FEDERAL JUDICIAL REVIEW JURISDICTION UNDER SECTION 2 (g)* OF THE FEDERAL COURT ACT: THE POSITION OF SECTION 96 JUDGES

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I. INTRODUCTION

The thoughtful observer of Canada's current constitutional debate cannot help but be impressed by the quality of work being done on basic problems associated with reshaping Canadian federalism. Yet he will also be troubled by the lack of attention being devoted to the "judicial power"; aside from issues affecting the Supreme Court and the appointment of judges there has been little comment on this aspect of the Canadian legal system.[1] In particular, the question of what is known in the United States

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* While the individual definitions in s. 2 of the Federal Court Act are not preceded by reference letters, the "(g)" is added for purposes of this article and should be taken to refer to the definition of "federal board, commission or other tribunal". *See infra*, note 9.

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[1] *See* THE TASK FORCE ON CANADIAN UNITY, A FUTURE TEACHER 129-30 (1979) which makes several recommendations respecting judicial power, all but one of which (entrenchment of judicial power) relate to the Supreme Court of Canada. The Constitutional Amendment Bill, Bill C-60, 30th Parl., 3rd sess., 1977-78 (first reading), devotes 21 clauses to the judicial power, almost all of which propose amendments to the Supreme Court. Clause 116 deals with federal jurisdiction, but it essentially reproduces s. 101 of the B.N.A. Act with only a minor (and for present purposes inconsequential) amendment. Because s. 96 of the B.N.A. Act is to be replaced by clause 117 of Bill C-60, and s. 101 by clause 116, two amendments to the definition section of the Federal Court Act would be required, although these would merely substitute the new numbers. The result is that the proposed Constitution does not seriously consider the judicial system in Canada. Only the REPORT OF THE CANADIAN BAR ASSOCIATION, COMMITTEE ON THE CONSTITUTION, TOWARDS A NEW CANADA (1978) addresses judicial power in any detail. Recommendation 6, *id.* at 47, specifically deals with the concerns of this comment. Furthermore, it should be noted that the Canadian Bar Association has struck a special committee to examine the Federal Court Act.

as "Federal Jurisdiction"[2] has escaped detailed scrutiny, and if mentioned at all, is dismissed with vague references to the *status quo*.[3]

Nevertheless, while the great issues of reform are attracting the attention of scholars and politicians, in its own way the Supreme Court of Canada, with the assistance of the Federal Court[4] and provincial superior courts,[5] is effecting an evolution in the field of federal jurisdiction. Questionable judgments by Canada's highest court restricting the scope of the term "laws of Canada" and hence, of section 17 of the Federal Court Act, have been rendered in the past.[6] Now, however, a frontal assault on the foundation of the judicial review jurisdiction of the Federal Court is being mounted. In two recent judgments, *Herman v. Attorney-General of Canada*[7] and *Minister of National Revenue v. Coopers and Lybrand*,[8] the Supreme Court has effectively reversed the implied structure of section 2(g) of the Federal Court Act and negatived, over a wide range of situations, one of the express purposes for which the Federal Court was created.[9]

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[2] *See, e.g.*, HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. P. Bator 1973), for an examination of the issue in the United States.

[3] Of the sources cited, *supra* note 1, only the C.B.A. Report discusses federal jurisdiction critically. *See* TOWARDS A NEW CANADA, at 52, where various alternative conceptions of federal judicial power are discussed briefly and then referred to the Federal Court Act Committee of the C.B.A. However, no firm position is taken on any of the issues raised.

[4] Smith v. The Queen, [1978] 1 F.C. 631, 81 D.L.R. (3d) 324 (Trial D. 1977); The Queen v. Rhine, [1978] 1 F.C. 356, 75 D.L.R. (3d) 730 (Trial D. 1977); Sumitomo Shoji of Can. Ltd. v. The Juzan Maru, [1974] 2 F.C. 488, 49 D.L.R. (3d) 277 (Trial D.).

[5] *Re* Ostello, 9 O.R. (2d) 780, 26 C.C.C. (2d) 261 (H.C. 1975); *Re* McLeod, [1973] 5 W.W.R. 129, 38 D.L.R. (3d) 251 (N.W.T.S.C.); *Re* Clark, 17 O.R. (2d) 593, 81 D.L.R. (3d) 35 (H.C. 1977). For a discussion of the *Clark* decision *see* Macdonald, Comment, 10 OTTAWA L. REV. 456 (1978).

[6] Quebec N. Shore Paper Co. v. Canadian Pac. Ltd., [1977] 2 S.C.R. 1054, 71 D.L.R. (3d) 111 (1976); McNamara Constr. Ltd. v. The Queen, [1977] 2 S.C.R. 654, 75 D.L.R. (3d) 273. *See* Hogg, Comment, 55 CAN. B. REV. 550 (1977).

[7] [1979] 1 S.C.R. 729, 23 N.R. 235, 91 D.L.R. (3d) 3 (1978).

[8] [1979] 1 S.C.R. 495, 24 N.R. 163, 92 D.L.R. (3d) 1 (1978).

[9] The Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 2(g), provides that:

> "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *British North America Act, 1967*.

Implicitly this section vests review of all power-holders under federal statutes in the Federal Court, subject to three specific exemptions. Federal jurisdiction is, hence, *the principle, not the exception*. Various authors have commented on the reasons why the Federal Court was created. *See, e.g.*, Mullan, *The Federal Court of Canada: A Misguided Attempt at Administrative Law Reform*, 23 U. TORONTO L.J. 14 (1973); Chalmers, *The Federal Court as an Attempt to Solve Some Problems of Administrative Law in the Federal Area*, 18 MCGILL L.J. 206 (1972); Jackett, *The Federal Court of Appeal*, 11 OSGOODE HALL L.J. 253 (1973). In each of these articles the point is stressed that creation of a Federal Court will overcome divergences in approach, interpretation, and procedure amongst provincial courts in the review of federal administrative agencies.

According to the Court,[10] at issue in both of these cases was the question whether a section 96 judge acting pursuant to the Income Tax Act[11] was performing his functions *qua* judge, or as *persona designata*. On this analysis, if the former, he would fall within the section 96 judge exception to federal review under section 2(g) of the Federal Court Act, and his decisions would be subject to challenge only by an appeal, according to the terms of the Judicature Act of the province for which he was appointed. If the latter, the 2(g) exception would not apply and he would be acting as a "federal board, commission or other tribunal" subject to being judicially reviewed exclusively by the Federal Court. In *Herman*, a unanimous court[12] held that Madam Justice Boland of the Ontario Supreme Court, in hearing a claim of privilege under section 232(4) of the Income Tax Act, was acting in her judicial capacity. In *Coopers and Lybrand* the court held, again unanimously (*per* Dickson J.), that His Honour Judge Zalev of the Ontario County Court was acting in his judicial capacity in authorizing a seizure under section 231(4) of the Income Tax Act. In both judgments the Court concluded that a section 96 judge acts as *persona designata* under section 2(g) of the Federal Court Act only if he is "exercising a peculiar, and distinct, and exceptional jurisdiction, separate from and unrelated to the tasks which he performs from day-to-day as a judge, and having nothing in common with the Court of which he is a member".[13]

Although phrased in the mundane and technical language of *persona designata*[14] these two seemingly non-controversial decisions are crucial to the shape of Canadian federalism, for at the bottom they rest on fundamental views about the nature of the judicial power in our federal system. Hence, at this time of constitutional introspection, both their legal and policy justification merit close analysis.

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[10] It will be argued below that characterizing the issue in this way itself undermines the intent and purpose of s. 2(g) by raising a psychological presumption that the exceptions to federal review stated therein are ascriptive and not descriptive. See Part VI, at p. 703 *infra*.

[11] S.C. 1970-71-72, c. 63, *as amended*.

[12] Dickson J. authored the opinion of the Court in which Pigeon, Beetz, and Pratte JJ. concurred. Laskin C.J. wrote his own concurring judgment.

[13] *Herman, supra* note 7, at 749, 23 N.R. at 249, 91 D.L.R. (3d) at 18; *Coopers and Lybrand, supra* note 8, at 509, 24 N.R. at 176-77, 92 D.L.R. (3d) at 11.

[14] For a comprehensive and at times highly entertaining treatment of these technicalities, *see* Gordon, *Persona Designata*, 5 CAN. B. REV. 174 (1927). At the outset it should be noted that although the expression *persona designata* is usually used with respect to judges, there is no reason why it cannot be applied to any person or body who exercises inherent or general statutory powers in a capacity independent of the statute conferring specified powers. Hence the "two-hats" theory of federal inter-delegation really is a particularization of the *persona designata* concept.

II. THE SCOPE OF THE EXPRESSION "FEDERAL BOARD, COMMISSION OR OTHER TRIBUNAL" IN SECTION 2(g) OF THE FEDERAL COURT ACT

At the time the Federal Court Act was passed, some commentators observed that drawing the jurisdictional boundaries for this new tribunal would be a difficult task.[15] Almost a decade of experience has confirmed these apprehensions,[16] as the attempt to clearly demarcate the judicial review powers of the new court by enacting a comprehensive definition of "federal board, commission or other tribunal" has proven unsuccessful.[17]

Federal judicial review jurisdiction is founded on the definition in section 2(g) of the Act.[18] It appears from this section that, for the purposes of the Federal Court Act, there are only four categories of persons or bodies who may exercise powers or jurisdiction by or under an Act of Parliament: (i) those bodies constituted under a provincial statute; (ii) those persons appointed under a provincial statute; (iii) those persons appointed under section 96 of the B.N.A. Act; and (iv) all other bodies or persons, however appointed.[19] While the status of bodies constituted or persons appointed under provincial statutes has created some controversy, until recently courts generally have been sympathetic to the aims of the Federal Court Act.[20] The language chosen to confer jurisdiction under section 2(g) is not, however, felicitous, for the criterion of inclusion, "having, exercising or purporting to exercise jurisdiction or powers," refers to the source of the power, whereas the criteria of exclusion, "other than a body constituted or established" or "any such person or persons appointed",

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[15] *See* Nicholls, *Federal Proposals for Review of Tribunal Decisions*, 18 CHITTY'S L.J. 254 (1970); Fera, *The Federal Court of Canada: A Critical Look at its Jurisdiction*, 6 OTTAWA L. REV. 99 (1973).

[16] *See, e.g.*, LAW REFORM COMMISSION OF CANADA, ADMINISTRATIVE LAW — FEDERAL COURT — JUDICIAL REVIEW, WORKING PAPER 18, at 9-14 (1977); MULLAN, THE FEDERAL COURT ACT: ADMINISTRATIVE LAW JURISDICTION 17-22, 73-74 (1977); Evans, *The Trial Division of the Federal Court: An Addendum*, 23 MCGILL L.J. 133 (1977); Lemieux & Vallières, *La compétence de la cour fédérale comme organisme bidividionnel de contrôle judiciaire*, 17 C. DE D. 379 (1976); Côté, Comment, 50 CAN. B. REV. 519 (1972); Gibson, Comment, 54 CAN. B. REV. 372 (1976); Macdonald, *supra* note 5; Hogg, *supra* note 6.

[17] MULLAN, *supra* note 16, at 17, writes that this issue has arisen in over thirty cases since 1971.

[18] Quoted *supra* note 9.

[19] Presumably this last category includes bodies constituted and persons appointed under a law of the Parliament of Canada, as well as bodies or persons appointed under the federal or *provincial* royal prerogative; *e.g.*, provincial cabinet ministers exercising delegated federal powers.

[20] Lemieux & Vallières, *supra* note 16, at 381-90. *See also Re* Lingley, [1972] F.C. 171, 33 D.L.R. (3d) 593 (Trial D.); *Re* Greene, [1972] 3 O.R. 395, 28 D.L.R. (3d) 297 (H.C.); *Ex parte* Hinks, [1972] 3 O.R. 182, 7 C.C.C. (2d) 316, 27 D.L.R. (3d) 593 (H.C.); *Re* Milbury, 4 N.B.R. (2d) 450, 25 D.L.R. (3d) 499 (C.A. 1972); *Ex parte* Tirey, [1971] 5 W.W.R. 149, 21 D.L.R. (3d) 475 (Alta. S.C.); Klingbell v. Treasury Bd., [1972] 2 W.W.R. 389 (Man. Q.B.).

refers to the locus of institutional structure or to the source of nomination to a given position. As a result, in determining federal jurisdiction, it is necessary to decide when a person who nominally holds a provincial (or section 96) appointment and who exercises federal statutory powers is acting as a "federal board, commission, or other tribunal", and when he is acting in his provincial (or section 96) capacity.

In the past few years, judgments in three Transport Board cases seem to have fallen prey to the confusions of this unfortunate language.[21] While an earlier decision, *Président de la Commission d'appel des Pensions v. Matte*,[22] might be taken as suggesting that the "constitution or establishment" of a body is determined solely by the law conferring jurisdiction or powers, the judgment in *Canadian Pacific Transport Co. v. Highway Transport Board*[23] holds that the "constitution or establishment" of a body should be determined by reference to the law under which it is institutionally structured or financed. This latter position appears to be confirmed with respect to a "person or persons appointed" by the Supreme Court decision in *Vardy v. Scott*,[24] where a provincially appointed magistrate exercising powers under the Extradition Act[25] was held not to be encompassed by the definition in section 2(g). Although not directly relevant to the question of when a section 96 judge acts as *persona designata* (the issue in *Herman* and in *Coopers and Lybrand*), the Transport Board judgments and *Vardy v. Scott* are important to the theory of federal jurisdiction adopted by the Supreme Court.[26]

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[21] Canadian Pac. Transp. Co. v. Highway Transp. Bd., [1976] 5 W.W.R. 541 (Sask. C.A.); *Re* Bicknell Freighters Ltd., 77 D.L.R. (3d) 417 (Man. C.A. 1977); National Freight Consultants Inc. v. Motor Transp. Bd., [1978] 2 W.W.R. 230, 84 D.L.R. (3d) 504 (Alta. S.C.).

[22] Summarized at [1974] Que. C.A. 252. In this case the Quebec Court of Appeal held that the Federal Pension Appeals Board was reviewable in provincial court when it heard appeals under provincial pensions legislation. The authority of this case for the proposition cited is slightly weakened because article 33 of the Quebec Code of Civil Procedure contains no nominational limitations such as those found in s. 2(g) of the Federal Court Act. Nevertheless, the Quebec Court clearly states that the federally constituted board is acting "as a provincial board", a conclusion which supports the "two-hats" view of federal inter-delegation.

[23] *Supra* note 21. Unfortunately, as in the other Transport Board cases, no justification whatever is given for this conclusion.

[24] [1977] 1 S.C.R. 293, 66 D.L.R. (3d) 431. *See* Fera, Comment, 3 QUEEN'S L.J. 183 (1977).

[25] R.S.C. 1970, c. E-21, s. 31.

[26] *See* Part VI, at p. 703 *infra*. Briefly, the decisions appear to mean that the "two-hats" theory of inter-delegation does not apply to the "establishment, constitution or appointment" exception set out in the latter half of section 2(g) of the Federal Court Act. That is, they suggest that a person or board who exercises federal powers is "provincially constituted or appointed" for the purposes of 2(g) if his "job title" or "corporate description" is of provincial origin. Similar reasoning would mean that a section 96 judge will never be exercising powers as *persona designata* unless expressly deemed to be so doing, for the reason that his "job title" is, *e.g.*, "County Court Judge" or "Justice of the Supreme Court".

Traditionally, the more difficult exclusion from the scope of section 2(g) has concerned "persons appointed . . . under section 96 of *The British North America Act, 1867*". It is clear that Parliament enacted this exemption in order to avoid totally excluding provincial court control of decisions taken under federal statutes by individuals who are also section 96 judges; for example, Divorce Act[27] or Bankruptcy Act[28] decisions. To determine the scope of this exemption courts have had recourse to the concept of *persona designata*.[29] In only one reported case prior to the *Herman* decision have the courts held that a federal decision-maker who also held an appointment as a section 96 judge was acting in his judicial capacity,[30] although in *Puerto Rico v. Hernandez* Pigeon J. suggested that in certain strictly criminal law matters the concept of *persona designata* probably would not operate.[31] Unfortunately, however, in none of these cases were comprehensive criteria advanced by which it could be determined when a section 96 judge was or was not acting *persona designata*.[32]

III. When Is a Section 96 Judge Acting as *Persona Designata?*

In the *Herman* case, Dickson J. begins his consideration of whether Madam Justice Boland was acting as *persona designata* by quoting from *Jowitt's Dictionary of English Law*,[33] which defines the expression as:

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[27] R.S.C. 1970, c. D-8, *as amended.*

[28] R.S.C. 1970, c. B-3, *as amended.*

[29] *See, e.g., In re* Shell Canada Ltd., [1975] F.C. 184, 29 C.R.N.S. 361 (App. D.); *In re* Peltier, [1977] 1 F.C. 118 (Trial D.); Puerto Rico v. Hernandez, [1975] 1 S.C.R. 228, 41 D.L.R. (3d) 549; Attorney-General of Canada v. Lavell, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481; Armstrong v. Wisconsin, [1972] F.C. 1228, 30 D.L.R. (3d) 727 (App. D.).

[30] Attorney-General of Canada v. Morrow, [1973] F.C. 889 (Trial D.). This case is not decisive, however, for Collier J. states only that "Morrow J. is not necessarily and indubitably sitting *persona designata*. . .". *Id.* at 895.

[31] *Hernandez, supra* note 29, at 234, 41 D.L.R. (3d) at 554.

[32] Gordon, *supra* note 14, at 174, states that the theory of *persona designata* is applicable "where a person is indicated in a statute or such instrument, not by name, but by his name of office or as one of a class. The question arises whether he is meant in his official or class capacity, or whether the intention is to single him out as *persona designata*, that is, as an individual, the reference to his office or class being merely a descriptive means of identifying him". In *Hernandez, supra* note 29, at 238, 41 D.L.R. (3d) at 557, Pigeon J. opined that a s. 96 judge is *persona designata* under s. 2(g) if he exercises powers which are special, distinct and independent of his ordinary functions. However, Pigeon J. neither offers any justification for importing this characterization (reminiscent of whether a provincial board is exercising section 96-type powers) into the language of the Federal Court Act nor suggests tests to be applied in making this determination. *See* Part VI, at p. 703 *infra*, for reasons why theories of *persona designata* derived from other areas of the law should not be incorporated into s. 2(g). *See also* note 61 *infra*.

[33] Jowitt's Dictionary of English Law (1965).

"[A] person pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character".[34] Then, after summarily reviewing a number of older authorities,[35] he analyzes the judgment in *Puerto Rico v. Hernandez*[36] and concludes that the judgment establishes only that section 28 review under the Federal Court Act "is available in respect of a judge acting as *persona designata* under a federal statute, and the likelihood of being found to be so acting is enhanced if the powers exercised are exercisable also by those who are not judges".[37]

This however, contributes little to a general theory of *persona designata*, for as Dickson J. himself notes: "[H]undreds of federal laws are administered daily by federally-appointed judges of provincial courts. [A] judge cannot become a *persona designata* from the mere fact that he is administering a piece of federal legislation."[38] Nevertheless, these considerations led the Court to the conclusion that:

> *Prima facie*, Parliament should be taken to intend a judge to act *qua* judge whenever by statute it grants powers to a judge. He who alleges that a judge is acting in the special capacity of *persona designata* must find in the specific legislation provisions which clearly evidence a contrary intention on the part of Parliament.[39]

On this view a close analysis of section 232(4) of the Income Tax Act[40] becomes necessary. First, Dickson J. identifies the issue before Madam Justice Boland as that of determining the existence and scope of the solicitor-client privilege. This he concludes, is not an unusual or exceptional exercise of judicial power, and moreover, it involves the application of the provincial law of evidence. Secondly, he notes that section 232 of the Income Tax Act neither sets up a separate tribunal, commission or board, nor assigns special machinery, materials or procedure for making these determinations; rather, the normal procedures of the Supreme Court of Ontario are to be followed. Specifically, in requiring the inspection of documents to ascertain the existence of privilege, the Act does not compel a judge to perform any special or

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[34] *Id.* at 1335. For similar definitions, *see* BLACK'S LAW DICTIONARY 1300 (4th ed. rev. 1968); OSBORN, CONCISE LAW DICTIONARY 240 (5th ed. 1964).

[35] Hynes v. Swartz, [1937] O.R. 924, [1938] 1 D.L.R. 29 (C.A.); Canadian N. Ont. Ry. v. Smith, 50 S.C.R. 476, 22 D.L.R. 265 (1914); C.P.R. v. Little Seminary of Ste. Thérèse, 16 S.C.R. 606, 12 L.N. 338 (1889); St. Hilaire v. Lambert, 42 S.C.R. 264 (1909); Godson v. City of Toronto, 18 S.C.R. 36 (1890); *Re* Sproule, 12 S.C.R. 140 (1886); The King v. Northumberland Ferries Ltd., [1945] S.C.R. 458, [1944] 4 D.L.R. 449.

[36] *Supra* note 29.

[37] *Supra* note 7, at 748, 23 N.R. at 247, 91 D.L.R. (3d) at 17.

[38] *Supra* note 7, at 749, 23 N.R. at 248-49, 91 D.L.R. (3d) at 18.

[39] *Supra* note 7, at 749, 23 N.R. at 249, 91 D.L.R. (3d) at 18. It should be noted that it is precisely because hundreds of federal laws are administered daily by section 96 judges that the third exception was written into s. 2(g). Without such an exception all CRIMINAL CODE decisions would be captured by s. 2(g).

[40] S.C. 1970-71-72, c. 63, *as amended*.

peculiar tasks outside of or divorced from his typical, commonplace judicial function.[41]

Thus, in adopting the presumption that a judge acts as *persona designata* only if he is "exercising a peculiar, and distinct, and exceptional jurisdiction, separate from and unrelated to the tasks which he performs from day-to-day as a judge, and having nothing in common with the Court of which he is a member",[42] Dickson J. advances a test which involves a "substantive characterisation of powers". This leads inexorably to the conclusion in both *Herman* and *Coopers and Lybrand* that judges acting under sections 232 and 231 respectively of the Income Tax Act are not *personae designatae*.

IV. Chief Justice Laskin's View Of When a Section 96 Judge is Acting As *Persona Designata*

In a special concurring opinion in *Herman,* Chief Justice Laskin also found Madam Justice Boland not to be acting as *persona designata*. In this judgment a more fundamental critique of the theory as applied to section 2(g) of the Federal Court Act is advanced. Laskin C.J. first observes that the question of when a section 96 judge is acting as *persona designata* will always involve difficult problems of characterization of power. He then notes that the underlying issue, the capacity in which Madam Justice Boland was acting, does not in any way concern "the quality of justice rendered" but only "the reviewability of the decision given".[43] He points out:

> [I]f an appeal is provided, the need for the distinction is pointless; if it is not provided, review would still be open through the prerogative writs or their statutory substitute and only in the case of a superior court Judge would the right of such review depend on holding that the function or power in question was exercised as *persona designata.*[44]

After reviewing the decisions in *Puerto Rico v. Hernandez*[45] and *Vardy v. Scott,*[46] he develops two policy reasons for restricting the application of the *persona designata* theory in section 2(g) situations.

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[41] *Supra* note 7, at 750, 23 N.R. at 249-50, 91 D.L.R. (3d) at 19. Dickson J. also refers to what he characterizes as "internal pieces of evidence" to buttress his conclusions that: first, s. 232(8) permits subsequent applications *to another judge* if the first judge cannot act, or cannot continue; second, s. 232(9) provides that no costs are to be awarded and at common law only judges have the power to award costs; third, s. 232(14) speaks of a waiver before a *judge or other tribunal* (emphasis added). *Supra* note 7, at 750, 23 N.R. at 250, 91 D.L.R. (3d) at 19. Dickson J. sees each of these as confirming that a judge who acts under s. 232(4) does so not as *persona designata* but in his capacity as a judge.

[42] *Supra* note 7, at 749, 23 N.R. at 249, 91 D.L.R. (3d) at 18.

[43] *Supra* note 7, at 733, 23 N.R. at 253, 91 D.L.R. (3d) at 5.

[44] *Supra* note 7, at 733, 23 N.R. at 253, 91 D.L.R. (3d) at 6.

[45] *Supra* note 29.

[46] *Supra* note 24.

First, he fears that once accepted, the theory must ultimately be applicable to all federal statutes; the result being that the courts will be called upon to determine, in respect of every power exercised by a section 96 judge, whether the power is exercised as *persona designata*. In addition to apprehending the enormity of this task, Laskin C.J. questions the utility of bifurcating review of decisions of the same individual, a result which inevitably flows from the characterization exercise. He concludes that adoption of the theory will

> mean review by the Federal Court if power is being exercised under a federal statute and appeal or review if power is being exercised under a provincial statute. Far more rational, in my view, to let the provincial laws operate in respect of appeal or review of Judges of provincial courts.[47]

A second reason for limiting the theory, according to the Chief Justice, is that some functionaries, such as the magistrate in *Vardy v. Scott*, will be subject to provincial review while others, such as the judge in *Puerto Rico v. Hernandez*, will be subject to Federal Court review, even though both decision-makers act under the same statute. He opines, "[A] conception which leads to such results has outlived its day".[48]

As a solution to the difficulty of determining when a judge acts as *persona designata* and as a device for limiting its application in respect of section 2(g) of the Federal Court Act, he cites[49] the opinion of D. M. Gordon that the Federal and Provincial Interpretation Acts should be amended to read as follows:

> Whenever by any statute judicial or quasi-judicial powers are given to a judge or officer of any Court, in the absence of express provision to the contrary, such judge or officer shall be deemed to exercise such powers in his official capacity, and as representing the Court to which he is attached.[50]

While accepting the underlying principle of Gordon's suggestion, Laskin C.J. nevertheless believes that the courts need not await legislative action, but rather, having created the theory of *persona designata*, they have the power to, and ought to, modify it. His judgment ends with this observation: "I think this Court should declare that whenever a statutory power is conferred upon a Judge or officer of a Court, the power should be deemed exercisable in official capacity as representing the Court unless there is express provision to the contrary."[51]

Consequently, unlike Dickson J., Chief Justice Laskin rejects "substantive characterisation of power" as a test for determining when a

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[47] *Supra* note 7, at 735, 23 N.R. at 255, 91 D.L.R. (3d) at 7.

[48] *Supra* note 7, at 736, 23 N.R. at 256, 91 D.L.R. (3d) at 8.

[49] *Id.*

[50] *Supra* note 14, at 185.

[51] *Supra* note 7, at 736, 23 N.R. at 256, 91 D.L.R. (3d) at 8. It is significant that Laskin C.J. does not accept Gordon's limitation of the suggested presumption to functions characterized as judicial or quasi-judicial. Hence, under Laskin C.J.'s view, acts of pure administration delegated to s. 96 judges would nevertheless be presumed to be accomplished by the judge in his official capacity.

section 96 judge acts as *persona designata*. Instead he prefers to set up a presumption which can be rebutted only formally, by an express statutory provision to the contrary.

V. Analysis of the Tests Offered by the Supreme Court for Determining When a Section 96 Judge Acts As *Persona Designata*

The judgments of both Laskin C.J. and Dickson J. in *Herman*, and Dickson J. in *Coopers and Lybrand* for the most part flow logically from the premises respecting *persona designata* under section 2(g) of the Federal Court Act which they presuppose. What is important, therefore, is to carefully examine the justifications each offers for viewing the issue as he has, and to evaluate whether the tests advanced for determining when a section 96 judge falls within the definition of "federal board, commission or other tribunal" are appropriate.

The earlier review of Mr. Justice Dickson's judgment in *Herman* revealed three elements to his consideration of the theory of *persona designata*. First, he adopts a presumption that Parliament intends judges to act *qua* judge when it grants them statutory powers.[52] Secondly, following *Hernandez*, he asks if the power is exercisable also by those who are not judges.[53] Finally, he suggests that to be acting as *persona designata* a judge must be exercising a peculiar, distinct and exceptional jurisdiction, divorced from his day-to-day tasks.[54]

Should Parliament be presumed to intend judges to act *qua* judge in all cases of delegated statutory powers?[55] While it may be that normally persons appointed as judges perform traditional judicial functions, it is possible to distinguish between powers granted to judges to preside at trial-type adjudications or the incidents thereof (usually expressed in terms of the inherent jurisdiction of a court), and powers which are to be

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[52] *Supra* note 7, at 749, 23 N.R. at 249, 91 D.L.R. (3d) at 18. Laskin C.J. also advocates such a presumption. *Supra* note 7, at 736, 23 N.R. at 256, 91 D.L.R. (3d) at 8. It should be noted that neither Dickson J. nor Laskin C.J. restricts this presumption to s. 96 judges. However, while Dickson J. speaks only of judges, Laskin C.J. refers to a "judge or officer of a Court", which presumably encompasses Masters, registrars, bailiffs and lawyers.

[53] *Supra* note 7, at 748, 23 N.R. at 247, 91 D.L.R. (3d) at 17.

[54] *Supra* note 7, at 749, 23 N.R. at 249, 91 D.L.R. (3d) at 18. *Cf.* the judgment of Pigeon J. in *Hernandez*, *supra* note 29.

[55] An analogous situation arises whenever Parliament or a legislature grants powers to a Minister or Lieutenant-Governor in Council, who are the only other state officials who wield substantial non-statutory powers deriving from their office. Should it be presumed to intend these to act *qua* Minister or *qua* Lieutenant-Governor in Council? Over the past twenty-five years Canadian courts have consistently held these delegated powers to be exercised by *personae designatae*, that is, not by virtue of prerogative. *See* Border Cities Press Club v. Attorney-General of Ontario, [1955] O.R. 14, [1955] 1 D.L.R. 404 (C.A. 1954); *Re* Doctors Hosp. and Minister of Health, 12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Div'l Ct. 1976).

exercised outside the framework of ordinary civil or criminal jurisdiction.[56] Hence, in the past courts have distinguished the conduct of a trial under the Criminal Code from the authorization of a wiretap under section 178(12) of that Act.[57] Again, the conduct of a trial under the Combines Investigation Act has been distinguished from an authorization to engage the assistance of police to search under section 10(5) of that Act.[58] Finally, prior to *Herman*, the trial of an offence under the Income Tax Act was distinguished from a determination of privilege under section 232 of that Act.[59] Each of the former classes of judicial function is performed *qua* judge; each of the latter, not being incident to a criminal trial, should be seen to be performed as *persona designata*. The same reasoning applies to civil matters.[60] Without some justification related specifically to the purposes for, and the results of, characterization in any given circumstance,[61] it is difficult to understand how Dickson J. arrived at this conclusion: "*Prima facie*, Parliament should be taken to intend a Judge to act *qua* judge whenever by statute it grants powers to a Judge."[62] Moreover, given the variety of tasks delegated to section 96 judges it is debatable whether a general presumption of any nature should be erected.

Mr. Justice Dickson also attaches great weight to the fact that in *Hernandez* the extradition function could also be performed by a

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[56] Much of the argument in *persona designata* cases appears to rest on an unarticulated assumption that there is something sacrosanct about the judicial function. This emotional preference for treating judges (and especially s. 96 judges) as a special segment of our political and constitutional scheme accounts for continual reference to the "office of the judge" and to illustrations drawn from trial-type adjudications. Despite the lawyers' mythology to the contrary, there is nothing so unique about the judicial function that judges must always be considered to be performing it. For a recent case in which this view of *persona designata* is expressed, *see* Olympic Towers Ltd. v. Flanigan, 7 C.P.C. 171 (Ont. H.C. 1978).

[57] R.S.C. 1970, c. C-34, *as amended* by S.C. 1973-74, c. 50, s. 2, S.C. 1976-77, c. 53, s. 8. *See Re* Ho, 32 C.C.C. (2d) 339 (B.C.S.C. 1976).

[58] R.S.C. 1970, c. C-23, *as amended*. *See In re* Shell Canada Ltd., *supra* note 29.

[59] S.C. 1970-71-72, c. 63, *as amended*. For a decision under the prior Act, *see* Attorney-General of Canada v. Brown, 62 D.T.C. 1331 (B.C.S.C. 1962).

[60] *See* Attorney-General of Canada v. Lavell, *supra* note 29. Although in Bay v. The Queen, [1974] 1 F.C. 523 (Trial D.), the proceeding in question was before a band registrar, an inquiry may be held before a judge under s. 9 of the Indian Act, R.S.C. 1970, c. I-6. Such an inquiry would be reviewable in the Federal Court. Possibly *contra* Attorney-General of Canada v. Morrow, *supra* note 30.

[61] *See* Part VI, at p. 703 *infra*, for reasons of judicial review policy which address these two concerns and suggest that the presumption should in fact be in favour of a s. 96 judge acting as *persona designata* when he exercises delegated federal powers. In many respects the problems which arise in discussions of *persona designata* have their origin in the fact that the concept is used in a variety of contexts to achieve a variety of purposes. It is a thesis of this comment that the issue of *persona designata* with respect to s. 96 judges acting under s. 2(g) should be resolved by reference only to the purposes of that section, and hence, theories of the concept articulated in other situations should not bear on the resolution of the problem.

[62] *Supra* note 7, at 749, 23 N.R. at 249, 91 D.L.R. (3d) at 18

"commissioner" who was not a judge.[63] Yet while this may be additional evidence in certain circumstances that a judge does in fact act as *persona designata*, *a contrario* reasoning, to support the view that the absence of such other decision-makers means the judge acts *qua* judge, cannot be sustained. Often statutes will conscript members of the judiciary (and only members of the judiciary) because of the particular expertise they are likely to possess. Experience in evidentiary matters, in statutory interpretation, in the conduct of an adversarial process, and in detached, impartial evaluation of conflicting claims is the hallmark of the judge. These characteristics are rarely found to the same degree in other public officials. That Parliament recognizes the paramountcy of these qualifications in certain processes should not be taken as evidence that an ordinary judicial proceeding is envisioned. The inclusion or exclusion of non-section 96 judges as decision-makers reflects only an assessment of the abilities required in any given situation, not a determination as to the capacity in which a section 96 judge acts.[64]

The third factor articulated as bearing on the *persona designata* question relates to whether a judge is exercising a special or distinct jurisdiction, having nothing in common with the court of which he is a member. If this jurisdiction is characterized substantively, in terms of the nature of the power exercised, it is difficult to conceive of any possible statutory function that Parliament could assign to a section 96 judge which would fall under this criterion of exclusion. Section 96 judges, usually staffing courts with general, residual jurisdiction,[65] ordinarily have power to administer, adjudicate, make evidentiary determinations, interpret legislation, advise, supervise, approve accounts and records, convict, sentence, discharge, etc. As a result, an organic test such as that suggested by Dickson J. is effectively all-encompassing. In fact, the very characterization of the power exercised in *Herman* as relating to "solicitor-client privilege" demonstrates how wide such a criterion may become. If all delegated statutory powers were characterized in such general terms judges would always act *qua* judge: a judge hearing claims by women who wish settlement rights on Indian reserves is determining a

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[63] *Supra* note 7, at 747, 23 N.R. at 247, 91 D.L.R. (3d) at 16. Laskin C.J., on the other hand, rather than treating s. 9 of the Extradition Act, R.S.C. 1970, c. E-21, as meaning that s. 96 judges do not function as judges, concludes that the section elevates "commissioners" to the status of judges. *Supra* note 7, at 735, 23 N.R. at 255, 91 D.L.R. (3d) at 7. *Cf.* Fera, *A Critical Examination of the Law Reform Commission's Proposals for Reform of Extradition Review*, 20 CRIM. L.Q. 103 (1977).

[64] Ironically, one of the main complaints from the bench and bar about administrative decision-makers concerns what is perceived as a somewhat cavalier attitude towards procedural propriety. The increased use of judges as *personae designatae* in situations where their expertise can improve the administrative process should, therefore, be welcomed.

[65] *See, e.g.*, The Judicature Act, R.S.O. 1970, c. 228, ss. 13-17, *as amended*. Even county court judges, nominally possessing only a limited jurisdiction, exercise wide powers either by statute or by consent. *Cf.* The County Courts Act, R.S.O. 1970, c. 94, *as amended*.

question of status; a judge hearing a request for police assistance at a seizure is exercising discretion on a matter of warrant issuance; a judge hearing an extradition application is conducting a simulated preliminary inquiry and trial. Thus, judicial functions in each of these areas where judges have, in the past, been held to act as *personae designatae* would be included in Mr. Justice Dickson's formulation as "routine exercise[s] of inherent judicial power".

Nevertheless, Dickson J. clearly contemplates that some judges may act as *personae designatae*. Consequently, the actual application of this kind of test must be examined further. In most cases, although phrased in terms of substance, the specifics advanced in support of these criteria for evaluation do not bear on the power exercised, but rather on formal or structural features of the process under review. Hence, in *Herman*, the facts that ordinary civil procedures were used and that the order was registered in the Supreme Court of Ontario, as well as other "internal evidence",[66] were held by the court to be persuasive indications that Madam Justice Boland was not acting as *persona designata*. But each of these is obviously not a substantive, organic criterion; each is a formal, structural criterion. Moreover, once factors to be evaluated are shifted in this way, different considerations bear on the characterization task. In *Herman*, none of these structural features is conclusive, for there is nothing unusual in one court using the facilities of another,[67] nor in one jurisdiction adopting the procedures enacted by another.[68] Administrative efficiency and the desire for procedural uniformity should not be mistaken for a conscious attempt to vest powers in a court. The reasoning of Dickson J. in *Herman*, and the difficulty he experiences in applying his own test, demonstrates how difficult it is to develop a "substantive" test for determining when a section 96 judge acts as *persona designata* under section 2(g).

If the criteria formulated by Dickson J. should not be accepted as guides to the *persona designata* question, should those put forward by Laskin C.J. be adopted? In contrast to his colleague, the Chief Justice favours a purely formal test for rebutting the presumption that power is exercised in an official capacity; namely, the existence or absence of

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[66] *See supra* note 41. Only the second of these has any weight at all, for there is no reason to conclude that the other judge in s. 232(8) is also not acting as *persona designata*. The reference to "other tribunal" in s. 232(14) supports a *persona designata* conclusion, rather than militating against it (as Dickson J. thinks), for in no sense need "tribunal" mean "court".

[67] County courts and the Supreme Court of Ontario share facilities in almost every county in Ontario. Moreover, in many instances the Federal Court Trial Division also makes use of county court-houses.

[68] *See, e.g.*, The Summary Convictions Act, R.S.O. 1970, c. 450, s. 3, which provides, "Except where inconsistent with this Act, Parts XIX and XXIV and sections 20, 21, 22, 446 (in so far as it relates to a witness), 621, 623, 624, 625, 682, 683, 684 and 689 of the *Criminal Code* (Canada) . . . apply *mutatis mutandis* to every case to which this Act applies. . .".

express statutory language to the contrary. Moreover, unlike Dickson J., the Chief Justice attempts to explain why the underlying presumption against powers being exercised as *persona designata* should be adopted. First, he suggests that it would be less rational to permit review of some decisions of a given judge to be vested in the Federal Court and review of other decisions to take place in provincial courts.[69] It is difficult to see the force of this argument, for the locus of appeal or review is rarely determined solely by the nominal status of the judge. For example, in civil matters in Ontario, final orders of county and district courts are appealed to the Ontario Court of Appeal, while interlocutory orders are appealed to the Divisional Court.[70] In criminal matters, similar variances occur with respect to whether a provincial court judge (magistrate) is trying indictable or summary conviction offences.[71] Finally, even in administrative law matters, whether review is sought in the Divisional Court or in the High Court depends mainly on the power exercised, not on the nominal status of the decision-maker.[72] It is fundamental to our legal system that review or appeals be determined both by the office of the decision-maker and by the nature of the power he exercises. The *persona designata* theory is merely one recognition of this fact.

The second reason advanced by Laskin C.J. for setting up a presumption restricting the scope of *persona designata* with respect to section 96 judges is that it is not logical that, even though they act under the same statute, higher functionaries should be reviewed in Federal Court while minor functionaries are subject to supervision by provincial courts.[73] Specifically, the decisions in *Puerto Rico v. Hernandez*[74] and *Vardy v. Scott*[75] are contrasted. However, at least two commentators have characterized the latter decision as highly unusual,[76] and in the Supreme Court judgment little justification is offered for not treating a magistrate under the Extradition Act[77] as a "federal board, commission or other

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[69] *Supra* note 7, at 735, 23 N.R. at 255, 91 D.L.R. (3d) at 7. Note that the assumption underlying this assertion is that there is something to be preferred in "provincial superior courts" as compared to the Federal Court. On this point *see* Part VI at p. 703 *infra*. It is to the credit of Laskin C.J. that he attempts to tailor his reasons for advancing this presumption to the specific issue to be addressed in s. 2(g), *i.e.*, the extent of federal jurisdiction. *See* note 61 *supra*.

[70] For a diagrammatic summary of the principal provisions of the relevant legislation *see* WATSON, BORINS & WILLIAMS, CANADIAN CIVIL PROCEDURE at p. 1-48 (2d ed. 1977).

[71] A similar diagrammatic scheme may be found in M. FRIEDLAND, CRIMINAL LAW AND PROCEDURE 8 (5th ed. 1978).

[72] *See, e.g., Re* Regina and Nimbus News Dealers Ltd., [1972] 3 O.R. 293 (Div'l Ct.). If review is sought by a Crown agency, it might be argued that nominal status is a factor for the Judicial Review Procedure Act, S.O. 1971, Vol. 2, c. 48, *as amended by* S.O. 1976, c. 45, which vests review in the Divisional Court, may not be binding upon the Crown.

[73] *Supra* note 7, at 735, 23 N.R. at 255-56, 91 D.L.R. (3d) at 7-8.

[74] *Supra* note 29.

[75] *Supra* note 24.

[76] *See* MULLAN, *supra* note 16, at 20-21; Fera, *supra* note 24.

[77] R.S.C. 1970, c. E-21.

tribunal".[78] The Chief Justice is surely correct in finding it difficult to appreciate how the two functions performed in these cases can be differentiated for the purpose of judicial review jurisdiction; the judgment which is incorrect, however, is not *Puerto Rico v. Hernandez* but *Vardy v. Scott*. Rather than the contrasting of these two judgments showing that the theory of *persona designata* has outlived its day, it merely establishes that the concept applies not only to section 96 judges, but also (in a modified form) to each of the exclusions set out in section 2(g) of the Federal Court Act.[79]

Analysis of the approaches and the tests advanced by Laskin C.J. and Dickson J. for determining when a section 96 judge acts as *persona designata* reveals that none can be invoked meaningfully to resolve this issue. Within the context of one approach to the jurisdiction of the Federal Court, they are consistent and logically linked together. However, the appropriateness of that underlying approach to federal jurisdiction is not subjected to scrutiny, and consequently the conclusion drawn is really only one of two equally plausible, but diametrically opposed possibilities.

VI. THE THEORY OF *PERSONA DESIGNATA* AND FEDERAL JURISDICTION

Although most of the preceding discussion was directed to a strict legal analysis of the Supreme Court judgments in *Herman* and *Coopers and Lybrand*, certain fundamental assumptions by the Court about the role and jurisdiction of the Federal Court became manifest. Principally at issue is the question whether the Federal Court Act creates a system of dual jurisdictions or whether this statute merely amends and slightly extends the limited jurisdiction of the former Exchequer Court.[80] The basis for one's presumptions about *persona designata* really is found in a theory of federal

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[78] This issue is canvassed in only three paragraphs at the end of Dickson J.'s judgment. *See* Vardy v. Scott, *supra* note 24, at 308-09, 66 D.L.R. (3d) at 443. The court states:

> A magistrate taking depositions . . . performs a simple administrative task similar to his role when hearing evidence in a preliminary inquiry . . . . The magistrate, appointed under a law of a province and exercising only peripheral powers under the *Extradition Act*, analogous to his usual duties, remains subject to the supervisory jurisdiction of provincial superior courts.

Dickson J. apparently realizes that the question of "provincial appointment" is an important consideration which is distinct from the s. 96 judge issue raised in *Hernandez*, *supra* note 29, even though it raises a *persona designata* problem. However, he dismisses this question with only a general reference to the magistrate's usual powers, a pseudo-organic criterion whose appropriateness has already been questioned in respect of s. 96 judges. *See* text accompanying notes *65-68 supra*.

[79] *See* text accompanying notes 19-26 *supra*, and notes 82-87 *infra*. That Laskin C.J. should conclude that *Hernandez* was wrongly decided is one more indication of his general hostility to the jurisdiction of the Federal Court. A similar conclusion can be derived from his analysis, set out *supra* note 63.

[80] *See* The Exchequer Court Act, R.S.C. 1970, c. E-11, *as repealed by* R.S.C. 1970 (2nd Supp.), c. 10, s. 64.

jurisdiction. In other contexts,[81] the Supreme Court seems to have opted for a restrictive theory,[82] to the chagrin of certain commentators.[83] In asserting that statutory powers conferred upon judges or officers of the court should be presumed to be exercisable in an official capacity unless there is an express provision to the contrary (or unless the powers are divorced from the regular powers of the court), Laskin C.J. (and Dickson J.) are continuing and expanding the current Supreme Court approach. Rather than viewing the phrase in section 2(g) of the Federal Court Act which states "or under section 96 of *The British North America Act, 1867*" as an exception to the general review jurisdiction of the Federal Court — a limited exception which refers only to powers exercised under the Judicature Act of a province or under a federal statute which envisions a trial-type adjudication in the instance[84] — they seem to be elevating the section 2(g) exclusions to the status of underlying principles of federal jurisdiction. What reasons can be advanced for rejecting the current court approach and preferring the more expansive of these two competing visions of federal jurisdiction?

First, the legal status and the institutional structure of the Federal Court should be considered by contrasting the Federal Court Act with the former Exchequer Court Act. Although both statutes purport to establish section 101 (B.N.A. Act) courts constituted as "courts of record", the Federal Court is expressly stated to be a "superior court of record having civil and criminal jurisdiction".[85] Again, while both courts are given a specified jurisdiction under certain federal statutes, and in respect of Crown liability, the Federal Court also exercises the general supervisory jurisdiction by way of extraordinary or statutory remedies over inferior federal tribunals.[86] Finally, although both statutes grant the court a concurrent original jurisdiction where the Crown or the Attorney-General

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[81] *See supra* note 60.

[82] By limiting the expression "laws of Canada" to statutes, the Supreme Court denies the existence of a federal "common law". Hence, the Federal Court exercises only a limited jurisdiction not tied to the panoply of federal powers under s. 91 of the B.N.A. Act, but only to those powers which have been the subject of statutory enactment. Presumably the Parliament of Canada could remedy this situation by enacting anticipatory incorporation by reference legislation which adopts the "common law" of the several provinces. This disingenuous creation of a federal common law would nevertheless meet the test articulated by the Supreme Court.

[83] Notably Hogg, *supra* note 6; P. HOGG, CONSTITUTIONAL LAW OF CANADA 125 (1977).

[84] *E.g.*, certain processes for deciding criminal or regulatory offences, for granting divorces, hearing petitions in bankruptcy, or patent and copyright claims, etc.

[85] R.S.C. 1970 (2nd Supp.), c. 10, s. 3.

[86] R.S.C. 1970 (2nd Supp.), c. 10, ss. 18, 28. To the argument that if the Federal Court were a true "superior court" it would not be necessary to enumerate in s. 18 the various extraordinary remedies, one answer would be that this provision is intended only to apportion jurisdiction between the trial and appeal divisions. It may also be claimed that s. 18 is a private provision, whose intent is to oust provincial superior court jurisdiction vis à vis certain remedies (*e.g., certiorari*) but not others (*e.g., habeas corpus*).

of Canada is a plaintiff in civil proceedings,[87] the Federal Court is also given a general residual jurisdiction respecting claims under the laws of Canada if no other court has been accorded jurisdiction.[88] These contrasts, especially considering the extensive residual jurisdiction (as a superior court, as granting extraordinary remedies, as having power when no other court has jurisdiction) vested in the new court, support the conclusion that, unlike the Exchequer Court, the Federal Court is intended to exercise both directly and residually, the judicial function with respect to all matters falling under section 91 of the B.N.A. Act, unless these are expressly given to another court. Hence, notwithstanding Supreme Court opinion to the contrary, on examination of the legal status and the institutional structure, the underlying premise of any examination of federal jurisdiction should be that since 1971 Canada has evolved a judicial system of dual jurisdiction, albeit not identical in framework to that of the United States.[89]

A second reason for concluding that the Federal Court Act establishes a system of dual jurisdiction (at least insofar as the judicial review function is concerned) derives directly from the language of section 2 (g). Because the grant of jurisdiction to the Federal Court is phrased in terms of the source of the power exercised, rather than the nominal source of appointment of the decision-maker, section 2(g) must be taken in principle as intending a review jurisdiction congruent with federal statutory powers under section 91 of the B.N.A. Act. Since judicial review theoretically lies only in respect of statutory powers,[90] this means that the supervisory scope of section 2(g) is, subject to any express exceptions, comprehensive insofar as federal powers under the B.N.A. Act are concerned. Federal

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[87] In light of recent decisions of the Supreme Court, this jurisdiction may be illusory. *See* Quebec N. Shore Paper Co. v. Canadian Pac. Ltd., *supra* note 6; McNamara Constr. Ltd. v. The Queen, *supra* note 6.

[88] R.S.C. 1970 (2nd Supp.), c. 10, s. 25.

[89] This view is not widely shared. *See* LAW REFORM COMMISSION OF CANADA, *supra* note 16; CANADIAN BAR ASSOCIATION, REPORT OF THE COMMITTEE ON THE FEDERAL COURT ACT (1978); *Hernandez*, *supra* note 29, at 241-49, 41 D.L.R. (3d) at 559-64 (*per* Laskin C.J.). *But see* Hogg, *supra* note 6, at 551; LASKIN, CANADIAN CONSTITUTIONAL LAW 793-99 (4th ed. A. Abel 1973).

[90] Despite the English decision in The Queen v. Criminal Injuries Compensation Board, [1967] 2 Q.B. 864, [1967] 2 All E.R. 770, Canadian courts have not held that prerogative powers are reviewable on *certiorari*. *See* Border Cities Press Club v. Attorney-General of Ontario, *supra* note 55; *foll'd Re* Multi-Malls Inc., 14 O.R. (2d) 49, at 58, 73 D.L.R. (3d) 18, at 27 (C.A. 1976). Of course a minister may exercise powers as a delegate of Parliament, in which case his actions are judicially reviewable. In these situations, however, he is held to be exercising "statutory powers" as *persona designata*. Insofar as judicial review of the federal Crown exercising prerogative powers is concerned, *see* Desjardins v. National Parole Bd., [1976] 2 F.C. 539, 71 D.L.R. (3d) 491 (Trial D.), where review is tied either to relief against the Attorney-General, or to an action under s. 17 for a declaratory judgment. In both cases the provisions of the Crown Liability Act, R.S.C. 1970, c. C-38, ss. 8(2), 9, would appear to vest review jurisdiction in the Federal Court.

Court judicial review jurisdiction is therefore not exceptional,[91] but is rather the general rule with respect to the statutory delegates of Parliament.

Once it is concluded that generally, an expansive view of federal jurisdiction should be taken, it then becomes necessary to examine the effect of the exceptions to Federal Court review set out in section 2(g). When read together, the Transport Board cases,[92] *Vardy v. Scott*,[93] and *Herman*[94] reveal that regardless of which of the three review exceptions is in issue, a similar characterization problem arises: namely, when will a body or person who exercises federal statutory powers be deemed to be "constituted, established or appointed," not by the Act conferring federal powers, but by or under a law of a province or by or under section 96 of the B.N.A. Act? Specifically, with respect to the first two exceptions, ought it to be concluded that absent express provisions to the contrary, a provincially established body or a provincially appointed person exercising delegated powers under a federal statute exercises his federal powers as a "provincial appointee", thus falling within the section 2(g) exception? In the alternative, ought the "two-hats" theory of delegation to be invoked in order to conclude, in the absence of express provisions to the contrary, that the body or person is *persona designata*, a "federal board, commission or other tribunal"?

Several early cases such as *Lingley v. Hickman*[95] are not really of assistance, for although a provincial officer made the appointment in question, legal authority to do so was conferred by a federal statute. Thus, the power-holder was not appointed under a provincial law. However, a basic guide to resolving this issue can be derived from extrapolating the ideas put forward by Laskin C.J. and Dickson J. in *Herman*; that is, by first asking if the section 2(g) exceptions should be treated as merely formal, to be determined solely by reference to an instrument of appointment, or if they should be viewed as substantive, to be determined by reference to the nature of the power delegated. If they are seen substantively, as suggested by Dickson J. with respect to section 96 judges, a difficult exercise in characterization becomes necessary.[96] Because the terms of such characterization inevitably are shifting between structural and substantive criteria, it makes little sense to adopt such a tedious approach when no significant constitutional issue is involved.[97]

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[91] *I.e.*, even in the light of the restrictive interpretations placed by the Supreme Court on the expression "laws of Canada", review jurisdiction under s. 2(g) is plenary. Reviewable "federal boards, commissions or other tribunals" can only be established by statute.

[92] *Supra* note 21.

[93] *Supra* note 24.

[94] *Supra* note 7.

[95] [1972] F.C. 171, 33 D.L.R. (3d) 539 (Trial D.).

[96] Some of the difficulties have already been reviewed in this paper. *See* text accompanying notes 65-68, 78 *supra*.

[97] This argument parallels that of Laskin C.J. in *Herman*, *supra* note 7, at 733, 23 N.R. at 253, 91 D.L.R. (3d) at 5. If the constitutional issue were whether power must be exercised by a s. 96 judge, substantive characterization would be necessary. *See* Tomko v.

This is especially important in view of the fact that "substantive characterization" habitually camouflages the influence of policy both in setting a presumption and in establishing its rebuttal in individual cases. If, on the other hand, the exceptions are treated as being formal only, as suggested by Laskin C.J., resolution of where the presumption should lie, and when it is rebutted, becomes overtly a matter of pure policy. For the reasons articulated below, whether policy is overt or covert, it should reflect an expansive view of federal jurisdiction.[98]

Returning to the specific issue of section 96 judges, perhaps the best place to begin an analysis of factors which ought to be considered in developing a *persona designata* theory is by asking for what reasons are tribunals, agencies and other statutory, non-judicial decision-makers created. If one acknowledges features such as efficiency, expertise and insulation from the traditional adversarial procedures of courts or normal appellate processes, then consistency demands an expansive concept of *persona designata*. In certain processes individuals with extensive judicial experience are designated because the volume and diverse location of cases does not justify full-time appointments, yet adjudicative expertise is deemed important. On the other hand, insulation of this process from the ordinary civil process is desired. Deeming a section 96 judge to act *qua* judge may accomplish the first of these objectives, but subverts the second, for it not only opens his decisions to all the time-consuming procedural incidents of his regular office, but also subjects his judgments to full appeal under provincial Judicature Acts. Abolishing these appeal rights would be too drastic a palliative to the problem since most section 96 judges acting *qua* judge are not subject to supervisory review through the extraordinary remedies. The theory of *persona designata* thus contributes to the principal objectives of statutory delegation: efficiency, expertise and the insulation of decisions from challenge other than by judicial review.

In the context of a federal system there is also an important pragmatic argument supporting a broad view of *persona designata*. One of the main justifications for the creation of the Federal Court was the fact that the possible development of ten differing approaches, procedures, and interpretations of federal legislation could be avoided. If many section 2(g) decision-makers are not viewed as *personae designatae*, in cases where conceivably they might fall within one of the three exceptions,

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Nova Scotia Lab. Rel. Bd., 9 N.S.R. (2d) 277, 69 D.L.R. (3d) 250 (C.A. 1974). But where the issue is merely the capacity in which a validly appointed s. 96 judge is acting, no constitutional question is raised, regardless of whether the power being exercised is an "1867 superior court" power or not.

[98] The upshot of the discussion which follows is that if a statute such as the Motor Vehicle Transport Act refers to the "provincial board", this reference should be read as "the body appointed by the province, which for the purposes of this Act is deemed not to be appointed by the province, but rather to be constituted as a federal board". This term "provincial board" should thus be presumed to be *descriptive* of a person or body, not *ascriptive* of the capacity in which he acts.

much of the rationale for the Federal Court will be circumvented. The sorry history of *habeas corpus* in federal matters should alert those who advocate a restrictive theory to the dangers of multi-jurisdictional review.[99]

A further reason for adopting a wide view of *persona designata* relates to the scope and procedures for challenging statutory decision-makers. To the extent that section 96 judges are acting *qua* judge when various review routes are open whenever statutes provide for alternative deicision-makers. For example, the section of the Extradition Act at issue in *Hernandez* provides that powers may be exercised by: "all judges of the superior courts and of the county courts of a province, and all commissioners who are from time to time appointed for the purpose in a province by the Governor in Council".[100] In Ontario, if the person exercising section 9(1) powers were a superior court judge, no review would be possible, but by virtue of section 29 of the Judicature Act[101] an appeal would lie to the Ontario Court of Appeal. If a county court judge were so acting, again no judicial review would be possible, but an appeal would lie to the Ontario Court of Appeal from a final decision, and possibly to the Divisional Court (or the High Court, depending on characterization of the process) from an interlocutory decision, by virtue of section 33 of the County Courts Act.[102] Finally, if the person exercising powers is a "commissioner", he is a section 2(g) "board, commission or other tribunal" in all cases and would be subject to judicial review only in the Federal Court. If section 9(1) also permitted provincial court judges to act (as many federal statutes do), conceivably the decision could be appealed to either the Divisional Court, the High Court or the Court of Appeal, or judicially reviewed in the High Court or the Divisional Court, depending on how the function performed was characterized.[103] By way of contrast, treating all these decision-makers as *personae designatae* simplifies the process and has the effect of vesting all review jurisdiction in the Federal Court. If the Supreme Court wishes to facilitate simplicity of

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[99] *See* Mitchell v. The Queen, [1976] 2 S.C.R. 570, 61 D.L.R. (3d) 77 (1975); *Ex parte* Collins, 30 C.C.C. (2d) 460 (Ont. H.C. 1976); *Re* Pereira, 14 O.R. (2d) 355, 73 D.L.R. (3d) 673 (C.A. 1977). It is not the confusion and injustice caused by the dissociation of *habeas corpus* from *certiorari* which is of concern here, but the widely divergent laws of federal *habeas corpus* which currently exist in Canada. *See* Wright, *Judicial Review of Parole Suspension and Revocation*, 18 CRIM. L.Q. 435 (1976). I have argued elsewhere that to fully overcome these difficulties the Federal Court Act should be amended so as to exclusively vest even review by collateral attack in the Federal Court. *See* Macdonald, Book Review, 57 CAN. B. REV. 155 (1978).

[100] R.S.C. 1970, c. E-21.

[101] R.S.O. 1970, c. 228, s. 29, *as amended by* S.O. 1971 (2nd sess.), c. 57, s. 3.

[102] R.S.O. 1970, c. 94, s. 33.

[103] *E.g.*, if the matter were characterized as a civil proceeding, appeals and judicial review would be before the Divisional Court. *See* The Judicature Act, R.S.O. 1970, c. 228, s. 17.

review procedures,[104] invocation of the *persona designata* theory should be encouraged.

A final consideration in developing a theory must be the psychological sensibilities of persons whose decisions are under review. This is especially true of section 96 judges who habitually perform the review function over other decision-makers.[105] Nevertheless, it is difficult to appreciate the distinction between review on appeal and review under section 18 or section 28 of the Federal Court Act. Moreover, trial division judges are likely to be sensitized to the difficulties of acting as *personae designatae* since they are often called upon to perform this role as Unemployment Insurance Umpires.[106] On the other hand, if review lies to the Federal Court of Appeal under section 28, then a fully constituted three-man appellate bench will hear the matter in much the same way that provincial courts of appeal dispose of ordinary appeals. A coherent framework of judicial review should not be undermined by emotional preferences developed in the days of the unitary court system of the "common law".

If the factors examined above point to giving as wide a scope as possible to the theory of *persona designata* in relation to the section 2(g) exceptions, under what circumstances, if any, should these exceptions operate to oust the judicial review jurisdiction of the Federal Court? In other words, given a presumption of federal jurisdiction, when should the courts find a decision-maker to be acting as a "provincial appointee" or as a "section 96 judge"?

First, it can be suggested that since much of the benefit of administrative decision-making lies in structuring carefully integrated procedures, if express appeal provisions locate this recourse in provincial courts, federal delegates should be seen to be acting in their provincial capacity for judicial review purposes. Thus, if appeals from nominally provincial appointees or section 96 judges lie to the Federal Court, as is the case under the Customs Act,[107] it would seem that federal judicial review of a *persona designata* is indicated; if, however, certain appeals are directed to provincial courts, as under the Criminal Code,[108] federal

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[104] This is asserted by Laskin C.J. in *Herman*, *supra* note 7, at 735-36, 23 N.R. at 255-56, 91 D.L.R. (3d) at 7-8.

[105] This concern is adverted to by Laskin C.J. in *Herman*, *supra* note 7, at 735, 23 N.R. at 255, 91 D.L.R. (3d) at 7, and is reflected in the comments of Morrow J. respecting the proceedings in Attorney-General of Canada v. Morrow, *supra* note 30, published in TIME, July 23, 1973, at 6-7.

[106] Unemployment Insurance Act, S.C. 1970-71-72, c. 48, *as amended* S. 92 designates all the judges of the Trial Division as U.I.C. Umpires. For an example of judicial review of an Umpire's decision, *see* Attorney-General of Canada v. Paulsen, [1973] F.C. 376, 38 D.L.R. (3d) 225 (App. D.).

[107] R.S.C. 1970, c. C-40, s. 48. *See* Gordon & Gotch Ltd. v. M.N.R., [1978] 2 F.C. 603 (App. D.).

[108] CRIMINAL CODE, ss. 601, 602, 603, *as amended by* S.C. 1972, c. 13, s. 52; S.C. 1973, c. 38, s. 6(1); S.C. 1973-74, c. 50, s. 3; S.C. 1974-75-76, c. 105, s. 13

jurisdiction should be excluded insofar as these decisions are also judicially reviewable.

A second circumstance in which the 2(g) exception should operate can be derived through an examination of the language of delegation itself. To the extent that a statute merely grants powers to a provincial appointee, a provincial board or a section 96 judge, normal theories of administrative delegation or federal inter-delegation would suggest that these act as *personae delegatae*;[109] in order for the decision-maker to be considered as fulfilling his provincial role, or his judicial role, express language to that effect is required.[110] For example, in order to escape the terms of section 2(g) respecting section 96 judges, federal statutes would need to stipulate the court to which they are attached or to expressly indicate they act *qua* judge; respecting provincially organized bodies, federal statutes would need to stipulate that the powers granted were being exercised in the board's capacity as a provincial board; respecting persons nominally appointed by a province, again, federal legislation would need to provide that powers are being exercised in a provincial capacity.

One final exception to the application of the theory of *persona designata* to a section 2(g) might be advanced. In the absence of express provisions to the contrary, where a person or body whose nominal appointment falls within one of the three section 2(g) exemptions exercises powers which are part of a larger process, review of which is ultimately vested in a provincial court, he should be held to be acting as a provincial appointee. Hence, all provincially-appointed decision-makers or section 96 judges acting incidental to the Income Tax Act[111] should be seen as "federal boards, commissions or other tribunals"; and for example, all such decision-makers acting as part of the trial process under the Criminal Code,[112] the Combines Investigation Act,[113] the Bankruptcy Act,[114] or the Divorce Act[115] normally would be subject to provincial review. However, given the concurrent jurisdiction of the Federal Court under many federal statutes, a bifurcation based on this criterion is unlikely to be free from difficulty in practice, unless review of such incidental proceedings were

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[109] *But see* Johnson v. Attorney-General of Canada, [1977] 2 F.C. 301, 72 D.L.R. (3d) 615 (App. D.). On the other hand, Lemieux & Vallières, *supra* note 16, at 389, are of the opinion that the *persona designata* theory applies to all provincial boards who exercise federal powers. This is more consistent with the position courts articulate respecting administrative delegation of powers to a Minister. *See supra* note 55. Insofar as federal inter-delegation is concerned, *see* HOGG, *supra* note 83, at 226-37.

[110] An analogous conclusion was reached in a different context by Bayda J. in *Re* Ombudsman for Saskatchewan, [1974] 5 W.W.R. 176, 46 D.L.R. (3d) 452 (Sask. Q.B.).

[111] S.C. 1970-71-72, c. 63, *as amended.*

[112] R.S.C. 1970, c. C-34, *as amended.*

[113] R.S.C. 1970, c. C-23, *as amended.*

[114] R.S.C. 1970, c. B-3, *as amended.*

[115] R.S.C. 1970, c. D-8, *as amended.*

held to follow the jurisdictional route of the principal proceeding.[116] If no principal proceeding were yet instituted, the presumption of *persona designata* would vest review jurisdiction in the Federal Court.

In summary, recognition that the Federal Court Act ostensibly creates a system of dual jurisdictions compels the adoption of a wide view of section 2(g) and a restrictive view of its exceptions. In particular, this means giving a liberal interpretation to the theory of *persona designata* as it affects provincial appointees or section 96 judges. A presumption that federal powers are so exercised, tempered by a limited number of formal or structural criteria (express contrary language, locus of statutory appeal, integration of incidental proceedings with principal action) for displacement, accomplishes this objective.

VII. CONCLUSIONS

The seemingly innocuous question of *persona designata* under section 2(g) of the Federal Court Act reveals, at bottom, implications of high constitutional significance. Given that the theory of *persona designata* one adopts in this context has a fundamental effect on the nature of federal jurisdiction, this issue deserves a thorough canvassing in the current constitutional debate. Vague allusions to the *status quo* are inappropriate not only because the current scope of federal jurisdiction is being constantly modified by the Supreme Court, but also because Parliament has never clearly indicated whether the Federal Court Act was intended to create a comprehensive system of dual jurisdictions. While this comment has been critical of the assumptions underlying the Supreme Court decisions in *Herman v. Attorney-General of Canada* and in *Coopers and Lybrand v. Minister of National Revenue*, this should not be taken to mean that the judgments are poorly reasoned. The Court has opted for one of two theories of federal jurisdiction, a restrictive theory, and has constructed judgments which accomplish this end. It is at least a virtue of present Supreme Court judgments in administrative law matters that even if critics feel decisions to be wrong, they are wrong only on policy, and there they err with clarity.[117]

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[116] This is to say that where a concurrent jurisdiction is established, the choice, by the plaintiff or the prosecution, of the court in which to institute proceedings will also determine whether the s. 2(g) exceptions come into play. If a provincial court is chosen, incidents to the main proceedings will be reviewed in provincial court since the decision-maker will be presumed to be acting as a provincial appointee. If the Federal Court is chosen, incidents will be reviewable in the Federal Court, since the decision-maker will be presumed to be acting as *persona designata*.

[117] *Cf.* Gibson, Comment, 56 CAN. B. REV. 693 (1978).