THE FEDERAL COURT OF CANADA: A CRITICAL LOOK AT ITS JURISDICTION

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I. INTRODUCTION

On May 31, 1972, after serving the Canadian people for ninety-five years, the Exchequer Court of Canada held its last sitting. Established in 1875, the Exchequer Court was originally closely associated with the Supreme Court of Canada in that the same Dominion Act[1] established the two courts, and in that each was composed of the same members. The Exchequer Court was a court of first instance, while the Supreme Court heard nothing but appeals.[2]

The two statutory courts[3] were separated in 1887,[4] and a few years later, by virtue of the Exchequer Court Amendment Act,[5] the Exchequer Court was given jurisdiction in matters of Admiralty for Canada.[6] According to chapter 26 of that Act, the general rules and orders of the Exchequer Court put into force in 1876, and any subsequent general rules, would apply to any proceeding taken by virtue of the new Amendment Act.[7] Of course, it was also made clear in section 2 of chapter 26 that any general rule or order in force in Her Majesty's High Court of Justice in England would apply in a similar action taken in the Exchequer Court of Canada.[8]

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[1] The Supreme and Exchequer Court Act, 38 Vict., c. 11 (1875)

[2] R.M. DAWSON, THE GOVERNMENT OF CANADA 429 (4th ed. 1963) [hereinafter cited as DAWSON].

[3] A court such as the Exchequer Court is not a "common law" court but a "statutory" court of record. Its jurisdiction and powers are always found in the statute that created it or in some other act granting the court jurisdiction.

[4] The Exchequer Court Act, 50 & 51 Vict., c. 16 (1887).

[5] Exchequer Court Amendment Act, 1891, 54 & 55 Vict., c. 26.

[6] Since 1891 Admiralty decisions have been published in the Exchequer Court Reports.

[7] 2 Can. Exch. xv (1892).

[8] *Id.* at xv.

In 1906, the Exchequer Court was established under its own separate act, the Exchequer Court Act.[9] Although amendments were made after that year, and the Act revised and re-enacted in a consolidated form in the early fifties and amended on several subsequent occasions, the Exchequer Court Act that applied in 1971[10] was "substantially identical in form to the 1906 Act."[11]

II. The New Federal Court of Canada

Although the Exchequer Court no longer exists, in name at least, the jurisdiction which it exercised is now continued in the Federal Court of Canada. That change was brought about by the Federal Court Act which received Royal Assent in December of 1970, and came into force by proclamation on June 1 of the following year.[12]

All eight judges of the former Exchequer Court are now serving in a judicial capacity in the new two division Federal Court of Canada.[13] Three other appointments have been made so far (May, 1972): one to the Court of Appeal[14] and two others to the Trial Division.[15] When sitting, the judicial officers of the new court wear the same apparel that was worn by the judges of the Exchequer Court—black robes with gold trimming. And as a further example of the tie between the old and the new, the historic Admiralty Court mace is sometimes still put on display when the Federal Court is hearing admiralty cases.

III. Jurisdiction of the Trial Division

A. Jurisdiction Previously Held by Exchequer Court

Most of the jurisdiction which belonged to the Exchequer Court is now exercised by the Trial Division of the Federal Court of Canada. Consequently, unless provided for elsewhere, the Trial Division exercises exclusive, original jurisdiction in all cases involving revenues of the Crown, or in which relief is claimed against the Crown—that is, where suits against

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[9] Can. Rev. Stat. c. 140 (1906).

[10] Exchequer Court Act, Can. Rev. Stat. c. 98 (1952), *as amended*, Can. Stat. 1952-53 c. 30, Can. Stat. 1957 c. 24, Can. Stat. 1960-61 c. 38, Can. Stat. 1964-65 c. 14, Can. Stat. 1966 c. 39. With the Federal Court Act all of the Exchequer Court Act is repealed except §§ 26 to 28.

[11] R. Hughes, Federal Court of Canada Service 531 (looseleaf service 1970) [hereinafter cited as Hughes].

[12] Can. Stat. 1970-71 c. 1 [hereinafter cited as Federal Court Act].

[13] These are: W.R. Jackett (now Chief Justice of the Federal Court), Camil Noel (now Associate Chief Justice of the Federal Court), Jacques Dumoulin, A.L. Thurlow, A.A. Cattanach, H.F. Gibson, Allison A.M. Walsh and Rod Kerr.

[14] Mr. Justice Louis Pratte was appointed to the Court of Appeal in June, 1971. The Honourable Mr. Justice Dumoulin and Mr. Justice Arthur Thurlow, both judges in the Exchequer Court, are the other members of the Appeal Division.

[15] Mr. Justice D.V. Heald was appointed in July, 1971 and Mr. Justice Collier was appointed in October of the same year.

the Crown are involved.[16] More precisely, like the Exchequer Court, the Federal Court deals,

> [W]ith claims against the Crown for property taken for any public purpose or injuriously affected by the construction of any public work, and claims against the Crown arising out of any death or injury to person or property resulting from the negligence of any officer or servant of the Crown[17] while acting within the scope of his duties or his employment upon any public work, etc.[18]

The Trial Division also hears cases which concern patents of invention, copyrights, trade marks and industrial design.[19] It administers the law of expropriation under the Expropriation Act passed in 1970;[20] and it is responsible for income tax appeals, estate tax appeals,[21] and appeals against citizenship cases.[22]

In another area, if the legislature of a province has passed an Act agreeing that the Exchequer Court (or in the future, the Federal Court) "has jurisdiction over controversies between the Dominion and that province or between that province and any other province or provinces which have passed similar acts,"[23] the Trial Division determines such controversies in the first instance.[24] Such cases, as before, may be appealed to the Supreme Court of Canada.

As could be expected, the Trial Division also acts as a Court of Admiralty exercising a general jurisdiction in admiralty cases with an appeal in such cases lying to the Appeal Division of the Federal Court.[25] The provisions that deal with admiralty and maritime law are found mainly in section 22 of the Federal Court Act, [26] and continued later in sections 42 and 43.[27] It is interesting that "[s]ection 42 appears to carry forward all preceding maritime law jurisdiction and practice subject to changes made in Bill

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[16] Federal Court Act § 17(1), (2). That was covered in the Exchequer Court Act, CAN. REV. STAT. c. 98, §§ 17, 18 (1952).

[17] According to § 37 of the Federal Court Act, for the purpose of determining liability in any action against the Crown, anyone who was at anytime a member of the Canadian Forces or R.C.M.P. is considered to have been, at the time, a servant of the Crown.

[18] DAWSON at 430.

[19] Federal Court Act, § 20; like § 21 of the Exchequer Court Act, CAN. REV. STAT. c. E-11 (1970).

[20] Expropriation Act, CAN. REV. STAT. c. E-19 (1970). Section 49 of the Exchequer Court Act (1952) dealt with set-off and compensation to a person for land taken by the Crown.

[21] Federal Court Act § 24.

[22] Federal Court Act § 21.

[23] DAWSON at 430.

[24] Federal Court Act § 19. That section is very much like § 30(1) in the Exchequer Court Act (1952).

[25] Federal Court Act § 27.

[26] Similar provisions are found in the Admiralty Act, CAN. REV. STAT. c. 1, Sched. A, §§ 18, 21 (1952).

[27] In the various sub-paragraphs of § 43 it is stipulated when actions against a ship, aircraft or other property may be commenced in rem or in personam.

C-192, hence anything that may have been omitted from, say, the Admiralty Act is arguably carried forward in any event."[28]

Generally speaking then, the Trial Division, by virtue of the Federal Court Act, has basically the same areas of jurisdiction which the Exchequer Court possessed under the Exchequer Court Act, the Admiralty Act and other statutes which granted it jurisdiction. Of course there are differences: "Gone, for instance, are references to claims arising out of Treaties of Peace with Bulgaria (Exchequer Court Act) and references to jurisdiction over letters patent to public lands ... (Exchequer Court Act). Replacing these are simplified clauses such as section 17, 23 and a residual powers clause in section 25."[29] With regard to navigation and shipping, there are some changes too. In addition to repealing the "ancient and unsatisfactory"[30] provisions in the Admiralty Act, jurisdiction in matters such as ships' mortgages,[31] through bills of lading,[32] and state-owned ships is clarified and extended.

B. New Areas of Jurisdiction

In addition to all of that, the Trial Division of the Federal Court exercises jurisdiction in areas not previously assigned to the Exchequer Court of Canada.

In relation to bills of exchange, promissory notes,[33] aeronautics, and works and undertakings extending beyond a single province, the Trial Division, under clause 23 of the Federal Court Act, is given concurrent jurisdiction with the provincial courts. According to former Attorney-General John Turner, "this means that a member of the public will have resort to a national court exercising a national jurisdiction when enforcing a claim involving matters which frequently involve national elements."[34]

By way of practical example, Mr. Turner cites an aircraft tragedy in which the survivors residing in different provinces will be able "to decide on a common forum [in which to litigate], thus eliminating duplication of effort, and obtain one judgment."[35] So much for the Trial Division.

IV. APPEAL DIVISION

A. Appellate Jurisdiction

The Federal Court of Appeal is granted both "appellate and original

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[28] HUGHES at 545.

[29] *Id.* at 538.

[30] The phrase was used by John Turner in similar context, see 5 H.C. DEB. 5473 (1970).

[31] Federal Court Act, §§ 22(2)(*c*), 22(3)(*d*).

[32] *Id.* § 22(2)(*f*). No such provision existed in the Admiralty Act (1952).

[33] Exclusive legislative jurisdiction over these instruments was granted to Parliament under § 91(18) of the B.N.A. Act, but until now, judicial jurisdiction was left exclusively with the provincial courts.

[34] 5 H. C. DEB. 5473 (1970).

[35] *Id.* at 5473

jurisdiction [which] have no equivalent in the Exchequer Court Act or other federal statutes."[36]

According to section 27 "an appeal lies to the Court of Appeal from any final judgment [or] judgment on a question of law, determined before trial, [by] the Trial Division." In addition, section 27 (2) (*a*) grants a right of appeal from any interlocutory judgment of the Trial Division, without leave, within ten days that such an intermediate judgment or decree is pronounced. That contrasts with the traditional procedure in provincial courts where leave is necessary to appeal an interlocutory order.[37]

B. Original Jurisdiction

Perhaps the most interesting, and so far, the most controversial section of the Federal Court Act is clause 28 which grants the Court of Appeal jurisdiction to *review* the decisions of federal boards, commissions and other tribunals.

Clause 28 must be considered in conjunction with section 18 of the Bill. The two are delicately related. Sub-section (3) of section 28, seems to qualify the exclusive, original jurisdiction granted in clause 18 to the Trial Division to "review" administrative decisions and issue the prerogative writs: where the Court of Appeal has jurisdiction under section 28 to review and set aside a decision of an administrative agency, "the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order."[38] Thus, as far as the review of administrative decisions is concerned, it is perhaps safe to say "that all such actions are brought in the Trial Division except when the Court of Appeal by section 28 (1) has jurisdiction."[39]

The Court of Appeal can review and set aside the non-discretionary decisions of administrative agencies on three grounds, including error of law, whether or not such an error appears on the face of the record. In that way, it is arguable, that section 28, in addition to "defining the judicial jurisdiction of the Court of Appeal, appears to create substantive law."[40]

C. Motives for Instituting the New Act

Before getting into a more detailed examination of certain sections and aspects of the Federal Court Act, consideration should be given to the reasons behind the Government's action to create the new Court with new jurisdiction. Officially, the Government cited only three reasons. The first of them concerned its desire to eliminate supervision of federal administrative agencies by the provincial courts and, by so doing, achieve a more uniform application of administrative law. The second objective was to provide

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[36] HUGHES at 541.

[37] *Id.* at 541.

[38] *See* Federal Court Act § 28(3).

[39] HUGHES at 541.

[40] *Id.* at 541.

a more modern procedure to effect judicial review of statutory powers granted the various federal boards and tribunals; and finally, by creating an appellate division in the Federal Court, to reduce the work load of the Supreme Court of Canada. While not stated publicly, two other considerations were probably as predominant in the government's thinking as were the three stated objectives.

1. To re-examine and update jurisdiction

By deciding that a new Act should be drafted, the Government was able to give the Department of Justice an ideal opportunity to make an innovative re-examination of the entire area of jurisdiction which over the years passed in piece-meal fashion to the federal trial court. As a result of that review, the jurisdiction of the new Court was redefined and/or clarified, and in some instances, extended into new areas. Unlike the situation that prevailed with its predecessor, the jurisdiction of the new Court was consolidated, for the most part, under one piece of legislation. In addition, procedural matters were simplified and made more or less uniform in the various areas of jurisdiction assigned to the Court.

For example, under the new statute, the entire Admiralty Act of 1952 is repealed and the admiralty jurisdiction updated or expanded. It should be noted that under that Admiralty Act, the Exchequer Court was, in effect, an Admiralty Court as well with its own rules which were quite different from the general rules and orders of the Exchequer Court. In contrast, sections 47 to 51 and a few parts of other sections[41] of the Federal Court Act set the general rules for the new Court in all its areas of jurisdiction, and the detailed procedure—general rules and orders[42] formulated by the judges of the Court—have been streamlined.[43]

2. To extend "presence" of the Federal Government

Another supposed reason for creating the new Federal Court with new jurisdiction is the Dominion Government's desire to "[extend] itself throughout the country and [make] itself visibly apparent to the people."[44] Two features of the Federal Court Act, in particular, seem to confirm that supposition. First, section 18 of the Act attempts to deprive the provincial courts of their rather jealously guarded power to grant the prerogative remedies. An attempt in Committee and in the House to get the Government

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[41] Under § 48(1) of the Federal Court Act, the procedure for bringing an action against the Crown is brought into line with the general procedure for suing a private party. In that regard, *see* Federal Court Act § 64(1), *repealing* Petition of Right Act, CAN. REV. STAT. c. 210 (1952).

[42] Under § 46 of the Federal Court Act, subject to the approval of the Governor in Council, the Federal Court may, from time to time, make general rules and orders.

[43] The detailed rules of procedure appear in 105 CANADA GAZETTE No. 1403, June 5, 1971, at 1403.

[44] The words of Professor G.D. Watson of York University. *See* 28 MINUTES OF PROCEDURE AND EVIDENCE OF THE H.C. STANDING COMMITTEE ON JUSTICE AND LEGAL AFFAIRS 7 [hereinafter cited as 28 MINUTES].

to grant concurrent jurisdiction in those matters failed. Second, both the Trial and Appeal Division of the Federal Court will move about the country to hear matters. While the Exchequer Court could sit in any convenient place in Canada, "the concept of a travelling Court of Appeal is unique."[45]

Commenting on section 18 and what the Government possibly hopes to achieve by it, Professor G.V.V. Nicholls told the Committee on Justice and Legal Affairs, that as a result of the provisions in that section a "significant change in the constitutional balance of powers between the provinces and the federal authorities"[46] has occurred. Professor Nicholls explains: "A large segment, indeed, of administrative law in Canada is to be transferred from the traditional superior courts in the ten provinces to a new federal court. Considerable encouragement will be given to the growth of a 'federal common law'."[47]

3. Relief for Supreme Court

Three reasons were advanced by the Government itself for the new legislation—Bill C-172. The first of these concerns the desire to relieve the Supreme Court of Canada of some of its work load, and in so doing, allow it to become "a more creative court."[48] That is, a court that can "be left as a final appellate court dealing with matters of law, matters affecting the constitution of this country, matters affecting public administration and the interpretation of the statutes under which administrative tribunals operate."[49]

In 1949, when the Supreme Court of Canada became the highest judicial organ in constitutional disputes, similar sentiments were expressed. At that time, the intention was that the Supreme Court become a court whose basic work would involve constitutional adjudication. To date, it is not that kind of court at all. In fact, more than ninety-five per cent of its business has involved the routine review of ordinary civil and common law questions. By way of comparison, the United States Supreme Court decided more constitutional questions in 1964 than the Supreme Court of Canada has in the last twenty years.[50]

Thus, it is impossible to be assured that with the Federal Court Act the Supreme Court will become more "creative." Certainly, however, by establishing a Court of Appeal in the Federal Court, the Act does, in fact, free the Supreme Court of certain responsibilities so that it can handle fewer, if not, more important matters.

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[45] HUGHES at 537.

[46] 27 MINUTES OF PROCEDURE AND EVIDENCE OF THE H.C. STANDING COMMITTEE ON JUSTICE AND LEGAL AFFAIRS 8 [hereinafter cited as 27 MINUTES].

[47] 27 MINUTES at 8.

[48] The words of John Turner. *See* 5 H.C. DEB. 5470 (1970).

[49] *Id.* at 5470.

[50] S.R. Mitchell, The Supreme Court of Canada Since the Abolition of Appeals to the Judicial Committee of the Privy Council at 3-4 (paper presented at the meeting of the Learned Societies and the Canadian Political Science Association, June 7, 1967).

Since 1949, it can be said that the Supreme Court has acted as both "first" and "final" appellate tribunal in so far as appeals from the Exchequer Court were concerned. Without a first appeal court "to sift the record or prepare the record on which an appeal [could be] based,"[51] the Supreme Court has spent more time than would otherwise be expected with such appeals. Members of the Supreme Court have "not infrequently commented [that on appeal cases from the Exchequer Court, they] had the benefit of only one judicial opinion from a lower court."[52]

4. Correct practice of multiple supervision of federal administrative agencies

The second reason advanced by the Government for introducing the Bill concerns the superintendence of federal administrative agencies by the ten superior provincial courts through the issuance of the prerogative remedies. Under that scheme, a board, such as the Canada Labour Relations Board, was subject to the "diverse jurisdictions and practices of the various superior provincial courts."[53]

In addition, such a board could be deliberately harassed by a number of jurisdictions at about the same time. In other words, a party could attack a non-discretionary decision of that Board, on certain grounds, by obtaining several prerogative writs from the various high courts in the provinces. That was particularly the situation when the Board was dealing with a matter involving a national employment question.[54]

But under clause 18 that kind of "multiple supervision, with a lack of consistent jurisprudence and application"[55] is abolished and replaced by a "single supervision" to be provided by the Federal Court. At least, that is the intention of the Government. But there is a good possibility that, because the common-law writs are so fundamental, a litigant will still be able to go to a provincial high court, if he chose that forum instead of the Federal Court, and have an irregular decision of a federal tribunal quashed. In that regard, the provincial high courts have frequently commented on the supervisory jurisdiction they possess. In 1937, for example, the Chief Justice of Alberta in *Kettenback Farms Ltd. v. Henke*, an action to review the findings of the Board of Review created under the federal Farmers' Creditors Arrangement Act,[56] stated: "A Superior Court exercising the powers of the former Court of King's Bench as this Court does has a supervisory authority over inferior courts and over tribunals for the purpose of seeing that they do not go beyond their jurisdiction."[57]

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[51] Turner, 5 H.C. DEB. 5470 (1970).

[52] HUGHES at 533.

[53] Turner, 5 H.C. DEB. 5470 (1970).

[54] Turner, 1 H.C. DEB. 679-80 (1970).

[55] Turner, 5 H.C. DEB. 5470 (1970).

[56] Can. Stat. 1934 c. 53, CAN. REV. STAT. c. F-5 (1970).

[57] Kettenback Farms Ltd. v. Henke, [1937] 3 W.W.R. 703, at 704, *quoted in* Warren, *The Declaratory Judgment: Reviewing Administrative Action*, 44 CAN. B. REV. 610, at 615 (1966).

More recently, in a case involving proceedings for certiorari, Lord Denning stated: "[t]he Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. Thus control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law.[58]

5. Provide for review other than that available with writs

The third and final reason given by the Government for the Federal Court Act also concerns the prerogative writs. According to Mr. Turner, the Government has reacted to a feeling amongst a growing number of practitioners and observers of jurisprudence that the ancient common law remedies are no longer adequate for present day purposes.

Since the jurisdiction exercised by provincial courts over federal agencies arose out of pre-Confederation legislation, no significant improvement in the superintendence of provincial courts over federal boards could be made by provincial legislatures. Thus unless changes were made by Parliament, resort would have to be exclusively to the ancient remedies.[59] That particular allotment of powers and restrictions was made clear in a Supreme Court ruling in May of 1969 in *Three Rivers Boatman Ltd. v. Canada Labour Relations Board.*[60]

Thus, under clause 28 of the Federal Court Act, the Appeal Division, in the words of the Minister of Justice, "will have jurisdiction to review the decisions and orders of federal boards stripped of the archaic legalities that have traditionally applied to the ancient remedies."[61]

It must be remembered, of course, that under clause 18 of the Act, the prerogative remedies are continued in the Trial Division of the Federal Court. But under clause 28(1), the Appeal Division has jurisdiction to review and set aside a judicial or quasi-judicial decision on three grounds:

> (a) [if a board] failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction
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> (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
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> (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner, or without regard for the material before it.[62]

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[58] Rex. v. Northumberland Compensation Appeal Tribunal. *Ex parte* Shaw, [1952] 1 K.B. 338, at 346-47, *quoted* in Warren, *The Declaratory Judgment Reviewing Administrative Action*, 44 CAN B. REV. 610, at 611 (1966).

[59] Turner, 5 H.C. DEB. 5471 (1970).

[60] Three Rivers Boatman Ltd. v. Canada Lab. Rel Bd., 12 D.L.R 3d 710 (1970)

[61] Turner, 5 H.C. DEB. 5471 (1970).

[62] Federal Court Act § 28(1)(*a*), (*b*), (*c*)

It should be noted that the first two grounds are grounds on which the ancient remedies have traditionally been issued. For example, mandamus has been used to compel an administrative agency to exercise its function[63] and certiorari has been used to quash decisions made without jurisdiction or irregularly.[64] In judicial decisions, certiorari can be used for error of law on the face of the record. And, according to J.F. Garner, may be obtained whether or not the reasons for the decision are written or given orally.[65]

The third ground, clause 28 (1) (*c*), is obviously new. Unfortunately, because of its loose wording, it must await judicial interpretation for clarification. If, however, it is given a broad construction so that "administrative" decisions are apt to be set aside simply because, in the opinion of the Appeal Court, a particular board did not give proper "regard [to] the material before it," then a good number of well qualified boards will be, in effect, superseded in their decision-making power by a strictly "judicial" tribunal.

IV. Forum Shopping

There are other provisions in the Act that are also unacceptable. Concurrent jurisdiction and "forum shopping" which inevitably results from it, will be considered next.

Under sections 17(4) and 23, the Trial Division of the Federal Court is given concurrent, original jurisdiction. The former section has to do with proceedings of a civil nature in which the Crown claims relief or in which relief is sought against a servant of the Crown. Section 23 pertains to jurisdiction between subject and subject in cases involving bills of exchange, promissory notes, aeronautics and interprovincial works and undertakings.

It is interesting to note that neither of the above sections specify with what other court the jurisdiction is concurrent. Quite conceivably, it could be concurrent with the Appeal Division, although it is generally assumed that the concurrency lies with the provincial courts.

Although concurrent jurisdiction, especially in matters covered by section 23, may be convenient for certain claimants involved in matters of a national scope, because of the possibility of "forum shopping" it is undesirable. The term, "forum shopping" is used to describe a practice that can occur where there are two possible courts to which a person may resort. Obviously, with such a choice the litigant, on the advice of counsel, will choose the forum that is apt to be most advantageous to him.

What is really happening is that the person taking the initiative—the plaintiff —is resorting to one court "because it is more inconvenient or it is less beneficial to his opponent."[66] Unfortunately, advantage may be gained

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[63] Radcliffe & Cross, The English Legal System 60 (4th ed. Cross & Hall 1964).

[64] *Id.* at 204.

[65] J.F. Garner, Administrative Law 124 (1st ed. 1963).

[66] The words of Professor Watson. *See* 28 Minutes at 9.

in that way because courts differ in at least two important respects: (1) In the Canadian system, courts have different general and detailed rules of procedure, and (2) contrary to the general conception of our courts, different jurisdictions do, in fact, deal with basically the same subject matter in different ways.[67]

Of course, in some instances, it is possible for the defendant to appeal an "unfavourable" decision, but needless to say, both time and money on his part is necessary. Where one or both are lacking, it is obvious that his opponent will be able to benefit from the system of concurrent jurisdiction.

From a strictly federalist viewpoint, it is probably preferable to have matters involving the Dominion Government under section 17(4) adjudicated in a federally appointed court. But it must be realized that the members of the provincial superior courts are, indeed, appointed by the Dominion. If the Federal Government doubts the capability of the high courts to handle matters in which it is involved, then it should make better appointments.

V. Non-Crown Defendants

As has already been mentioned, the Federal Court (Trial Division), like the previous Exchequer Court, has exclusive original jurisdiction to hear actions against the Federal Crown. Under such an exclusive grant, an unacceptable problem develops in situations where a plaintiff is injured in circumstances which permit him to sue both the Crown and a defendant other than the Crown or a servant of the Crown.

But since the Federal Court has no jurisdiction in general matters between subject and subject, the plaintiff must bring two actions, each in a separate forum—one in the Trial Division and another against the "non-crown" defendant(s) in a provincial court. Apart from the expense the plaintiff encounters, there is "the ever present possibility that justice will be denied through inconsistent verdicts."[68]

In other words, the provincial court may find that the Crown or a servant of it was responsible for causing, say, the injury, while the Federal Court may give judgment for the defendant because in its opinion the private individual was at fault. Neither court is bound by the other's determination because there are different parties involved. When the action in the provincial court was being heard, the Crown was not represented by counsel during the hearing because in the provincial forum the Crown cannot be put on trial.

It has been suggested that under the residual power clause—section 25 of the Federal Court Act—the Federal Court is given jurisdiction to hear actions against a non-crown defendant where such action is half of the action being taken—the other half directed against the crown. If, indeed, that is the intent of section 25, it has not been spelt out clearly. Further-

[67] The opinion of an Ottawa Lawyer, G.F. Henderson, Q.C. See 28 Minutes at 47.

[68] Watson, 28 Minutes at 28.

more, it is doubtful that such an intention could be realized under the terms of the British North America Act: "[T]he problem [is] whether or not the federal government has constitutional power to invest a federal court with jurisdiction as between subject and subject when the dispute between them is one that is governed by provincial law."[69]

VI. Interlocutory Appeal

Under section 27, the appellate jurisdiction of the Federal Court, as well as some procedural requirements for appeal, are set out. In addition to the usual basis for appeal,[70] any interlocutory judgment of the Trial Division can be appealed[71] without leave within ten days after such a ruling is made.[72] "This is rather unusual, the customary procedure in provincial courts being that leave must be sought to appeal an interlocutory order (compare section 25 The Judicature Act,[73] R.S.O. 1960, c. 197)."[74]

The limitations usually placed on the right of appeal from interlocutory orders are not exclusively for the purpose of cutting down the work of the appellate courts, but more to limit certain abuses that come about if there is an automatic appeal. An example can, perhaps, best explain that point.

During an examination for discovery, a plaintiff, on the advice of his counsel, may refuse to answer a question posed by the defendant's lawyer. The matter may then be taken before a judge who rules on the question. With an automatic right of appeal, the defendant who is not too eager to get to trial, may appeal the ruling. In so doing, he delays the prospect of a trial and increases the potential costs that can be incurred by the plaintiff, and hopefully discourages him from proceeding further. It is obvious, then, that "there is the problem of harassment and delay which can result from an automatic right of appeal from interlocutory judgments and it is [therefore] ill advised to provide [that sort] of appeal in such situations."[75]

VII. Rule Making

Under clause 46, the Federal Court, like its predecessor the Exchequer Court,[76] is empowered to make detailed rules of procedure, from time to time, to regulate the practice and procedure in its two divisions.

Although the rule-making power is given exclusively to the judicial officers of the Court, it is obvious that the rules affect more than just that body of judges. Both the lawyer and the citizen he represents in that

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[69] Watson, 28 Minutes at 16.

[70] Federal Court Act § 27(1)(*a*), (*b*).

[71] Federal Court Act § 27(1)(*c*).

[72] Federal Court Act § 27(2)(*a*).

[73] In Ontario, to appeal to the Ontario Court of Appeal it is necessary to obtain leave from a judge other than the one who heard the original question.

[74] Hughes at 541.

[75] Watson, 28 Minutes at 18.

[76] *See* Exchequer Court Act, Can. Rev. Stat. c. 98, § 87(1) (1952).

forum have a vital interest in them. From the practitioner's viewpoint, in an already demanding profession, the procedural rules should be as least vexing and time consuming as possible. And as far as the citizen is concerned, the rules should be such that the expense encountered in litigating is minimal.

It is, therefore, not unrealistic to expect that the rule-making body of any court be broadly based. In Ontario, for example, the Rules Committee, in addition to judges, has a few members of the practising bar, and the prospects are reasonably good that, in the near future, its membership will be broader yet.

Perhaps, a better example lies in the United States where the primary responsibility for the formulation of the rules in the federal court system has fallen to an Advisory Committee.[77] The Committee is composed of judges, lawyers and law professors from different parts of the nation, and it welcomes representations from the legal profession generally and from the public at large. Well in advance of enactment, which is really a power granted to the Supreme Court itself,[78] the Committee publishes draft proposals for rules and again invites public comment and representation.

It must be pointed out that somewhat similar provisions are provided in section 46(4) of the Canadian Federal Court Act. However, those provisions apply only to amendments or revocations "to the general rules and orders *first made* under this section."

VIII. Review of Administrative Decisions

Contrary to what Mr. Turner told the House in March of last year,[79] it is apparent, from what can be positively stated at this time, that the average citizen's position vis-a-vis federal administrative agencies has not really been improved under the Federal Court Act.

For one thing, no provision is made, beyond the rules of natural justice, to require boards to conduct their hearings according to minimum standards of procedure. Without getting into a detailed statutory code to govern the operations of such agencies, the Federal Court Act could have easily made failure to conduct hearings according to certain fundamental rules one of the grounds that would permit court review of a board's decisions. Some of the procedural rules recommended by either the Franks Committee or the Gordon Committee[80] could have been enumerated in the Act; namely,

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[77] Its official name is Advisory Committee on the Federal Rules of Civil Procedures.

[78] The Court invariably follows the Committee's advice.

[79] *See* 5 H.C. Deb. 5474 (1970).

[80] The Franks Committee was appointed in the United Kingdom to study administrative tribunals and enquiries. Its report was made in 1957. The Gordon Committee studied the organization of government in Ontario. It reported in 1959. A brief commentary of their recommendations can be found in Cheffins, *Administrative Tribunals: Some Recommendations from the United Kingdom and Ontario*, in Eleven Lectures on Administrative Boards and Commissions 1 (J.E. Brierley ed. 1961).

that the interested parties be given (1) adequate notice of the hearing, (2) full particulars of the case, (3) the right to examine before the hearing reports or documents to be introduced as evidence, and (4) the right to be represented by counsel.

Second, in clause 28 a distinction is made between administrative decisions on the one hand and judicial and quasi-judicial decisions on the other. As a result, the Court of Appeal will not be able to set aside—quash—a decision or order of an administrative nature; that is, an order made by an agency under the statutory discretion vested in it. According to the Minister of Justice, the Appeal Division was so limited because "it is not the function of the federal court [sic], which is a continuation of the Exchequer Court, to substitute its judgment for Parliament's on policy matters. These boards have been given powers delegated to them by Parliament to administer the policy set by Parliament."[81]

In the past, however, Canadian courts have frequently claimed the right to review the decision of a tribunal taken in the exercise of what they were prepared to concede was an administrative function. For example, in the High Court of Ontario, in *Re Powell and Windsor Police Commissioners,* Mr. Justice Stark said: "The authority in which a discretion is vested must act in good faith, must have regard to all relevant considerations, ... must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously."[82]

It is obvious, then, that from the point of view of safeguards for the citizen, section 28 (1) of the Federal Court Act is a retrograde step.

IX. Concluding Remarks

Like most statutes, the Federal Court Act, while achieving certain desirable ends has, unfortunately, certain undesirable features.

On the positive side, it does, in fact, consolidate and up-date the jurisdiction of the federal trial court. And with the creation of the Appeal Division, the Act will undoubtedly provide relief in the work load for the Supreme Court of Canada. In addition, it will provide judicial consistency in the review of federal administrative boards, and it will prevent the possible harassment of a board from ten provincial jurisdictions. Also, from a federalist viewpoint, the Act will most definitely increase the "presence" of Dominion judicial administration throughout the nation as both the Trial and Appeal Division of the new court are on circuit.

On the negative side, it tries to restrict a role courts have played in overseeing *administrative* decisions, and it places the issuance of prerogative

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[81] 1 H.C. Deb. 680 (1970).

[82] *Re* Powell & Windsor Police Commissioners, 70 D.L.R.2d 178, at 182 (Ont. High Ct. 1968). In that decision, Mr. Justice Stark also outlined the court's jurisdiction to issue the extraordinary remedies.

writs exclusively in, what may prove to be, a less convenient court. And in certain civil matters, while the plaintiff may get to enjoy some advantage by picking the forum, he may be discouraged by certain features of the Federal Court Act which permit an automatic appeal on interlocutory orders, and the prospect, that where non-crown defendants are involved, no relief may be realized if the provincial and federal courts disagree on who is responsible.

The thing that is rather disturbing about the Federal Court Act is that many, if not most, of the undesirable provisions could have been eliminated without really affecting the main ends achieved by it. It appears as if the Federal Government—really the Department of Justice—is not properly enlightened or it does not desire to be. If neither of those assessments is correct, one more unacceptable is possible. Perhaps, the proposals incorporated into the Act were based on personal preference and bias.