justice apply. This matter is discussed briefly by Evans, *supra* note 1, at 135.

[93] *Supra* note 36.

[94] Pigeon J. in *Howarth*, *supra* note 10, at 471, 50 D.L.R. (3d) at 351.

[95] As noted earlier, there are two requirements to be met before the Federal Court of Appeal can be said to have jurisdiction under s. 28 of the Federal Court Act. First, there must be a "decision or order" and second, it must not be one "of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". In a broader sense, there are other requirements. These are examined in D. MULLAN, THE FEDERAL COURT ACT, ADMINISTRATIVE LAW JURISDICTION 34-39 (1977).

[96] S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 347 (3d ed. 1973). In support of that statement, de Smith cited R. v. Birmingham City Justice, *Ex parte* Chris Foreign Foods, [1970] 1 W.L.R. 1428, [1970] 3 All E.R. 945 (Q.B. Div'l Ct.) and R. v. Liverpool Corp., *Ex parte* Liverpool Taxi Fleet Operators' Ass'n, [1972] 2 Q.B. 299, [1972] 2 All E.R. 529 (C.A.). Those cases are discussed by Mullan, *supra* note 33, at 305-07.

[97] *Id.*

[98] *Id.* at 1432, [1970] 3 All E.R. at 949.

performing a judicial or quasi-judicial function or acting throughout as an administrator. The other two members of the Bench expressed exactly the same view.[99]

In any event, the Federal Court of Appeal in deciding whether or not *certiorari* might issue in *Martineau (No. 2)* did not appear in the least inclined to take the approach suggested by *Chris Foreign Foods*. While Jackett C.J. conceded that it was not clear "just how strong a resemblance there must be" before it can be said that a decision "bears some resemblance to the judicial process" and be the subject of *certiorari*, he did make it clear that "[a]ny decision that is not judicial but is 'sufficiently near a judicial decision to be the subject of a writ of *certiorari*' is, in our view, a decision that is required to be made on a 'quasi-judicial basis' within the meaning of those words in s. 28".[100]

It appears then, in terms of the judicial/administrative classification, that if a decision cannot be reviewed and set aside under section 28 of the Federal Court Act, then it cannot be quashed by *certiorari*. In arriving at that conclusion the reasoning of the court is not particularly coherent. However, by referring to the judgment, footnotes and Appendix, the following progression can be synthesized:

1. *Certiorari* only issues where the decision attacked is judicial or is required by law to be made on a judicial or quasi-judicial basis.[101]

2. If a decision is not judicial but is sufficiently near a judicial decision to be the subject of a writ of *certiorari*, then that decision must be made on a "quasi-judicial basis" within the meaning of section 28.[102]

3. While no attempt is made to define "quasi-judicial", sections 18 and 28 of the Federal Court Act strongly suggest that the words "quasi-judicial basis" were intended to include every method of reaching a decision or order that would support an application by way of *certiorari* other than decisions made on a purely "judicial basis".[103]

That reasoning and conclusion lead to the interesting question of whether a decision which is "sufficiently judicial in nature" may be reviewed *either* under section 18 *or* section 28. From a reading of the Court of Appeal's judgment in *Martineau (No. 2)*, one would be inclined to give a positive response to that query. The Appendix to that judgment gives further weight to that conclusion. In paragraph four, Jackett C.J. wrote:

> Where a person is aggrieved by a decision that should have been made on a quasi-judicial basis, he may attack it by way of *certiorari*, proceedings in the nature of *certiorari* [under section 18(b) of the Federal Court Act] or s. 28 proceedings. . . .[104]

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[99] *See* the reasons of James J., *id.* at 1434, [1970] 3 All E.R. at 949. Cooke J. agreed both with Lord Parker and James J.

[100] *Supra* note 70, at 254, 40 C.C.C. (2d) at 327.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 254, 40 C.C.C. (2d) at 328 (emphasis added).

Moreover, when one considers that those remarks appear in response to a question of law remitted to the court — namely, whether or not the Trial Division has jurisdiction to grant relief by way of *certiorari* — one seems further compelled to accept the conclusion that where the appropriate "judicial" classification can be made, the Trial Division retains its supervisory jurisdiction by way of *certiorari*.

It is my view, however, that the court does not in fact hold that opinion, nor did it intend in any way or form to move towards establishing that principle. That the implication arises from what was written has already been canvassed. What is here being suggested, however, is that it was neither knowingly nor intentionally inserted.[105] If anything, it ensues from a failure of the Court of Appeal to render a carefully worded and fully explained judgment and its attempt to "avoid misunderstanding" by inserting footnotes and an Appendix.

At the same time, it is my view that the court did not want to permanently close the door on *certiorari* in the Trial Division. In that regard, the crucial line of its decision appears to be sufficiently qualified: "[I]t should be adjudged that the Trial Division does not have jurisdiction to grant the relief sought in the proceedings in that Court."[106] Nonetheless, in light of the ultimate decision and explanation in *Martineau (No. 2)*, and assuming that quasi-judicial decisions *cannot* be attacked with equal facility either by *certiorari* or section 28 proceedings, then it is difficult to see what is left for the traditional remedy.[107]

In any event, it is apparent that the Court of Appeal has missed or avoided another golden opportunity for clarifying once and for all the delicate relationship between review under sections 18 and 28 and the effect of section 28(3) on the Trial Division's jurisdiction. The *Martineau (No. 2)* decision again underlines the need, as this writer has previously stated:

> to end speculation as to the availability of *certiorari* in the Trial Division, [by] legislative intervention . . . [and] to specify the purposes for which it is available in that forum. And more importantly, a simple form of proceeding in the Trial Division like that available at present in . . . Ontario . . . [should be implemented].[108]

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[105] Refer again to s. 28(3) of the Federal Court Act (quoted in note 9, *supra*). There are a number of clear statements in the Trial Division of the Federal Court suggesting that the whole field of *certiorari* is now occupied by s. 28(1) of the Federal Court Act. *See, e.g.*, Sherman & Ulster Ltd. v. Comm. of Patents, 14 C.P.R. (2d) 177, at 181 (F.C. Trial D. 1977). *See also* the comments of Dickson J. in *Howarth*, *supra* note 10, at 458, 50 D.L.R. (3d) at 356.

[106] *Supra* note 70, at 253, 40 C.C.C. (2d) at 327 (emphasis added).

[107] The following cases seem to suggest some possibilities for *certiorari*: Royal American Shows v. M.N.R., [1976] 1 F.C. 269, 29 D.T.C. 5375 (Trial D.); Cathcart v. Public Serv. Comm'n, [1975] F.C. 407, 56 D.L.R. (3d) 1 (Trial D.); Auger v. Can. Penitentiary Service, [1975] F.C. 330 (Trial D.). *See also* those cases discussed by Evans, *supra* note 1, at 138-40. *Compare* discussion of the same cases by this writer, *supra* note 2, at 503-05.

[108] Fera, *LRC's Proposals for Reform of the Federal Judicial Review System — A Critical Examination and Counterpoise*, 8 MAN. L.J. 529, at 546 (1977).

David Mullan has observed that there have "been instances in which the formal requirements of the old remedies in their new home have led to a failure on the part of the [Trial Division] to reach the merits of what may well have been arguable cases".[109] The *Martineau (No. 2)* decision may be yet another example. If there were any basis for saying that the applicant had a legal grievance,[110] then it may also be said that *certiorari* was not seen as the appropriate legal remedy in the circumstances. Equally significant is the fact that section 18(b)[111] was apparently not found to be of any assistance to the applicant in providing some form of legal relief.

## IV. The Fairness Doctrine

Finally, though it has now been held that "convictions" of an inmate are administrative in nature and not amenable to review under section 28,[112] or to *certiorari*, or to proceedings in the nature of *certiorari*,[113] may it nonetheless be said that there is still a duty on the person making such decisions to "act fairly"? As Lord Parker C.J. stated in *In re H.K.*[114] with reference to an immigration matter:

> [E]ven if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate . . . let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not . . . a question of . . . being required to act judicially, but of being required to act fairly. Good administration and . . . a bona fide decision must . . . require not merely impartiality . . . but [a *limited application* of] the so-called rules of natural justice. . . .[115]

As noted earlier, Jackett C.J. in *Martineau (No. 1)* seemed to suggest that while "as a matter of sound administration" disciplinary decisions "must be, and must appear to be as fair and just as possible", they may not be amenable to supervision by judicial process.[116] That view appears to have been confirmed and elaborated upon by the same court in *Martineau (No. 2)*. More significantly, it would appear that all administrative decisions not required by law to be made on a "quasi-judicial basis" are, as seen by the Court of Appeal, no more than "rules of management" for

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[109] *Supra* note 95, at 42.

[110] Although not clear on this point, the Appendix does seem to suggest that the applicant in *Martineau (No. 2)* may be said to have had some form of a legal grievance. In that regard, *see* the opening paragraph and paragraph 4. *Supra* note 70, at 253-54, 40 C.C.C. (2d) at 327-28. However, what is expressed in the Appendix is what the court described as "tentative views" and not a "concluded position".

[111] Apparently, neither counsel for the applicant nor the court proffered s. 18(b) of the Federal Court Act as a device for cutting across the traditional restrictions of the writs. In other words, given that *certiorari* was not available, there was no suggestion that something in the nature of the equitable remedies might here help the aggrieved person.

[112] *Martineau (No. 1)*, *supra* note 36 (S.C.C.)

[113] *Martineau (No. 2)*, *supra* note 70.

[114] *Supra* note 34.

[115] *Id.* at 630, [1967] 1 All E.R. at 231.

[116] *Supra* note 36, at 210-11, 12 N.R. at 171 (App. D.).

which (apart from an allegation of nullity or voidability *if* the decision becomes the subject of certain legal proceedings) there is only a *political remedy*.

That point of view was candidly expressed by the Chief Justice in the Appendix[117] to *Martineau (No. 2)*. He said that what is meant by deciding something on a quasi-judicial basis (leaving aside possible bias) is fundamentally that it must be decided on a fair and just basis. Ordinarily, this requires that a person affected be given a fair opportunity to answer what is alleged against him, but in circumstances where that is not feasible (in immigration border examinations and proceedings of special tribunals such as the English Gaming Board, for example) something less will meet the requirement.

*Certiorari*, proceedings in the nature of *certiorari*, and section 28 applications are proceedings the purpose of which is to have orders or decisions reviewed and set aside if *ultra vires*[118] or voidable. A "decision" that is *ultra vires* or voidable does not gain force or effect merely because such a proceeding is not available. It follows that such a "decision" cannot be relied on as a defence to a proceeding in a court for something that apart from that decision, would be illegal. Depending on the circumstances, therefore, a decision which is *ultra vires* or voidable would not be a defence to a legal proceeding such as *habeas corpus*, *mandamus* or prohibition.

Pausing here for a brief comment, it may be that, to this point in its reasoning, the court is still referring only to decisions of a quasi-judicial nature which have (for reasons not explained) no legal remedy. However, in the next few paragraphs the court seems to go on to adopt the view that purely administrative decisions may also be *ultra vires* or voidable and that, while there is no legal remedy to quash or set them aside for a particular deficiency in the Federal Court, such decisions could not be used as a defence in certain legal proceedings. If that is so, could it be that the only principle the Court of Appeal was attempting to state in this case is that while purely administrative decisions affecting rights are not reviewable in the Trial Division by way of *certiorari* or proceedings in the nature of *certiorari* for procedural deficiencies, they may be attacked by way of *habeas corpus*, prohibition or *mandamus*? That appreciation of what was written would, it seems, be strongly dependent upon the court's view of what constitutes an *ultra vires* or voidable decision.[119] But there are still other difficulties with that "interpretation".

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[117] *Supra* note 70, at 253-54, 40 C.C.C. (2d) at 327-28. Again, it is noted that the views expressed therein by the court are seen as "tentative" and not as a "concluded position".

[118] *Id.* at 253, 40 C.C.C. (2d) at 328. It would appear that Chief Justice Jackett used that expression synonymously with "null and void" or a "nullity". For an excellent discussion of the words "void" and "voidable" in the context of administrative law, *see* Durayappah v. Fernando, *supra* note 34, at 353-54, [1967] 2 All E.R. at 159-60 (Lord Upjohn).

[119] For assistance, *see* Chief Justice Jackett's discussion of void and voidable decisions in Wilby v. M.M.I., [1975] F.C. 636, at 641, 59 D.L.R. (3d) 146, at 150 (App. D.).

For instance, in the list of legal proceedings against which an *ultra vires* or voidable decision would be no defence, why did the court include prohibition and exclude declaratory relief? It is still a widely held view that prohibition will issue only against bodies which are required to act in a judicial capacity,[120] whereas a declaratory judgment is available irrespective of whether the decision in issue[121] is judicial or administrative. Moreover, the Federal Court of Appeal's implicit view[122] of both *In re H.K.*[123] and *Regina v. Gaming Board*[124] cannot be ignored. In the latter case especially, it was made abundantly clear that the concept of fairness possessed some procedural content with reference to purely administrative decisions, that is, non-judicial and non-quasi-judicial decisions.[125] However, the Federal Court of Appeal does not appear to recognize those assertions. Indeed, as Jackett C.J. recognized, the *Martineau (No. 2)* decision will be open to much speculation and will undoubtedly be "misunderstood".

Continuing his argument, Jackett C.J. asserted that decisions which had to be made on a quasi-judicial basis ordinarily required giving the person affected a fair opportunity to answer the allegations against him, and then went on to say:

> 3. There are, however, ministers and officials who have purely administrative powers that are not subject to judicial review. Such persons must also exercise

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[120] *See* DE SMITH, *supra* note 96, at 64. *See also* "B" v. Dep't of Manpower and Immigration, [1975] F.C. 602, at 608-13, 60 D.L.R. (3d) 339, at 345-49 (Trial D.).

[121] In R. v. Bales, *Ex parte* Meaford General Hospital, [1971] 2 O.R. 305, 17 D.L.R. (3d) 301 (H.C.), prohibition was denied and a declaration issued instead because the function was administrative in nature. *See also* Grauer Estate v. The Queen, [1973] F.C. 355, 5 L.C.R. 249 (Trial D.) where prohibition was refused against an administrative decision. And in Lingley v. Hickman, [1972] F.C. 171, 33 D.L.R. (3d) 593 (Trial D.) declaration was held to be available with respect to an "administrative" decision giving rise to a duty to comply with the rules of natural justice and doubt was also expressed as to the availability of *certiorari*. Heald J. cited the following authorities: I. ZAMIR, THE DECLARATORY JUDGMENT 119 (1962); Barnard v. Nat. Dock. Lab. Bd., [1953] 2 Q.B. 18, at 41, [1953] 1 All E.R. 1112, at 1119 (C.A.) (Lord Denning); Pyx Granite Co. v. Ministry of Housing and Local Gov't, [1958] 1 Q.B. 554, at 571, [1958] 1 All E.R. 625, at 632 (C.A.) (Lord Denning) and another English case, Worthing Corp. v. Southern Ry., [1942] Ch. 178, [1942] 1 All E.R. 256, which held that declaratory proceedings may be especially convenient where the determination of the question in dispute depends on the construction of legislative provisions.

[122] *See* the court's references to immigration border examinations and the decision of the English Gaming Board in the context of quasi-judicial decisions, *supra* note 70, at 254, 40 C.C.C. (2d) at 328.

[123] *Supra* note 34. The Federal Court of Appeal seems to ignore both Lord Parker's judgment in *In re* H.K. (*see* quote in text at note 115, *supra*) and Lord Denning's subsequent reliance on that judgment in holding (in R. v. Gaming Bd., *supra* note 34) that the Board must act fairly.

[124] *Supra* note 34, at 430, [1970] 2 All E.R. at 533-34. And in subsequent decisions, Lord Denning has made it clear that classification of functions no longer is relevant in deciding whether the standards of natural justice or fairness apply. *See, e.g.*, Pearlberg v. Varty, [1971] 1 W.L.R. 728, [1971] 2 All E.R. 552 (C.A.) or *In re* Pergamon Press Ltd., [1971] Ch. 388, [1970] 3 All E.R. 535 (C.A.).

[125] *See* R. v. Gaming Bd., *id.* at 430, [1970] 2 All E.R. at 533-34.

> their powers on a fair and just basis because they are acting on behalf of the public; but they are answerable, *not to the Courts*, but to their superiors or to the appropriate Legislature. They are not required to act on a quasi-judicial basis.
> 4. Where a person is aggrieved by a decision that should have been made on a quasi-judicial basis, he may attack it by way of a *certiorari*, proceedings in the nature of *certiorari or* s. 28 proceedings; but where he has a grievance in respect of other decisions that are required to be made on a fair or just basis (apart from an allegation of nullity or voidability if the decision becomes the subject of legal proceedings) *his remedy is political*.[126]

Those remarks, too, will undoubtedly generate more confusion and more litigation. This writer, then, finds a new basis upon which to hinge a previous recommendation and a new opportunity to reiterate:

> [S]trictly administrative decisions should be reviewable and . . . a new attempt should be made to provide for such review [in the Federal Court] by means of legislative intervention. However, the grounds of review should be expressly defined and limited so as to dissipate and avoid much of the confusion now evident about the existence of the "duty to act fairly" and the exact scope of the procedural requirements it encompasses.[127]

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[126] *Supra* note 70, at 254, 40 C.C.C. (2d) at 328 (emphasis added).
[127] *Supra* note 108, at 535-36.