Report No. 40

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

APPLICATION FOR JUDICIAL REVIEW

INSTITUTE OF LAW RESEARCH AND REFORM

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INSTITUTE OF LAW RESEARCH AND REFORM

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ACKNOWLEDGMENT

The Institute wishes to acknowledge the contribution of Margaret A. Shone of Institute Counsel who was responsible for the project and prepared the Report.

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Table of Abbreviated References

	Enactment	Abbreviation
Canada.	British Columbia. Judicial Review Procedure Act, R.S.B.C. 1979, c. 209 (first enacted as S.B.C. 1976, c. 25)	BC
	Ontario. Judicial Review Procedure Act, R.S.O. 1980, c. 224 (first enacted as S.O. 1971, c. 48)	Ont
England.	Supreme Court Act 1981 (U.K.), c. 54, s. 31	Eng Act
	Order 53 of the Rules of the Supreme Court as substituted in 1977 by the Rules of the Supreme Court (Amendment No. 3) 1977, S.I. 1977 No. 1955	Eng Rules
New Zealand.	Judicature Amendment Act 1972, No. 130 of 1972 as am. by Judicature Act 1977, No. 32 of 1977, ss. 10-15	NZ

	Study	Abbreviation
Canada	Law Reform Commission of Canada, Judicial Review and the Federal Court (Report 14, 1980)	LRCC 14
	British Columbia. British Columbia Law Reform Commission, A Procedure for Judicial Review of the Actions of Statutory Agencies (LRC 18, 1974)	BCLRC 18
	Ontario. Royal Commission Inquiry Into Civil Rights. Report No. 1. (Commissioner: Honourable J.C. McRuer, 1968)	McRuer Report

England.	The Law Commission, Report on Remedies in Administrative Law (Law Com. No. 73, Cmnd. 6407, 1976)	LC 73
	The Law Commission, Remedies in Administrative Law (Published Working Paper No. 40, 1971)	LCWP 40
New Zealand.	Public and Administrative Law Reform Committee, Administrative Tribunals Constitution, Procedure and Appeals (Fourth Report, 1971) 6-16, paras. 11-28	NZLRC 4

PART I SUMMARY OF REPORT

1. The Problem to be Solved

A person who wants judicial review of an administrative decision, action or refusal must choose one from two and sometimes three procedures. If he makes the wrong choice he is likely to have to incur the cost and delay of starting again, and he may even lose his remedy. Further, he may be unable to obtain in one proceeding all the remedies to which he is entitled under the general law.

2. The Proposed Solution

The proposed solution is to substitute for the several existing procedures one simple procedure in which the claimant can obtain any and all of the judicial review remedies to which he is legally entitled.

3. Existing Remedies

The existing remedies are as follows:

(1) Prerogative remedies:

(a) certiorari (set aside the decision);

(b) prohibition (prohibit a decision-maker from making a decision);

(c) mandamus (order performance of a duty);

(d) quo warranto (prohibit unauthorized exercise of public office);

(e) habeas corpus (order release of person wrongfully detained).

(2) Non-prerogative remedies:

(a) a declaration that an administrative act or decision is invalid;

(b) an injunction preventing a decision-maker from making a decision and preventing anyone from acting on a decision.

4. Existing Procedures

The prerogative remedies are obtained by summary procedures commenced by notice of motion. The non-prerogative remedies are obtained in ordinary civil actions in which all the usual interlocutory steps are either necessary or normal, including pleadings, examinations for discovery and production of documents, although declaration in some circumstances may be obtained by a third procedure called originating notice. These differences in procedure are not functional.

5. Description of Proposed Procedure

The procedure proposed is an application commenced by originating notice and disposed of by summary procedure (though if more elaborate procedures are needed, the court could direct that they be followed). The notice originating the application would contain a concise statement of the facts verified by affidavit or other evidence. It would be served on all interested parties and the Attorney General.

If the claimant uses the wrong procedure, the Court could allow him to carry on under the correct procedure. The conversion could be directed either if the claimant mistakenly uses the new procedure when it does not apply or mistakenly uses another procedure when the new procedure does apply.

6. Changes in the Powers of the Court

The proposal relates almost entirely to procedure. However it would extend the Court's powers in the following ways:

(1) The Court's existing power to declare a decision invalid would be extended so that it could also set the decision aside (and the six-month limitation period applicable to certiorari would apply to all such cases).

(2) The Court would have power to refer an administrative decision back to the person who made it for reconsideration in accordance with the Court's directions.

(3) The Court would have discretion to grant interim relief regardless of the remedy sought.

(4) The Court would have power to cure a defect in form or a technical irregularity where there has been no substantial wrong or miscarriage of justice.

7. Implementation

We propose that the procedure be established by the Alberta Rules of Court. Statutory validation would be needed because of

the changes in the Court's powers mentioned in section 6 above.

The procedure for implementation would be as follows:

(1) Consideration by the Rules Committee;

(2) Order in council promulgating amendments to the Alberta Rules of Court;

(3) Amendment to s. 47 of the Judicature Act validating the new Rules.

8. Other Jurisdictions

Ontario, British Columbia, New Zealand and England have established similar single procedures by statute rather than by Rules of Court. What this Report proposes, however, is essentially a Court procedure, and we think that Court procedures should be prescribed by the Rules of Court.

Ontario, British Columbia and New Zealand provide elaborate statutory definitions of the cases to be brought under the single procedure. These definitions have caused litigation. England lets the claimant choose to follow the single procedure or another procedure; in a case of doubt, however, the claimant's only safe course is the single procedure. We do not think that the provisions to get mistaken procedures on the right track are complete in any of these jurisdictions.

Under our proposal it will be for the claimant to choose to follow the judicial review procedure or another procedure; and for the Court, if it is not satisfied with the applicant's choice, to direct that the application continue under the other

procedure. The claimant would not be deprived of his remedy (e.g. through the expiry of a limitation period after the commencement of the proceeding) and the proceeding would go ahead with the minimum of cost and delay.

9. Further Work

This proposal does not deal with the following:

(1) Joinder of a claim for damages to a claim for judicial review;

(2) Except for the matters listed in section 6 above, substantive matters such as standing to apply, grounds for judicial review, and the nature of the relief.

These subjects will be dealt with in later stages of the Institute's project.

PART II JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

APPLICATION FOR JUDICIAL REVIEW

Chapter 1. Introduction

a. Reasons for Report

1.1 We have for several years been interested in the whole field of judicial review of administrative action and have done much work on it. However, it is the procedure by which judicial review is obtained that is causing the most urgent problems, and not the substantive law. We have accordingly decided to issue a report which is mainly confined to proposals for solving these problems by the substitution of a single procedure for the two, and sometimes three, procedures which now exist.

1.2 The distinction between "procedure" or "procedural law" and "substance" or "substantive law" is not clear cut, making it difficult to be precise about the coverage of a report on procedure. Generally speaking, we use the terms "procedure" and "procedural law" to describe the process followed by a person who has been wronged to obtain relief; we use the terms "substance" and "substantive law" to describe the causes for which the law offers relief and the relief available, i.e. the rights and remedies.

b. Procedural Reform in Other Jurisdictions

1.3 Our decision to proceed with recommendations for procedural reform was influenced by the successful introduction of a single procedure for judicial review of administrative

action in Ontario, New Zealand, British Columbia and England (hereinafter "the jurisdictions under study").

1.4 Ontario led the way in 1971 by introducing the Judicial Review Procedure Act (hereinafter "the Ontario Act").[1] It was based on the recommendations of the Royal Commission appointed by the Ontario government in 1964 to inquire into civil rights (hereinafter "the McRuer Report").[2]

1.5 New Zealand followed suit in 1972 with the enactment of the Judicature Amendment Act 1972 (hereinafter "the New Zealand Act").[3] The provisions are based on the recommendations of the Public and Administrative Law Reform Committee, in its Fourth Report, Administrative Tribunals: Constitution, Procedure and Appeals[4] and on a draft statute proposed in the Fifth Report.[5] Major amendments in 1977[6] flow from the recommendations in the Eighth Report.[7]

1.6 British Columbia adopted the same model in 1976 with the enactment of its Judicial Review Procedure Act (hereinafter "the British Columbia Act").[8]

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1 R.S.O. 1980, c. 224 (first enacted as S.O. 1971, c. 48) (noted hereinafter as "Ont").

2 Royal Commission Inquiry into Civil Rights, Report No. 1 (Commissioner: Honourable J.C. McRuer) 1968 (noted hereinafter as "McRuer Report").

3 No. 130 of 1972 (noted hereinafter as "NZ").

4 January 1971, 6-16, paras. 11-28 (noted hereinafter as "NZLRC 4").

5 January 1972, 6-8, paras. 18-22 and Appendix.

6 Judicature Amendment Act 1977, No. 32 of 1977, ss. 10-15.

7 September 1975, 18-21, paras. 23-30.

8 R.S.B.C. 1979, c. 209 (first enacted as S.B.C. 1976, c. 25)

The British Columbia Act is the outcome of the British Columbia Law Reform Commission's recommendations on A Procedure for Judicial Review of the Actions of Statutory Agencies.[9]

1.7 England introduced a single procedure by Rules of Court in 1977 (hereinafter "the English Rules").[10] They are based on the Law Commission's recommendations in its Report on Remedies in Administrative Law.[11] The new procedure was legislated in 1981 as section 31 of the Supreme Court Act (hereinafter "the English Act").[12] The English Rules continue in force under the new legislation.

1.8 In addition to legislation in the jurisdictions under study, the studies and experiences federally in Australia and Canada will be valuable to later stages of our project. Comprehensive statutory reform to replace the common law remedies came into effect in the Commonwealth of Australia on 1 October 1980.[13] The legislation was the outcome of the Report of the

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[8](cont'd)(noted hereinafter as "BC").

[9] LRC 18, 1974 (noted hereinafter as "BCLRC 18").

[10] Order 53 of the Rules of the Supreme Court as substituted in 1977 by the Rules of the Supreme Court (Amendment No. 3) 1977, S.I. 1977 No. 1955 (noted hereinafter as "Eng Rules").

[11] Law Com. No. 73, Cmnd. 6407, March 1976 (noted hereinafter as "LC 73"). LC 73 was preceded, in 1971, by Working Paper No. 40, Remedies in Administrative Law (noted hereinafter as "LCWP 40").

[12] Supreme Court Act 1981 (U.K.), c. 54 (noted hereinafter as "Eng Act").

[13] Administrative Decisions (Judicial Review) Act 1977 (No. 59 of 1977 as am. No. 66 of 1978 and No. 111 of 1980).

Committee of Review on Prerogative Writ Procedures,[14] and the Report of the Commonwealth Administrative Review Committee.[15]

1.9 Section 28 of the Federal Court Act creates a jurisdiction in the Federal Court of Canada which goes beyond the jurisdiction of superior courts to review at common law.[16] The Law Reform Commmission of Canada has since studied the topic and recommended more extensive reform in its report on Judicial Review and the Federal Court.[17] In August 1983 the Canadian Department of Justice issued a paper entitled Proposals to Amend the Federal Court Act. Among its proposals is a recommendation for a single procedure to eliminate the existing procedural complexities of judicial review under the Federal Court Act.[18]

c. Consultation

1.10 During the course of our work we have received help from various individuals and groups. We gratefully acknowledge the assistance of: Mr. Justice W.A. Stevenson, Chairman, and members of the Rules of Court Committee; Mr. Justice S.S. Lieberman of the Alberta Court of Appeal and Mr. Justice D.C. McDonald of the Alberta Court of Queen's Bench, who have provided

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14 Parliamentary Paper No. 56, 1973 ("The Ellicott Committee Report").

15 Parliamentary Paper No. 144, August 1971 ("The Kerr Committee Report").

16 Federal Court Act, R.S.C. 1970, 2nd Supp., c. 10.

17 Report No. 14, 1980 (noted hereinafter as "LRCC 14"). See also Working Paper No. 18, Federal Court Judicial Review, 1977 and David J. Mullan, The Federal Court Act: A Study of the Court's Administrative Law Jurisdiction, published in 1977 for the Law Reform Commission of Canada, Administrative Law Series.

18 At 10, #20(ii).

us with official liaison with these two courts; Professors D.P. Jones and F.A. Laux of the Faculty of Law at the University of Alberta; Professors P. Freeman, P. McDonald and M.F. Rutter, formerly of the Faculty of Law at the University of Alberta; Professors E.E. Dais and A.R. Lucas of the Faculty of Law at the University of Calgary; the Legal Forum; Harris Wineberg of the Legal Research and Analysis Branch, Attorney General's Department; Edmonton practitioners A.S. deVillars, D.J. Finlay, S.D. Hillier, A.H. Lefever, F.F. Slatter, P.A. Smith and M.J. Trussler; and the general membership of the Northern Alberta Administrative Law Section of the Canadian Bar Association.

Chapter 2. Scope of Judicial Review

a. Meaning of "Administrative Action"

2.1 In bare political theory, the legislature sets the policies of government while the executive, aided by a vast civil service, handles the day-to-day administration. In practice and with increasing frequency the legislature empowers a specific official or body (hereinafter a "public authority" or "authority") to perform a statutory function. Examples range from a clerk in the Motor Vehicles' office responsible for the issue of drivers' licenses or vehicle registrations to major decision-making bodies such as the Public Utilities Board or the Labour Relations Board. The powers, authorities and duties exercised by public authorities in the administration of government we call "administrative action".

b. Purpose of "Judicial Review"

2.2 The administrative actions of public authorities often affect the legal rights of citizens. The courts are long used to dealing with citizen complaints. From the early days of the common law, the superior courts developed a number of remedies to supervise the decisions, proceedings and other actions of the inferior courts. With the growth in bureaucratic power the superior courts extended their supervisory jurisdiction to public authorities and expanded the remedies available for the purpose. Although the procedures for obtaining these remedies are different in many ways, they are all part of a process by which the courts control the actions of inferior courts and public

authorities. That process is called "judicial review" and is the subject of this report.

2.3 The purpose of judicial review is to ensure that inferior courts and public authorities do their job and that they do it properly. It is a "public law" jurisdiction. In exercising the jurisdiction, the superior courts protect both the public interest in good administration and the rights of individual citizens. The "private law" activities of government--which are carried out on the basis of ordinary contract, property, commercial or corporate law--are not strictly concerned with public administration and therefore not within the judicial review jurisdiction.

c. Distinction between "Public Law" and "Private Law"

(1) Distinction in General

2.4 Generally speaking, there is no clear analysis distinguishing public and private law in common law systems of jurisprudence. The distinction has its roots in the Roman jurisprudential model which views law as a chain of relationships dividing private obligation (person-and-person) and property (person-and-thing) relationships from the public law relationship between the individual and the state (person-and-state).[19] This model recognizes the unique position of the state and the unequal power relationship between public authorities and the citizen.

2.5 Because it is not generally well developed in common law systems, the distinction between public and private law does

[19] Geoffrey Samuel, "Public and Private Law: A Private Lawyer's Response" (1983) 46 Mod. L. Rev. 558 at 558-59.

not ordinarily have a rigid application. Although it is useful as a conceptual tool to help analyze rights and duties, it does not describe "a body of wholly autonomous rules entirely separate from private law" as in some continental countries (e.g. France, where the system of public law is much more developed).[20]

(2) Distinction Applied to Remedies

2.6 The English distinction between public and private law is more developed in the area of judicial review where a somewhat formal distinction is based on the remedies which are available. The judicial review remedies divide into two groups: the "prerogative remedies" and the "non-prerogative remedies". The word "prerogative" refers to powers emanating from the Crown.

2.7 The "prerogative remedies" of importance for judicial review are certiorari, prohibition, mandamus, quo warranto and habeas corpus. They are ancient in origin, having first issued at common law in the name of the King for the public law purpose of controlling inferior judicial and other officials. Because the complaints were brought by citizens the remedies eventually became available to citizens and no longer issued in the King's name. The prerogative remedies are known as "public law remedies" by reason of their history and purpose.

2.8 The "non-prerogative remedies" of importance for judicial review are declarations and injunctions. Both remedies originated in equity, a separate jurisdiction which evolved

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[20] Carol Harlow, "'Public' and 'Private' Law: Definition without Distinction" (1980) 43 Mod. L. Rev. 241 quoting Vedel, Droit Administratif (5th ed., 1973) at 57-58.

historically to supplement the common law.[21] A third remedy, damages, is infrequently awarded against public authorities. It originated at common law. All three remedies were developed in ordinary law suits brought by one citizen against another. Although the courts eventually extended them to citizens complaining against public authorities, they continue to be known as "private law remedies".

2.9 The jurisdiction of the courts over common law and equity was merged by the Judicature Acts, 1873 and 1875. Many procedures were also merged but the "public law remedies" retained their separate procedural character distinct from the "private law remedies" available in ordinary civil proceedings. Moreover, declarations and injunctions, being remedies in equity, continued to supplement the common law and not to replace it. Their availability continues to this day to depend on the old divisions of jurisdiction. (Both the "prerogative remedies" and the "non-prerogative remedies" are described more fully in chapter 3.)

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[21] The English Court of Chancery, i.e. "equity", historically refused to grant a declaration without consequential relief. Statute empowered it to grant a declaration only: Court of Chancery Act, 1850, c. 14. The power was generalized by the Chancery Procedure Act, 1852, c. 86, s. 50. The Judicature Acts, 1873 and 1875, further empowered the Supreme Court to make binding declarations of right whether or not any consequential relief was or even could be claimed. Section 11 of Alberta's Judicature Act, R.S.A. 1980, c. J-1, continues this power today.

d. Difference between Judicial Review and Ordinary Civil Proceedings

2.10 Judicial review differs from ordinary civil proceedings, for the courts reviewing administrative action are concerned to uphold private rights, to control illegal public action and to protect public administration. As the English Law Commission has pointed out, a challenge "affects a wide range of interests--the interest of the person making the challenge, the interest of the administration and the interests of the persons relying on the challenged order."[22] The court plays a role in balancing the administrative convenience of the state with fairness to individual citizens who are affected.

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[22] LCWP 40 at 56.

Chapter 3. Existing Remedies and Procedures

a. Existing Remedies

(1) Prerogative Remedies

3.1 We have said that five prerogative remedies are of importance for judicial review today: certiorari, prohibition, mandamus, quo warranto and habeas corpus.

3.2 Certiorari lies to compel an inferior court or a public authority to provide the record of proceedings before it to the superior court. Typically, the application will be accompanied by a request for an order to set aside a decision, technically "to quash".[23] Certiorari may be sought on its own or in aid of other relief such as prohibition or habeas corpus. Certiorari with an order to set aside is so common that the word "certiorari" used alone (though it relates only to providing the record) often describes an application for an order to set aside a decision. "Certiorari" is used in this sense in the jurisdictions under study. An order to set aside may be granted on grounds that the pubic authority has acted in excess or abuse of its jurisdiction (including acting without procedural fairness), or that an error made within jurisdiction appears on the face of the record.

3.3 Prohibition lies to prevent an inferior court or tribunal from acting or continuing to act in excess or abuse of its jurisdiction (again including acting without procedural

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[23] Re Board of Governors of Mount Royal College and Mount Royal Non-academic Staff Association (1974) 48 D.L.R. (3d) 454 (Alta. T.D.) per Milvain C.J.T.D. at 455.

fairness). The essential difference between prohibition and certiorari to quash is one of timing. Prohibition prevents a decision from being taken in the first place; certiorari expunges a decision which has been taken. The principles underlying the availability of the two remedies do not differ.[24]

3.4 Mandamus lies to compel the proper exercise of public duty imposed on an inferior court or public authority by law or custom.

3.5 Quo warranto lies to restrain the exercise of a public office by an unauthorized person.

3.6 Habeas corpus, "the most renowned contribution of the English common law to the protection of human liberty,"[25] lies to compel the production of the body of a person detained by another to determine the legality of the confinement. The remedy is wider than judicial review because it lies not only against public authorities but against anyone, "whether the custody be under criminal process, or civil, or military, or naval, or private, or governmental Executive Act or otherwise."[26] Its uses include challenges to custody and deportation orders and immigration matters, the detention of persons with mental disabilities and the custody of children.

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[24] The King v. Electricity Commissioners, ex p. London Electricity Joint Committee Company Ltd. et al. [1924] 1 K.B. 171 (C.A.) per Atkin L.J. at 206.

[25] S.A. deSmith, Judicial Review of Administrative Action (4th ed. J.M. Evans ed. 1980) 596.

[26] R. v. McAdam (1925) 44 C.C.C. 155 at 178-79 (B.C.C.A.) per Martin J.A.

(2) Non-prerogative Remedies

3.7 We have said that two non-prerogative remedies are of importance for judicial review today: declarations and injunctions.

3.8 The emergence of the declaration in the public law area is comparatively recent. The remedy can serve either to define the rights of parties or to declare invalid an action or proposed action which exceeds the powers of an authority. Its appropriateness to test the legality of subordinate legislation was established in 1910 by the English Court of Appeal in Dyson v. Attorney-General,[27] and this is perhaps its most useful area of application.

3.9 The use of the injunction to curtail administrative abuse is also a comparatively recent phenomenon. An injunction is an order which prohibits a person from doing or continuing some wrongful act. It is used in the public law sphere to restrain a public authority from acting in excess or abuse of its authority or relying on ultra vires legislation.

b. Existing Procedures

3.10 The Alberta Rules of Court direct the summary disposition of an application for prerogative relief. An application for non-prerogative relief, on the other hand and with one exception, must be pursued by statement of claim.

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[27] [1911] 1 K.B. 410 (C.A.).

(1) Prerogative Remedies

3.11 Part 56 of the Alberta Rules of Court sets out the procedure for obtaining the prerogative remedies. It is entitled Crown Practice Rules in Civil Matters.

(a) Crown Practice Rules of General Application

3.12 Rule 737 stipulates that, except as specially provided in Rules 738-53, the general Rules of Court apply. Rule 738 replaces the ancient procedure for the issue of and return to a writ by a simpler procedure for application by notice of motion returnable before the court, leading to a judgment or order in the nature of the old writs of certiorari, prohibition, mandamus, quo warranto and habeas corpus.[28] Rule 739 describes the persons to be served with the notice of motion. Rule 740 provides for an appeal to the Appellate Division (since 1979, the Alberta Court of Appeal), and Rule 741 empowers a judge of the Court of Appeal to make any direction required to give effect to the order of the Court.

3.13 Rules 384 to 393 govern notices of motion. They are located in Part 29 entitled Motions and Applications. The notice of motion provides a summary method of bringing an application before the court. Ordinarily, it is reserved for an application in an action or proceeding which is in progress before the court. Its use to initiate a claim for prerogative relief is anomalous. Two provisions are of importance for our purposes:

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[28] The elimination of the writ as the commencing document dates back to Alberta's 1914 Rule 842, borrowed in turn from Ontario's 1897 Rule 1294.

(1) Rule 385 provides for disposal of the motion by a judge in chambers; and

(2) Rule 386 prescribes two days or more as the time ordinarily allowed between service of the motion and the day of the hearing.

(b) Crown Practice Rules of Specific Application

3.14 Certain of the Rules are specific to certiorari, mandamus and quo warranto.

(i) Certiorari

3.15 Rule 742 places a time limit of six months from judgment, order, warrant or inquiry on the filing and service of a notice of motion for an order in the nature of certiorari. The application of Rule 548 which gives the court power to enlarge or abridge time stipulated in the Rules is specifically excluded. Rule 743 provides for endorsement of the notice with a direction to the lower court or public authority to deliver up the record. The record includes the judgment, order or decision and reasons as well as the process commencing the proceedings, the evidence and the exhibits filed, if any. Rule 744 requires the lower court or public authority to certify the contents of the record upon the return or, if it is unable to make the return, to certify the reason for its inability to do so. As well, the court may dispense with the return of evidence or exhibits.

(ii) Mandamus

3.16 Rule 751 requires that an affidavit of the person pursuing the claim shall accompany an application for mandamus. Rule 752 prohibits action from being taken against a person for acts done in obedience to a mandamus issued by the court. Rule 753 provides that the order may stipulate the time for performance and specify terms.

(iii) Quo Warranto

3.17 Rule 745 specifies that where statutory provisions exist, they take precedence over Rules 746 to 750 which otherwise govern applications for quo warranto. By Rule 746, application may not be made without leave of the court unless the case is brought by the Attorney General on behalf of the Crown. The application for leave must be accompanied by the affidavit of a "relator", that is, the person upon whose complaint, or at whose instance, the proceedings are brought. By Rule 747, special leave of the court is required to raise any objection that is not specified in the notice of motion. Rule 748 permits substitution of a new relator in special circumstances. Where similar objections are taken on applications against several persons for usurpation of the same office, subrule 749(1) enables the court to consolidate the applications, or to stay proceedings on all but one of them until judgment is rendered. Subrule 749(2) requires that before any application is stayed against a defendant he must first undertake to renounce his claim to the office if the Crown succeeds on the application which proceeds. Rule 750 requires a defendant who does not intend to defend to

file a document called a "disclaimer" renouncing his claim to the office. Once the disclaimer is filed judgment of ouster may be entered and costs may be taxed as in judgment by default.[29]

(iv) Prohibition and Habeas Corpus

3.18 There are no Crown Practice Rules specific to prohibition and habeas corpus.

(2) Non-prerogative Remedies

(a) Rules of General Application

3.19 Ordinarily, a non-prerogative remedy is obtained in an action commenced by a statement of claim issued under Rule 6(1). The Rules provide for pleadings, examination for discovery, production of documents and other interlocutory proceedings, and trial in open court. The procedure, which can be prolonged and costly, is appropriate where the issues are complex and witness reliability will affect the resolution of facts in dispute.

(b) Rules of Specific Application

(i) Injunction

3.20 The Rules expedite the granting of an injunction where the pleadings include a claim for injunctive relief. Where an injunction is required immediately, Rule 392(1) allows the plaintiff to serve notice of motion for an injunction without leave either with the statement of claim or after service of the statement of claim but before the time limited for filing the

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[29] These Rules appear to have originated in the early 1700's with 9 Ann. c. 20, ss. 4, 5.

statement of defence. (Service of other notices of motion must be with leave obtained ex parte.) Rule 392(2) states that the defendant may serve any notice of motion on the plaintiff at any time after the issue of the statement of claim.

3.21 An interim injunction may be granted ex parte under Rule 387 if the court is satisfied that no notice is necessary or that the delay caused by notice of motion might entail serious or irreparable mischief. The injunction usually will be restricted to a short duration, and the defendant may apply, on notice to the plaintiff, for variation or discharge of the order.

(ii) Declaration

3.22 In exception to the general rule, proceedings for a declaration may be commenced by originating notice in circumstances specified in Rule 410. These include:

> (d) proceedings where, under any statute or these Rules, provision is made that the proceedings be taken by originating notice;
>
> (e) proceedings for the determination of any question where there are no material facts in dispute and the rights of the parties depend upon the construction of
>
> (i) a written statement, or
>
> (ii) a statute or order-in-council or a regulation
>
> and for a declaration of the rights of the persons interested.

3.23 An originating notice is a method of commencing an action without pleadings and, unlike proceedings commenced by statement of claim, the application is heard in chambers, not court. The "procedure was invented for the purpose of quickly determining simple points".[30]

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[30] Re Holloway [1894] 2 Q.B. 163 (C.A.) at 166. See the

3.24 The Rules governing proceedings commenced by originating notice are contained in Part 33. Rule 405(1) directs the originating notice to be in Form G. Rule 405(2) states that it is to include a concise statement of the nature of the claim made and of the relief or remedy claimed in the proceedings with sufficient particulars to identify the cause of action. Form G anticipates that an affidavit or affidavits will be read in support of the application. Rule 406 requires the originating notice together with affidavits to be served ten days before the date named for the hearing. Rule 407 empowers the court to give any necessary directions, and to permit evidence to be given orally at the hearings. By Rule 408 the court may give directions as to the persons to be served, whether or not they are parties. By Rule 409 it may make an order summarily disposing of questions arising on the application or give directions for their trial. Those proceedings which may be commenced by originating notice, including proceedings for a declaration in the circumstances referred to above, are specified in Rule 410.

c. Problems in the Existing Law

3.25 There are two defects in the existing law which deprive some claimants of judicial review remedies to which they are entitled and impose upon other claimants unjustified cost, trouble and delay. The two defects are as follows:

(i) Different legal rules apply to different judicial

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[30](cont'd)Chancery Procedure Act 1852, 15 and 16 Vict. c. 86, ss. 45 and 47, and the Judicature Rules of 1883, O. 55, rr. 3-11.

review remedies and their companion procedures. The rules deal with such important things as standing to commence the proceedings, the time within which proceedings must be commenced and the grounds which must be proved. The remedies sometimes overlap in part but are often significantly different.

(ii) A claim for prerogative relief and a claim for non-prerogative relief cannot be brought together.[31]

3.26 Some examples of difficulties caused by differences in the legal rules applicable to different judicial review remedies are as follows:[32]

(i) Courts sometimes hold that a claimant who could have obtained a prerogative remedy cannot obtain a non-prerogative remedy.[33] For example, a court might hold that a claimant who could have obtained an order for certiorari setting aside a decision cannot obtain a declaration that the decision is invalid.

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[31] Re Oil, Chemical & Atomic Workers International Union and Polymer Corporation [1966] 1 O.R. 774 (Ont. H.C.). According to Laycraft J. (as he then was), this is the major cause of current difficulties: McCarthy v. Board of Trustees (No. 1) [1979] 4 W.W.R. 725 at 730 (Alta. T.D.).

[32] This account is based largely on BCLRC 18 at 24-25 and LC 73 at 15-16.

[33] Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board [1952] O.R. 366 (Ont. C.A.); but see Driver Salesmen, Plant Warehouse and Cannery Employees, Local Union v. Board of Industrial Relations (1967) 61 W.W.R. 484 (Alta. T.D.) per Riley J. at 489.

(ii) A declaration is often an alternative to certiorari, but covers a much wider range of acts of public authorities. Traditionally, certiorari applied only to decisions which were similar enough to those made by courts to be characterized as "judicial" or "quasi-judicial";[34] it now also applies, on grounds of procedural unfairness, to decisions which are merely administrative or ministerial.[35] Similarly, an injunction is often an alternative to prohibition but covers a much wider range of acts of public authorities.

(iii) A declaration or injunction may be granted against a private authority or non-statutory tribunal such as the executive of a club or trade union. A prerogative remedy may not.[36]

(iv) The prerogative remedies may be granted against entities which do not have the capacity to be sued whereas declarations and injunctions may not.[37]

(v) The prerogative remedies are rarely available

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[34] See e.g. Calgary Power Ltd. v. Copithorne (1958) 16 D.L.R (2d) 241 (S.C.C.).

[35] Martineau v. Matsqui Institution Disciplinary Board (No. 2) [1980] 1 S.C.R. 602.

[36] Howe Sound Co. v. International Union of Mine, Mill and Smelter Workers [1962] S.C.R. 318.

[37] Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board supra n. 33; Westlake et al. v. The Queen [1971] 3 O.R. 533 (Ont. H.C.).

against the Crown,[38] and an injunction is not available at all. A declaration is the only effective remedy,[39] and in an action for a declaration against the Crown there is no interim remedy to preserve the situation until the final decision is made.

(vi) Declarations and injunctions are obtained in ordinary civil actions in which there is available a range of interlocutory procedures which may assist a claimant, for example, examinations for discovery, production of documents, and interim injunctions to preserve the situation until the final decision is made. Prerogative remedies are more summary in nature and the interlocutory procedures are not readily available.

(vii) Damages may be obtained in conjunction with non-prerogative relief but not with prerogative relief.

(viii) An order of certiorari quashes a decision and renders it ineffective. A declaration merely states the legal position that the decision is unauthorized or otherwise invalid; it does not quash the decision nor does it order or prohibit

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[38] See Re Gooliah and Minister of Citizenship and Immigration (1967) 63 D.L.R. (2d) 224 (Man. C.A.); Border Cities Press Club v. Attorney-General for Ontario [1955] O.R. 14 (Ont. C.A.).

[39] Proceedings against the Crown Act, R.S.A. 1980, c. P-18, s. 17.

any action.

(ix) A notice of motion for certiorari must be brought within six months from the date of the decision impugned. A declaration may be sought with no fixed limit of time although an unreasonable delay may operate as a discretionary bar.

(x) Historically, any member of the public could apply for and, in the discretion of the court, be granted prerogative relief.[40] The extent of the connection with the proceedings which is required of the applicant for non-prerogative relief is uncertain.

3.27 A complainant who is entitled to a remedy should not be deprived of it or put to cost, trouble and delay, by

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[40] For a current statement, see Martineau v. Matsqui Institution Disciplinary Board (No. 2), supra n. 35 per Dickson, J. at 619:

> When concerned with individual cases and aggrieved persons, there is the tendency to forget that one is dealing with public law remedies, which, when granted by the courts, not only set aright individual injustice, but also ensure that public bodies exercising powers affecting citizens heed the jurisdiction granted them. Certiorari stems from the assumption by the courts of supervisory powers over certain tribunals in order to assure the proper functioning of the machinery of government. To give a narrow or technical interpretation to "rights" in an individual sense is to misconceive the broader purpose of judicial review of administrative action. One should, I suggest, begin with the premise that any public body exercising power over subjects may be amenable to judicial supervision, the individual interest involved being but one factor to be considered in resolving the broad policy question of the nature of review appropriate for the particular administative body.

procedural barriers and complexities. We believe, as did the Public and Administrative Law Committee of New Zealand in 1971, that: "A citizen is entitled to a system that is much less complex and less uncertain--it is wrong that so much can depend upon the particular remedies sought by a litigant."[41]

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[41] NZLRC 4 at 14.

Chapter 4. A New Procedure for Judicial Review

a. Goals of a New Procedure

4.1 The judicial review procedure should allow the court to protect the legal rights of individual citizens and control the illegal action of public authorities while taking into account the public interest in good administration. The procedure should enable the court to hear the evidence and arguments relevant to a claim for relief. Where a case for relief is made out, the court should be empowered to grant the most appropriate relief, be it prerogative or non-prerogative. The claim should not be defeated merely because the applicant applies for the wrong remedy. The procedure should accommodate individual cases while remaining as simple, expeditious and inexpensive as possible. Notice provisions and other safeguards should be fair to both applicants and respondents.

b. Alternative Approaches

4.2 Two approaches to procedural reform have been taken in other jurisdictions. One is to introduce a single procedure for review. The other is to adapt the existing diverse procedures.

(1) Introduction of A Single Procedure for Judicial Review

4.3 Ontario, New Zealand, British Columbia and England have introduced a single procedure for judicial review. That procedure opens the way to any relief to which the applicant would be entitled in proceedings for certiorari, prohibition, mandamus, a declaration, an injunction, or a combination of these

remedies.[42] The substantive law governing these remedies remains essentially unaffected (although some changes have been made). This means that a particular remedy can be granted only if its substantive law requirements have been satisfied.

(2) Adaptation of Existing Procedures

4.4 Changes in New South Wales,[43] Nova Scotia[44] and more recently New Brunswick[45] make the consequences of the wrong choice of remedy less serious than at present. These jurisdictions preserve the existing procedures for obtaining prerogative and non-prerogative relief, but build in greater versatility. As with the single procedure for judicial review, the substantive law requirements continue undisturbed.

4.5 A similar adaptation of the Alberta Rules of Court would enable the court to grant the appropriate remedy, prerogative or non-prerogative, notwithstanding that it is not available in the proceeding by which the application was commenced. If the wrong remedy were sought the court could grant the right one, or it could order the application to be continued under the procedure by which the right remedy should have been sought and give directions to effect the change of procedure. Joinder of claims for prerogative and non-prerogative relief also could be allowed. Otherwise, the procedures we have described in

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[42] The judicial review procedure in British Columbia and England also includes the statutory remedy which replaces quo warranto in those jurisdictions. See paras. 7.5 to 7.6.

[43] New South Wales Rules of the Supreme Court (1970-1980).

[44] Rules of Civil Procedure made under section 42 of the Judicature Act, S.N.S. 1972, c. 2 (effective 1 March 1972).

[45] New Brunswick Rules of Court.

paras. 3.10 to 3.24 would remain unchanged.

c. Recommendation for a Single Procedure

4.6 At first glance, the adaptation of the existing rules to streamline the procedures for judicial review is an attractive solution. It would permit procedural problems to be addressed as part of a comprehensive code of procedure for civil actions. More important, it would avoid the need to distinguish between the public and private law uses of injunctions and declarations because there would be no change in the method of initiating the claim.

4.7 The simplicity of this solution is, however, more apparent than real. It leaves unanswered questions about the procedures to be observed on joinder of a claim commenced by summary procedure with a claim commenced by statement of claim. It also leaves unanswered questions about the reasons which would justify granting the "right" remedy at the end of proceedings which had been focussed, through procedure, on another remedy. As well, the elaborate procedures of the ordinary civil action, which are not routinely needed for judicial review matters, would remain applicable to an action for non-prerogative relief.

4.8 In our opinion, a single procedure for judicial review will do most to ensure that applications are decided on their merits and do not fail for procedural reasons. A single procedure can be fashioned with the flexibility to meet the needs of particular cases in a simple and direct manner.

> Recommendation 1. We recommend that a single procedure for making an application for judicial review be introduced in Alberta.

d. Promulgation in Rules of Court

4.9 The single procedure for application for judicial review has been enacted by statute in three of the four jurisdictions under study.[46] In the fourth jurisdiction it was first introduced by rules but later legislated.[47] Legislation has the advantage that it does not need to be limited to procedural reform.

4.10 However, our purpose in this report is to make recommendations for simplification of the procedure for obtaining judicial review of administrative action. We think that the place for the reforms we recommend is in the Rules of Court. That is where procedures of general application are found and, at least in theory, changes to the rules are effected more readily than amendments to statutes. To ensure the validity of our proposed rules, we make recommendations in Chapter 16 for their endorsement by legislation.

> Recommendation 2. We recommend that the single procedure for making an application for judicial review be introduced in the Alberta Rules of Court as Part 56.1: Judicial Review in Civil Matters.

[See section 2 of our proposed Rules to Amend the Alberta Rules of Court on p. 92.]

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[46] Ont (1971); NZ (1972); BC (1976).

[47] Eng Rules (1977); Eng Act (1981).

Chapter 5. Initiation of Procedure

a. Compatibility with General Body of Rules

5.1 Three possibilities for designing a procedure for judicial review are indicated by the jurisdictions under study. The first possibility[48] is to select one initiating procedure from among those available under the Alberta Rules of Court and to modify the selected procedure as needed. The second possibility,[49] a variation of the first, is to select an initiating procedure under the existing rules and then to empower the court to go outside the selected procedure and to give directions on a wide range of procedural matters. The third possibility[50] is to enact a comprehensive set of rules designed specifically for judicial review.

5.2 We prefer the first possibility. In our view the general rules should be followed insofar as they are compatible with the special needs of judicial review. Where necessary, they should be specially varied by the rules establishing a procedure for judicial review. Variations should be minimal.

> Recommendation 3. We recommend that, except where provided specially in the Rules relating to an application for judicial review, the general rules including the

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48 Ont 2(1); BC 2(1).

49 NZ 4(1), 9 and 10.

50 Eng Act 31(1) and Eng Rules.

originating notice Rules under Part 33 and those relating to abridgment or extension of time should apply.

[See our proposed Rule 753.19 on p. 112.]

b. Method of Initiation

5.3 Under the existing Alberta Rules of Court the methods of beginning proceedings are statement of claim (non-prerogative remedies), originating notice (declarations under Rule 410(e)) and petition, the residual category being statement of claim. Proceedings for prerogative remedies may be begun by ordinary notice of motion but this is an anomaly.[51]

5.4 We think that the statement of claim procedure would be unduly cumbersome for most claims for judicial review. More often than not, pleadings will be unnecessary because the facts are commonly not in dispute and the real issue is one of law.

5.5 We prefer the commencement of applications by a summary procedure under which relief may be granted within a short time. The choice, then, is between the originating notice procedure and the anomalous notice of motion procedure. The main differences between them are:

(1) the time after service within which the application may be heard (2 days for notice of motion and 10 days for originating notice although this time may be abridged under Rule 548); and

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[51] See para. 3.13.

(2) the cost of filing the application (no fee for notice of motion and $25 for originating notice).

In addition to being anomalous as a method of commencement, a notice of motion has two serious deficiencies in the context of judicial review: the court cannot make interim orders and there is inadequate provision for interlocutory process.

5.6 In our view the bringing of an application for judicial review by originating notice would best meet the goals of the single procedure. An originating notice would permit proceedings to be commenced expeditiously, and we would hope that in the majority of cases an order would be granted summarily. Where there are facts in dispute or the nature of the case is complex, the court would be able to give directions for the trial of any questions, making use of the interlocutory processes for which the Rules of general application already provide.

> Recommendation 4. We recommend that an application for judical review be taken by an originating notice.

[See our proposed Rule 753.3 on p. 94.]

Chapter 6. Forum

6.1 In Alberta today an originating notice is brought before a judge of the Court of Queen's Bench sitting in chambers.[52] The judge has power to direct the trial of an issue including trial in open court where it seems proper.[53]

6.2 In several jurisdictions applications for judicial review are heard by a court which has been chosen because it now has or may be expected to develop specialized knowledge of administrative law principles. In Ontario applications for judicial review are heard in the Divisional Court except in cases of urgency when application may be made to a judge of the High Court.[54] In New Zealand applications are heard by the Administrative Division of the Supreme Court.[55] Similarly, in New South Wales proceedings in the nature of judicial review are taken before the Administrative Law Division of the Supreme Court which was created in 1973.[56] The proceedings assigned to the Division include proceedings:

> (i) for commanding or otherwise requiring a public body or a public officer to perform a public duty;
>
> (ii) for prohibiting or otherwise restraining a public

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52 Rule 405(1): Form G. Notice of motion may be disposed of by a judge in chambers under Rule 385. Proceedings commenced by statement of claim will be conducted before a judge of the Court of Queen's Bench, ordinarily in open court.

53 Rule 409.

54 Ont 6.

55 NZ 15.

56 New South Wales (Supreme Court Act 1970-80), s. 38.

body or a public officer from performing or purporting to perform any acts;

(iii) for determining by declaration or otherwise any matter concerning the powers of a public body or a public officer.[57]

6.3 On the other hand, a 1980 amendment to the English rules channels the hearing of most non-criminal applications for judicial review to a single Queen's Bench judge.[58] Prior to the amendment, applications ordinarily went to a three-judge Divisional Court of the Queen's Bench Division which, by reason of procedural reforms introduced in 1977, "in effect became an administrative division of the High Court".[59] The court may still direct the more specialized hearing.

6.4 We agree with the conclusion of the British Columbia Law Reform Commission that the advantages of a specialized tribunal might need to be examined in the future, as it has been in other Commonwealth jurisdictions, but that no proposal for a new forum is needed at this time.[60] We recommend that applications for judicial review continue to be heard by a judge of the Court of Queen's Bench. Any wider examination of court structures is beyond the ambit of our project.

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57 Ibid., s. 53(3B)(d) and Rules of the Supreme Court 1970-80, Schedule H.

58 Eng Rule 5(2).

59 H.R.W. Wade, Administrative Law (5th ed.) at 13.

60 BCLRC 18 at 31.

Chapter 7. Scope of Application

7.1 The application for judicial review is designed for use in the public law field and should not include proceedings for private law remedies. There are two remaining questions concerning the scope of the application. The first is: what remedies may be sought by the new procedure? The second is: should the new procedure be substituted for or added to the existing procedures for obtaining judicial review? The considerations pertaining to prerogative and non-prerogative relief differ.

a. Prerogative Remedies

(1) Certiorari, Prohibition and Mandamus

7.2 Because the prerogative remedies operate in the public law domain, the proposed new procedure can apply to them without affecting the award of relief in private litigation. In three of the jurisdictions under study the new procedure applies exclusively where the remedy sought is certiorari, prohibition or mandamus.[61]

7.3 In the fourth jurisdiction, New Zealand, the new procedure applies where a prerogative remedy is sought in relation to the exercise of a statutory power.[62] The definition of a statutory power has its main relevance to the use of the new procedure to apply for non-prerogative relief, and we discuss it

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[61] Ont 7; BC 12; Eng Act 31(1).

[62] NZ 6.

more fully in that context.[63] Because the definition of statutory power in New Zealand may not encompass all circumstances in which the existing remedies are available (e.g. it may not apply to powers exercised under the royal prerogative), the legislation provides that proceedings for an order of or in the nature of certiorari, prohibition or mandamus "shall be treated and disposed of as if they were an application for review" where the application is in relation to the exercise of a statutory power but not otherwise.[64] An application for a prerogative remedy which does not relate to the exercise of a statutory power must be brought under the old procedure.

7.4 The preservation of the old procedure alongside the new one is unnecessarily complex. We prefer the solution chosen in Ontario, British Columbia and England, and recommend that the remedies of certiorari, prohibition and mandamus be included under the new procedure. We recognize that some aspects of the existing rules peculiar to these remedies should be incorporated into the new procedure, and we make recommendations to include them as our Report progresses. We recommend the abolition of the old procedures by consequential amendment to the Crown Practice Rules in Civil Matters.[65]

> Recommendation 5. We recommend that, on an application for judicial review, the court should be able to grant any relief that the

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[63] See paras. 7.13 to 7.16.

[64] The jurisdictions of Ontario and British Columbia also define statutory power for the purpose of determining when an application for non-prerogative relief should come under the new procedure. They do not, however, differentiate procedures for prerogative relief on the same basis.

[65] See paras. 15.1 to 15.2.

applicant would be entitled to in proceedings for an order in the nature of certiorari, prohibition or mandamus.

[See our proposed Rule 753.4(1)(a) on p. 95.]

(2) Quo warranto

7.5 The remedy of quo warranto is rarely, if ever, sought in Alberta today. The Ontario and New Zealand Acts do not mention it. The McRuer Commission in Ontario dismissed it as a writ of comparative unimportance in modern times and one which has been to a large extent supplanted (e.g. by statutory provisions in municipal law).[66] The British Columbia Law Reform Commission has asserted its belief that "the modern occasions for quo warranto proceedings [are] so infrequent that it is not appropriate to subvert the Act to the procedure which we recommend for proceedings involving certiorari, prohibition and mandamus."[67] The judicial review legislation in British Columbia abolishes informations in the nature of quo warranto; substitutes the remedies of injunction to restrain a person from acting in an office in which he is not entitled to act and declaration to declare the office to be vacant where quo warranto formerly would have been available; and includes them under the application for judicial review.[68]

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66 McRuer Report at 239.

67 BCLRC 18 at 39. The "Act" referred to is one which, in 1897, codified the common law and early statutes surrounding the old information in the nature of quo warranto.

68 BC 19.

7.6 In England, the use of an injunction to restrain a person from acting in an office to which he is not entitled and a declaration to declare that the office is vacant were introduced in 1938.[69] These remedies may now be obtained by the new procedure.[70]

7.7 We will consider, at a later stage of our project, whether to retain the remedy of quo warranto, abolish it or introduce a modern substitute. For the time being, we think that an application for quo warranto should be brought under the new procedure.

> Recommendation 6. We recommend that, on an application for judicial review, the court should be able to grant any relief that the applicant would be entitled to in proceedings for an order in the nature of quo warranto.
>
> [See our proposed Rule 753.4(1)(a) on p. 95.]

(3) Habeas Corpus

7.8 The New Zealand, British Columbia and English Acts do not mention the remedy of habeas corpus. The Ontario Act stipulates that:

> Nothing in this Act affects proceedings under The Habeas Corpus Act or the issue of a writ of certiorari thereunder or proceedings pursuant thereto, but an application for judicial review may be brought in aid of an application for a writ of habeas corpus.[71]

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[69] Now Eng Act 30.

[70] Eng Act 31(1)(c).

[71] Ont 12(2).

7.9 This time-honoured constitutional remedy has peculiarities which make it unlike the other prerogative remedies (e.g. any time limitation would be offensive to habeas corpus; it is available against any person, not just a public authority). Furthermore, there may be jurisdictional impediments to its amendment. For example, in Ontario and Quebec habeas corpus statutes passed before Confederation have not been amended by the Parliament and cannot be amended by the provincial Legislature. Similar jurisdictional difficulties may stand in the way of amendment to Imperial statutes in force in Alberta. We cannot say, without further study which we will undertake in a later phase of the project, whether this is so.

7.10 As the Ontario provision indicates, on the other hand, an application for certiorari or other prerogative relief may be made in aid of habeas corpus. For procedural simplicity, the applicant should not be required to take two different proceedings to respond to a single event: one to produce the body under the existing notice of motion procedure and another to produce the record under the new judicial review procedure. Moreover, it would be strange to exclude habeas corpus from the new simplified procedure when habeas corpus is the most revered of the prerogative remedies because it protects the sanctity of an individual's liberty.

7.11 We recommend that habeas corpus be included under the new procedure but that the old procedure be preserved so that none of the existing protections are inadvertently lost. The applicant can then elect to follow either. (Rule 738 should continue to allow applications for habeas corpus, but not the

other prerogative remedies.[72])

> Recommendation 7. We recommend that, on an application for judicial review, the court be empowered to grant any relief that the applicant would be entitled to in proceedings for an order in the nature of habeas corpus.

[See our proposed Rule 753.4(1)(a) on p. 95.]

b. Non-prerogative Remedies

(1) Delineation of Public Law

7.12 The new procedure should be available for claims for declarations and injunctions in public law matters. It should not, however, be available for private law claims. The jurisdictions under study prescribe when the new procedure applies to declarations and injunctions. Ontario, New Zealand and British Columbia make its use depend on the existence of a claim based on the exercise of a "statutory power", as carefully defined. England prescribes its use by analogy to cases where prerogative relief may be granted.

(2) Delineation by Definition of "Statutory Power"

7.13 On an application under the new procedure in Ontario, New Zealand and British Columbia, the court may grant any relief to which the applicant would be entitled in proceedings for a declaration or an injunction, or both, "in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power."[73]

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[72] See para. 15.1.

[73] Ont 2(1); NZ 4(1); BC 2(2).

7.14 In Ontario, a "statutory power" is defined as:

> ... a power or right conferred by or under a statute,
>
> (i) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,
>
> (ii) to exercise a statutory power of decision,
>
> (iii) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,
>
> (iv) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party.[74]

A "statutory power of decision" is defined as:

> ... a power or right conferred by or under a statute to make a decision deciding or prescribing,
>
> (i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
>
> (ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not.

It includes the power of an inferior court.[75]

7.15 The Ontario definitions have provided the basis for the definitions of a "statutory power" and a "statutory power of decision" in New Zealand and British Columbia.[76] However, there are differences. For example, New Zealand and British Columbia

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[74] Ont 1(g).

[75] Ont 1(f).

[76] NZ 3; BC 1.

include a power or right to investigate or inquire into a person's rights, powers, privileges, immunities, duties or liabilities in their definitions of a "statutory power", whereas Ontario does not. Unlike Ontario and British Columbia, the opening words of the New Zealand definition of both a "statutory power" and a "statutory power of decision" embrace a power or right conferred "by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate" in addition to a power or right conferred by or under statute. (See Appendix A for a discussion of policy issues relating to definition.)

7.16 The delineation of public law by the definition of a "statutory power" has proven to be "a formula notably less generous than the test of the old common law",[77] and some applicants have been denied a remedy under the Ontario and British Columbia Acts because of a finding that a public authority was not exercising a statutory power. The use of the old procedures for some applications defeats the objective of the new procedure which is to consolidate applications for judicial review remedies into one form of proceeding. (See Appendix B for a more complete account of difficulties with the definition of a "statutory power".) The dual definitions of a "statutory power" and a "statutory power of decision" compound the confusion. (Again, see Appendix B.)

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[77] Carol Harlow, supra n. 20 at 152.

(3) Delineation by Reference to Prerogative Remedies

7.17 In England, a declaration may be made or an injunction granted under the new procedure where the court considers that it would be "just and convenient" to do so having regard to:

(a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari;

(b) the nature of the persons and bodies against whom relief may be granted by such orders; and

(c) all the circumstances of the case.[78]

7.18 The House of Lords decision in O'Reilly v. Mackman[79] compels the use of the judicial review procedure for applications for declarations and injunctions in public law matters because it contains protections for public authorities which foster the public interest in good administration.[80] The protections exist to safeguard public authorities "from unwanted litigation, preventing unnecessary public expenditure and minimizing interruption and delay in the decision-making process."[81] They include the following:

(1) the application must obtain the court's permission to apply for judicial review;

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78 Eng Act 31(2).

79 [1982] 3 All E.R. 1124 (H.L.).

80 Eng Rule 1(2) provides that the new procedure "may" be used for declarations and injuctions; Eng Act 31(1) says "shall". The House of Lords disregarded this change in O'Reilly, leaving open the possibility that the ordinary civil procedure may, in a rare case, be available for a public law matter--perhaps where it is subsidiary to the resolution of private law rights.

81 Maurice Sunkin, "Judicial Review: Rights and Discretion in Public Law" (1983) 46 Mod. L. Rev. 645 at 647.

(2) the court may impose terms on the application where it gives permission;

(3) the facts are verified from the outset by sworn affidavit requiring full and candid disclosure;

(4) the application must be made promptly--within three months though the court may extend the period;

(5) the interlocutory processes of examination for discovery, the discovery of documents and cross-examination of deponents on their affidavits are not automatic;

(6) damages may be joined so that all claims against a public authority can be heard together; and

(7) the process is centralized in a specialized court.

7.19 The requirement that the judicial review procedure be used exclusively for declarations and injunctions in public law matters puts applicants at a disadvantage:

(1) the applicant has less control over the conduct of the suit under the judicial review procedure than in ordinary civil proceedings;

(2) without discovery the applicant may not be able to obtain access to information essential to prove his case;[82]

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[82] See e.g. Anisminic, Ltd. v. Foreign Compensation Commission [1969] 1 All E.R. 208 (H.L.), where a minute disclosing the Commission's reasons for its decision which did not appear on the face of the record had been obtained only on discovery.

(3) the applicant must decide whether private or public law rights are in issue and this is tricky;[83]

(4) the applicant may lose his case by the wrong choice of procedure--the very ill which the new procedure was designed to prevent;

(5) the judicial review procedure must be used if a private law claim for damages against a public authority is to be heard together with an application for a declaration or an injunction;

(6) if the applicant is in doubt about which procedure is appropriate, he must use the judicial review procedure because there is no provision to continue, under the new procedure, claims commenced as ordinary civil proceedings.

(4) Recommendation

7.20 We do not think that applicants should be denied their remedies because they cannot bring themselves within a definition of "statutory power" or "statutory power of decision". Nor do we think that a satisfactory definition can be devised to delineate the class of public law matters for which judicial review would be available. We think that any definition which is adopted will lead to difficulties of interpretation and to consequent litigation over procedure, which is precisely what should be avoided.

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[83] See e.g. Cocks v. Thanet District Council [1982] 3 All E.R. 1135 (H.L.); Davy v. Spelthorne Borough Council [1983] 3 All E.R. 278 (H.L.); Law v. National Greyhound Racing Club Ltd. [1983] 3 All E.R. 300 (C.A.).

7.21 The only practical alternative is, in our view, a procedure under which the choice of procedure is ultimately within the discretion of the court. This is essentially the English model. We believe that our recommendations, which differ in several important respects from the procedure in England, will avoid the rigidity which has developed in that country. These are our recommendations that:

(1) there be "an open frontier"[84] between the judicial review procedure and ordinary civil proceedings, so that either may be easily changed to the other (paras. 8.1 to 8.4);

(2) the Alberta Court of Queen's Bench continue to hear both public and private law cases (paras. 6.1 to 6.4);

(3) no general limitation period be imposed at this time (paras. 12.6 to 12.7);

(4) damages continue to be claimed in ordinary civil proceedings (paras. 9.1 to 9.5); and

(5) permission to apply for judicial review not be required (paras. 12.3 to 12.5).

Recommendation 8. We recommend that, on an application for judicial review, the court be empowered to grant any relief that the applicant would be entitled to in proceedings for a declaration or injunction where the court considers that the judicial review procedure is just and convenient having regard to all the circumstances of the case including

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[84] H.W.R. Wade, "Public Law, Private Law and Judicial Review" (1983) 99 Law Q. Rev. 166 at 170.

(i) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition, certiorari or quo warranto, and

(ii) the nature of the persons or bodies against whom relief may be granted by such order.

[See our proposed Rules 753.4(1)(b) and 753.4(2) on p. 95.]

Chapter 8. Conversion of Procedure

8.1 In the majority of cases the public or private law character of a claim for a declaration or injunction will be clear. The use of the new procedure to bring the claim will flow from the guidelines for recognizing public law matters found in our proposed Rule 753.4(2). We think, however, that a safety valve should be provided in case an applicant makes a mistake in his choice of procedure or in case the other side tries to obtain a tactical advantage by alleging that he has.

8.2 The jurisdictions under study make the new procedure essentially obligatory for public law matters. The statutes in Ontario, New Zealand and British Columbia allow a judge, on the application of a party, to direct that "an action for a declaration or injunction or both, whether with or without a claim for other relief" shall be treated and disposed of summarily as if it were an application for judicial review "in so far as it relates to the exercise, refusal to exercise or proposed exercise of a statutory power."[85] They thus allow the judge to grant judicial review when the proceedings have been improperly brought as an ordinary civil action, but do not allow conversion the other way.

8.3 In England, the rules authorize the court to order an application for a declaration or an injunction to be continued by an ordinary civil action where the new procedure is not appropriate in the circumstances of the case.[86] However, there

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[85] Ont 8; NZ 7; BC 13.

[86] Eng Rule 9(5).

is no provision for conversion from an action to the new procedure.[87] When in doubt, the prudent litigant must therefore use the new procedure or risk losing his remedy.

8.4 In our opinion claimants should not lose their remedies because of a wrong choice of procedure. Rule 560 now safeguards against this possibility in other proceedings.[88] We recommend that the court be empowered to direct that an application for a declaration or injunction commenced under the new procedure be continued as a claim in an ordinary civil action or, conversely, that a claim for a declaration or injunction made in an ordinary civil action be continued as an application under the new procedure. Originating notice Rule 409 is not sufficient because it permits movement only from a summary hearing to the trial of an issue and not the reverse.[89] The court should also be empowered to shift an application from the new procedure to an originating notice under Rule 410, or the reverse. The power

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87 O'Reilly v. Mackman, supra n. 79 at 1133.

88 Rule 560 provides:

> An action improperly begun by statement of claim, originating notice or petition may be treated as an irregularity and the action may be continued upon such terms and subject to such conditions as the court may impose.

89 Rule 409 provides:

> The court may summarily dispose of the questions arising on the application and make such order as the nature of the case requires or may give such directions as seem proper for the trial of any questions arising on the application.

to direct the procedure by which the proceedings are to be continued should include the power to give the necessary directions.

Recommendation 9. We recommend that

(1) if the relief claimed in a proceeding begun by statement of claim or originating notice under Rule 410 or another procedure ought to be claimed on an application for judicial review, the court, on application or its own motion, be empowered to direct that the proceeding be continued as an application for judicial review; and

(2) if the relief claimed on an application for judicial review ought to be claimed in a proceeding begun by statement of claim or originating notice under Rule 410 or another procedure, the court, on application or its own motion, be empowered to direct that the proceeding be continued under that other procedure.

[See our proposed Rules 753.16(1) and (2) on p. 109.]

Recommendation 10. We recommend that where the court directs the conversion of proceedings under Recommendation 9(1) or (2) it be empowered to give such further directions as are necessary to cause the proceedings to conform to the procedure by which they are to be continued.

[See our proposed Rule 753.16(3) on p. 109.]

Chapter 9. Joinder of Damages

9.1 Under the existing law a claim for damages for a wrong committed by a public authority may be joined in an action for non-prerogative relief. A claim for damages may not be joined with a motion for prerogative relief.

9.2 England allows a claim for damages to be made under the new procedure whether the relief sought is prerogative or non-prerogative, thus avoiding a multiplicity of actions. Two conditions must be met before damages may be awarded:

(1) the claim must be joined with the application for judicial review and it must arise from a matter to which the application relates;

(2) the court must be satisfied that the claimant would have been awarded damages if the claim had been made in an action begun at the same time.[90]

9.3 In Ontario an ordinary action is brought in the High Court whereas, except in a case of urgency, applications under the new procedure are made to the Divisional Court.[91] The Divisional Court does not have jurisdiction to hear claims for damages. A judge of the High Court may transfer a claim for a declaration or an injunction to the Divisional Court for disposal under the new procedure.[92] Any other claim for relief in the

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90 Eng Act 31(4).

91 Ont 6(1).

92 Ont 8.

action must, however, stay in the High Court. The result is that a claim for damages cannot be joined with a claim for a declaration, injunction or other remedy under the new procedure in Ontario.

9.4 In British Columbia the Supreme Court has jurisdiction over all the remedies. We are told that attempts to join a claim for damages with an application under the new procedure have so far been unsuccessful. The jurisprudence, however, remains inconclusive. We have not investigated the situation in New Zealand.

9.5 Our consultations disclosed a lack of unanimity of opinion on the issue of including claims for damages under the new procedure. We have therefore deferred further consideration of the issue to a later phase of the project.

Chapter 10. Discretion to Refuse Relief

a. Discretion Under Existing Law

10.1 Under the existing law, the Court retains a discretion to refuse relief even though grounds for it have been established. The court may exercise its discretion in a variety of circumstances, such as where the conduct of the applicant is unreasonable or otherwise unmeritorious (e.g. action founded on immoral or illegal act); the granting of the remedy would be futile; the motives of the applicant for bringing the application are wrong; the defect is minor or inconsequential in nature; the application is premature (e.g. the court determines that an interlocutory matter could be dealt with more conveniently following the final decision of the tribunal); the application is frivolous or vexatious; or the applicant has acquiesced in the administrative act. Sometimes the discretion is said to include lack of standing, unreasonable delay, and the existence of a right of appeal or other more appropriate remedy--all of which, on one view, are known as the "discretionary bars." On another view, the so-called "discretionary bars" operate as preliminary questions or threshold tests which must be satisfied before review will take place at all.

b. Preservation of Discretion

10.2 Ontario, New Zealand and British Columbia preserve the discretion of the court to refuse relief under the existing

law.[93] These sections appear to have been enacted out of an abundance of caution, there being no suggestion in the legislation of those jurisdictions that the law underlying the award of the remedies is altered beyond the changes specified in the legislation.

10.3 In a case of undue delay the English Act authorizes the court to refuse to grant leave to apply for judicial review or, alternatively, to refuse to grant any relief sought on the application.[94] This the court may do

> ...if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

10.4 We think that the existing discretion should continue. However, Rules promulgated in accordance with our recommendations would not affect the discretion and therefore need not refer to them.

c. Exception

10.5 Under the Ontario, New Zealand and British Columbia Acts it is no longer possible for the court to refuse relief because the wrong remedy has been sought as long as the remedy to which the applicant is entitled is a remedy which can be granted

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[93] Ont 2(5); NZ 4(3); BC 8(1).

[94] Eng Act 31(6)).

under the new procedure.[95] This is a common sense result which we think a court would come to in the exercise of its discretion. We see no need to spell it out.

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[95] Ont 2(6); NZ 4(4); BC 8(2).

Chapter 11. Powers of Court on Review

a. Setting Aside in Lieu of Declaration

11.1 Error of law within jurisdiction renders a decision voidable and not void.[96] A declaration does not give complete relief where a decision is voidable because the decision continues to have effect notwithstanding any declaration that it ought not to have been made. The error must be attacked directly in proceedings brought by certiorari to quash the decision. Traditionally certiorari was available only to attack decisions of public authorities characterized as judicial or quasi-judicial, leaving claimants objecting to other decisions without an effective remedy.

11.2 Ontario, New Zealand and British Columbia meet the problem by empowering the court to set aside the decision of a public authority where the applicant is "entitled to judgment declaring that a decision ... is unauthorized or otherwise invalid."[97]

11.3 If it is possible to get a declaration that a decision is wrong, we think that it should also be possible to obtain an order setting the decision aside, provided that the application is brought within the time limit specified for an application for

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[96] Although the point remains contentious, the judgment of the Supreme Court of Canada in Re Harelkin and University of Regina (1979) 96 D.L.R. (3d) 14 (S.C.C.) per Beetz J. at 44-50 suggests that where a decision is rendered in breach of the requirements of natural justice the error similarly falls within jurisdiction and does not void the decision.

[97] Ont 2(4); NZ 4(2); BC 7.

certiorari to quash (see paragraph 12.6 and Recommendation 13). Our recommendation would change the substantive law.

> Recommendation 11. We recommend that, subject to Recommendations 16 and 17, where an applicant on an application for judicial review is entitled to a declaration that a decision or act is unauthorized or otherwise invalid the court be empowered to set aside the decision or act instead of making a declaration.
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> [See our proposed Rule 753.5 on p. 97.]

b. Remission of Matter to Public Authority

11.4 The legislation in New Zealand, British Columbia and England empowers the court to remit the whole or any part of a matter to the public authority for reconsideration and determination.[98] A complete rehearing of the matter in question is thereby avoided and the interests of efficiency and economy are served. The jurisdiction of the tribunal is also saved so that the matter can be reheard without argument that the jurisdiction has been spent. Exercise of the power would be appropriate where, for example, the tribunal has misinterpreted a point of law.

11.5 In some situations it would be unjust to continue the same proceedings. The person wanting administrative action, or where it has a function to perform or a goal to accomplish, the public authority, should have to start over. Exercise of the power to remit should therefore be in the discretion of the court so that it may take into account the factors relating to fairness. The court should also be empowered to give the public

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[98] NZ 4(5), (5A), (5B), 5(C), (6); BC 5, 6; Eng Act 31(5) and Eng Rules 9(4).

authority instructions in respect of the reconsideration.

11.6 In England the use of the power to remit is confined to applications for certiorari and the High Court is obliged to quash the decision to which the application relates before it may remit.[99] In New Zealand and British Columbia the power to remit relates to an act or omission in the exercise of a "statutory power of decision".[100] In New Zealand, the original decision continues to have effect unless it is revoked by the public authority or the court makes an interim order otherwise.[101] The British Columbia Act is silent about the effect of the original decision.

11.7 We think that the power to remit should extend to any matter. Where the public authority has made a decision, we would require the court to set it aside before ordering the remission. The order should not leave a wrong decision in effect. The affected party would then be able to pursue any relief flowing from the fact that the decision has been set aside. Our recommendations would change the substantive law.

> Recommendation 12. We recommend that on an application for judicial review the court be empowered to direct the public authority to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application for judicial review relates.

[See our proposed Rule 753.6(1) on p. 98.]

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99 Eng Act 31(5) and Eng Rules 9(4).

100 A "statutory power of decision" seems to be a "statutory power" which must be exercised only after consideration of evidence and arguments presented by affected parties: see Appendix B at p. 123.

101 NZ 4(5C).

Recommendation 13. We recommend that in giving a direction for reconsideration the court

(a) advise the public authority whose decision, act or omission is the subject matter of the application of its reasons for remitting the matter, and

(b) give such directions for the reconsideration as it thinks appropriate.

[See our proposed Rule 753.6(2) on p. 98.]

Recommendation 14. We recommend that where the public authority has made a decision, the court may direct a reconsideration and determination under Recommendation 12 only if the decision has been set aside.

[See our proposed Rule 753.6(3) on p. 98.]

c. Validation of a Minor Technical Defect

11.10 The discretion of the court, at common law, to refuse to set aside a decision on grounds of a minor defect in form or technical irregularity is not clear, particularly where the requirement infringed is mandatory.[102] Ontario, New Zealand and British Columbia get around the problem by authorizing the court to cure a defect in form or a technical irregularity in the decision of a public authority if the court finds that no substantial wrong or miscarriage of justice has occurred.[103]

11.11 We can envisage difficulties in the application of a curative provision. One may ask: What sort of technical defect

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[102] See Appendix B at p. 124.

[103] Ont 3; NZ 5; BC 9. The sections apply to the exercise of a "statutory power of decision", not statutory powers in general.

is intended? Would it include being out of time? the failure to meet a quorum? the exclusion of a party during part of the proceedings? the failure to give the required number of days' notice?[104]

11.12 We nevertheless agree with the objective of the Ontario, New Zealand and British Columbia sections, and are content to let the court decide when a defect or irregularity has resulted in a substantial wrong or miscarriage of justice and when it has not. We recommend that a discretion similar to the one contained in the Ontario, New Zealand and British Columbia Acts be spelled out in the new procedure. Our recommendation would change the substantive law.

> Recommendation 15. We recommend that, on an application for judicial review, where the sole ground for relief established is a defect in form or a technical irregularity, if the court finds that no substantial wrong or miscarriage of justice has occurred, the court have the discretion to refuse relief and, where a decision has been made, to make an order validating the decision, notwithstanding such defect, to have effect from such time and on such terms as the court considers proper.

[See our proposed Rule 753.7 at p. 99.]

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[104] In Costello and Dickhoff v. The City of Calgary, Supreme Court of Canada Reports Service, 1983 Cases at 5775-76, Alberta's Expropriation Procedure Act required the City of Calgary to serve three weeks' notice of its intention to pass an expropriation by-law. Seventeen days' notice was given. The action was commenced three years and three months after the expropriation. The Alberta Court of Queen's Bench and Court of Appeal did not regard the defect in notice as fatal and dismissed the action. The Supreme Court of Canada took the opposite view, holding that the statutory requirement should have been met.

d. Stay of Proceedings

11.13 In our discussion of interim relief[105] we will consider whether the court should have the power to stay proceedings before the public authority pending the outcome of an application for judicial review.

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[105] See paras. 13.1 to 13.8.

Chapter 12. Special Procedures for Judicial Review

12.1 We have recommended that the new procedure for judicial review be commenced by originating notice.[106] We have also stated that insofar as possible the new procedure should rely on the existing Rules.[107] In our view, the originating notice procedure should be varied for judicial review only where the unique features of judicial review compel special treatment. Because we intend that the new procedure will replace the existing Crown Practice Rules governing certiorari, prohibition, mandamus and quo warranto in civil matters, some features of these Rules must be incorporated into the new procedure.

12.2 In this chapter we consider the special procedures to be adopted for judicial review.

a. Judicial Permission for Application

12.3 Before proceedings for judicial review may be commenced in England, the court must give its permission or "leave" to apply for judicial review.[108] This requirement continues the pre-existing practice in respect of the prerogative remedies. The Law Commission regarded the obligation to obtain leave as an expeditious method of sifting out cases with no chance of success at relatively little cost to the applicant and no cost to any prospective respondent.[109]

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[106] See paras. 5.3 to 5.6.

[107] See paras. 5.1 to 5.2.

[108] Eng Rule 3.

[109] LC 73 at 17-18.

12.4 The new procedure in Ontario, New Zealand, and British Columbia does not require leave. Professor Wade has spoken against it in England, saying:

> In principle it seems wrong that there should be any brake on actions against public authorities which does not apply to actions generally. But the Commission make out a case, based on studies of the Divisional Court made in Bedford College, London, that the present requirement of leave provides a particularly rapid and cheap method of disposing of about a third of all applications. They have nothing to say, however, about the constitutional principle.[110]

12.5 We agree with Professor Wade that there should not be any brake on applications for judicial review. In our opinion the disadvantage of an extra step in all applications would outweigh the saving in some. We do not recommend a leave requirement.

b. Time for Bringing Application

12.6 Rule 742 requires a notice of motion for certiorari to be filed and served within six months after the decision to which it relates and this time may not be enlarged or abridged.

12.7 We propose that this limitation period should continue to be applicable to certiorari to quash. We further propose that it should be extended to an order to set aside in lieu of declaration, as the same considerations apply.[111] We make these recommendations to preserve this special limitation period but

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[110] "Remedies in Administrative Law" (1976) 92 Law Q. Rev. 334 at 336-37.

[111] See paras. 11.1 to 11.3.

will consider the matter further in a later phase of our project.

> Recommendation 16. We recommend that where the relief sought is an order to set aside a decision or act, the application for judicial review shall be filed and served within six months after the decision or act to which it relates.
>
> [See our proposed Rule 753.11(1) at p. 103.]
>
> Recommendation 17. We recommend that there be no enlargment or abridgement of the six month period set out in Recommendation 16.
>
> [See our proposed Rule 753.11(2) at p. 103.]

c. Contents of Application

12.9 Rule 405(2) provides:

> Every originating notice shall include a statement of the questions on which the applicant seeks the determination or direction of the court or, as the case may be, a concise statement of the nature of the claim made and of the relief or remedy claimed in the proceedings with sufficient particulars to identify the cause of action for which the applicant claims that relief or remedy.

The requirements of Rule 384(2) for notices of motion are similar.

12.10 The provisions covering the content of an application for judicial review in the jurisdictions under study are generally to the same effect. In Ontario and British Columbia an application for judicial review is sufficient if it sets out the grounds upon which the applicant is seeking relief and the nature of the relief sought.[112] In New Zealand the facts upon which the

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[112] Ont 9(1); BC 14.

applicant bases his claim to relief, the grounds and the relief sought must be stated.[113] In England the application for leave to apply for judicial review must include a notice containing a statement of the relief sought and the grounds upon which it is sought.[114] Where leave is granted, the applicant is confined to the grounds and relief set out in the statement unless the court allows an amendment.[115]

12.11 We think that a special form of originating notice should be devised for applications for judicial review, and that the notice should include a statement of both the grounds upon which relief is claimed and the nature of the relief claimed. Should a claimant begin his action improperly or the proceeding be otherwise defective in form, the curative provisions of general Rules 560 and 561 would apply.

> Recommendation 18. We recommend that an originating notice of application for judicial review be in Form G.1 modified in such manner as may be necessary having regard to the nature of the application.
>
> [See our proposed Rule 753.8(1) on p. 100 and our proposed Form G.1 on p. 114.]

> Recommendation 19. We recommend that every originating notice of application for judicial review include a concise statement of the grounds upon which relief is claimed in the proceedings and the nature of the relief claimed.
>
> [See our proposed Rule 753.8(2) on p. 100.]

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113 NZ 9(2).

114 Eng Rule 3(2).

115 Eng Rule 6.

12.12 The Ontario, British Columbia and New Zealand Acts provide, in addition, that it is not necessary to specify the common law remedy under which the claim would have been made before the introduction of the new procedure for judicial review.[116] The English scheme, on the other hand, appears to require a statement of the form of relief sought in traditional terms (e.g. certiorari, prohibition, mandamus, the statutory replacement of quo warranto, declaration, injunction).[117]

12.13 We concur with the provisions in Ontario, New Zealand and British Columbia which only require a statement of the grounds upon which the claim is based and the relief sought. It should not be necessary to name an existing remedy.

> Recommendation 20. We recommend that the court be empowered to grant any relief to which the applicant is entitled on an application for judicial review whether or not the remedy which provides that relief is specifically named in the application.
>
> [See our proposed Rule 753.4(3) on p. 95.]

12.14 Before relief may be granted in the jurisdictions under study, the court must determine that the applicant is entitled to relief under one of the existing remedies. The new procedure does not replace them. We think that the Rules should make this clear.

> Recommendation 21. We recommend that before granting relief under the new procedure for judicial review, the court must be satisfied

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[116] Ont 9(1); NZ 9(3); BC 14.

[117] Eng Act 31(1) and Eng Rule 2.

that the grounds for the remedy under which the applicant would be entitled to the relief have been established.

[See our proposed Rule 753.4(4) on p. 96.]

12.15 The English rules specify that the application must be accompanied by an affidavit which verifies the facts relied on.[118] Alberta's originating notice Rule 405(1) does not say that an affidavit is required. Form G refers to the reading of affidavits in support of the application and Rule 406 requires a copy of each affidavit to be served with the originating notice. The result is that the use of affidavits is anticipated but not mandatory.

12.16 Evidence sufficient to substantiate the claim is needed. In many, if not most, cases an affidavit will serve the purpose. It may not, however, be necessary. On an application for certiorari for error on the face of the record, the record may speak for itself, for example, by showing three persons sitting where four are required for a quorum. At times, the applicant may justifiably wish to avoid the procedural consequences, such as examination on the affidavit, admissions, and so on, of filing an affidavit.

12.17 We do not think that it should be mandatory to provide an affidavit. The application should, however, be supported by some evidence which could be provided from the record.

Recommendation 22. We recommend that every originating notice be supported by an affidavit or affidavits or other evidence,

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[118] Eng Rule 3(2).

> including the evidence of the record, verifying the facts relied on in the application for judicial review.
>
> [See our proposed Rule 753.8(3) on p. 100.]

12.18 Rule 305(3) pertains to interlocutory motions and hence to an application for a prerogative remedy under the existing Rules. It permits affidavits based on the belief of the deponent to be admitted. This is in exception to the general provision of Rule 305(1) that affidavits shall be confined to the statement of facts within the knowledge of the deponent.

12.19 We think that there will be times when an applicant for judicial review will not have actual knowledge of the facts demonstrating the improper administrative actions. To facilitate the judicial supervision of public authorities, we propose that affidavits based on the belief of the deponent, giving the source and grounds for the belief, should be accepted in support of an application for judicial review.

> Recommendation 23. We recommend that affidavits containing statements as to the belief of the deponent with the source and grounds thereof be admissible in support of an application for judicial review.
>
> [See our proposed Rule 753.8(4) on p. 100.]

d. Persons to be Served

12.20 Rule 739 gives specific direction for service of a notice of an application for prerogative relief. Rule 739(1) requires the notice to be served on every person "who appears to be interested or likely to be affected by the proceedings." Rule 739(3) requires service of the notice of motion "upon the person making the order or holding the enquiry" and on the Attorney

General. Rule 739(2) and originating notice Rule 408 both permit the court to require service which has not been made.

12.21 We think that Rule 739 should apply to applications for non-prerogative as well as prerogative relief. Our recommendation is in general conformity with the service requirements in the jurisdictions under study.[119]

12.22 The requirement that notice of applications for non-prerogative relief be served on the Attorney General gave us pause for thought. Would the Department be able to manage the increased volume of notices? We concluded "yes" for the reasons which follow.

12.23 First, even without service of notice by the applicant, the Attorney General's Department is often involved. In many instances counsel in the Department act for the public authority whose action is being challenged. Because the authority itself does not become embroiled as an adversary in judicial review proceedings,[120] the Attorney General may, for example, step in to argue a jurisdictional point where the propriety of the public authority doing so is questionable.

12.24 Second, both Ontario and British Columbia provide for service on the Attorney General[121] and information from these provinces shows the volume of applications to be manageable. Of a roughly estimated 400 to 500 applications per year in Ontario,

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[119] Ont 9(4); NZ 10(2)(c); BC 15 and 16; Eng Rules 5(3), (6) and (7).

[120] See para. 12.32.

[121] Ont 9(4); BC 16.

the Attorney General participates in perhaps 200. The estimate in British Columbia is 100 to 150 applications per year, again with substantially less participation. Intervention is much less frequent where the Attorney General is independent of the parties.

12.25 Third, the notices in Ontario and British Columbia have proven useful to the Department in clarifying the operation of the new procedure, monitoring attacks on the conduct of public authorities, and helping it to keep informed about public authorities with which it would otherwise be out of touch. Experience in screening applications has aided the development of guidelines for intervention. The counsel responsible for screening the applications may look at such matters as the point in issue, whether a provincial statute is involved and if so what Ministry is responsible so that the advice of the Ministry can be taken, and so on.

12.26 Fourth, we do not anticipate any problems with the mechanics of service since service is a requirement under the Crown Practice Rules now and those we consulted did not find any problem with it.

12.27 An alternative to automatic service on the Attorney General would be to let the presiding judge direct service where, for a constitutional or other reason, he is of the opinion that the Attorney General should be served. The logistics of involving a judge would mean delay by reason of adjournment for service or extra applications for directions. Moreover, the Attorney General might be overlooked on an application he would want to know about. We therefore reject this alternative.

Recommendation 24. We recommend that the application for judicial review be served upon

(a) the person from whose decision, act or omission relief is claimed,

(b) the Attorney General,

(c) every person who appears to be interested in or likely to be affected by the proceedings.

[See our proposed Rule 753.9(1) on p. 101.]

Recommendation 25. We recommend that the court be empowered to require the application for judicial review to be served upon any person not previously served.

[See our proposed Rule 753.9(2) on p. 101.]

e. Parties to Application

(1) In General

12.28 Originating notice Rule 408 permits the court to give directions as to the persons to be served "whether those persons are or are not parties." This Rule will apply as part of the general body of Rules and does not need to be repeated in the new procedure.

12.29 The mere fact of service does not make a person a party. The distinction is important because generally only parties are bound by the decision. The applicant should join as a party everyone he wants to be bound. The New Zealand Act gives the judge the additional power to direct whether any person

should be added or struck out as a party.[122] We recommend the inclusion of a similar provision.

> Recommendation 26. We recommend that the court be empowered to direct whether any person should be added or struck out as a party to proceedings for judicial review.
>
> [See our proposed Rule 753.10(1) on p. 102.]

12.30 Crown Practice Rule 739(4) allows any person who has not been served to show that he is affected by the proceedings and, if so, to take part in them as though served.[123] Such a person is an "intervenor". Under the existing law an intervenor is heard with the permission of the court and not as of right. We recommend the adoption, under the new procedure, of Rule 739(4) revised to make it clear that the court retains its discretion with respect to intervenors.

> Recommendation 27. We recommend that any person not served with the application for judicial review be entitled to show that he is affected by the proceedings and thereupon, in the discretion of the court, take part in the proceedings as though served.
>
> [See our proposed Rule 753.10(3) on p. 102.]

(2) Attorney General

12.31 Ontario and British Columbia permit the Attorney General to be heard in person or by counsel on an application for judicial review.[124] Rule 739(3), which requires service on the Attorney General, is silent as to his status in the proceedings.

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[122] NZ 10(2)(b).

[123] Eng Rule 9(1) is to the same effect.

[124] Ont 9(4); BC 16.

Although the right of the Attorney General to appear under this Rule is implicit, we would like it to be made explicit.

> Recommendation 28. We recommend that the Attorney General be entitled as of right to be heard on the application either in person or by counsel.

[See our proposed Rule 753.10(2) on p. 102.]

(3) Role of Public Authority

12.32 The proper role of the public authority whose action is being reviewed in the proceedings is an important issue. The current role is described by Mr. Justice Estey in Re Northwestern Utilities Limited and City of Edmonton:

> It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. Where the right to appear and present arguments is granted, an administrative tribunal would be well advised to adhere to the principles enunciated by Aylesworth J.A. in International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board, at pp. 589, 590:
>
> > Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board. If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance.
>
> Where the parent or authorizing statute is silent as to the role or status of the tribunal in appeal or review

> proceedings, this Court has confined the tribunal strictly to the issue of its jurisdiction to make the order in question. (Vide Central Broadcasting Company Ltd. v. Canada Labour Relations Board and International Brotherhood of Electrical Workers, Local Union No. 529. [[1977] 2 S.C.R. 112.][125]

12.33 We are satisfied with the situation under the existing law and do not recommend any change at this time. We will, however, study the issue of the role of the public authority in depth later in our project.

f. Ascertainment and Return of the Record

12.34 Rules 743 and 744 require the public authority whose decision is to be reviewed on an application for certiorari, on notice, to return to the Court "the judgment, order, warrant or decision together with the process commencing the proceedings, the evidence and all exhibits filed, if any, and all things touching the matter." Rule 744(5) permits the Court to dispense with the return of the evidence or exhibits or part of them.

12.35 In Ontario, the filing of the record is mandatory.[126] Both New Zealand and British Columbia empower the court to direct the filing of the record or any part of it.[127] In all three jurisdictions, the provisions for filing relate to the exercise of a statutory power of decision.

12.36 We think that the provisions of Rules 743 and 744 should apply to all applications for judicial review. Where the

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[125] [1979] 1 S.C.R. 684 at 709; 89 D.L.R. (3d) 161 at 178-79.

[126] Ont 10. "Record" is defined in section 20 of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484.

[127] NZ 10(2)(j); BC 17.

application is to set aside a decision, the applicant should be entitled to see the entire record, and return of that record should be mandatory. Where other relief is sought, the applicant should notify the public authority if he wants the record to be returned, the public authority should be able to object, and the court should have the power to order the production of as much of the record as it considers appropriate. Whether the application is to set aside a decision or for other relief, the list of documents ordinarily sent to the reviewing court should be comprehensive. The public authority, however, should have the right, which it has now, to have the documents limited to those relevant to the judicial review.

> Recommendation 29. We recommend that existing Rules 743 and 744 be revised as set out in our proposed Rules 753.12, 753.13 and 753.14.
>
> [See our proposed Rules 753.12 at p. 104, 753.13 at pp. 105-106, and 753.14 at p. 107.]

g. Time Between Service and Hearing

12.37 Under Rule 406, an originating notice must be served ten days before the date named for the hearing of the application. Under notice of motion Rule 386, a notice of motion must be served at least two days before the hearing. Both the ten-day and two-day time periods may be abridged under Rule 548. Rule 739(3), which applies where certiorari or prohibition is sought, requires service on the Attorney General and the public authority at least seven days before the hearing.

12.38 We are satisfied that the needs of judicial review can be met by the ten-day period directed by Rule 406. Where greater speed is required, the applicant may apply under Rule 548 for an order to abridge the time.

h. Matters Covered by General Rules

12.39 Originating notice Rules 407, 408 and 409 give the court wide latitude to direct the procedure which is appropriate for an application before it and to make such order as the case requires. In directing these procedures, we believe the court will rely on the general rules governing matters such as further particulars, admissions of fact, cross-examination on affidavit, examination for discovery, the production of documents, the settlement of issues, the fixing of a time for the hearing, the hearing of evidence and costs. Some of these matters are covered by specific legislation in the jurisdictions under study. We are content with the provisions of the existing Rules and see no need to recommend specific provisions for judicial review.

Chapter 13. Interim Orders

a. In General

13.1 The primary purpose of an interim order on an application for judicial review is preservation of the status quo pending final determination of the application. An order to stay the administrative proceedings would be appropriate where the court's decision could be overtaken by events, or where a person's rights might be seriously affected by continuing the proceeding.[128]

13.2 According to the case law a public authority does not have to suspend its proceedings because an application for judicial review has been commenced. The court's power to make interim orders on an application for prerogative relief, including an order to stay the decision of a public authority, is dubious. Interim relief may be awarded in proceedings for non-prerogative relief. An interim injunction can be appropriate to maintain a situation when an injunction is sought in the main action, although the conditions under which the courts are prepared to grant an interim injunction are quite stringent.[129] As mentioned previously,[130] an interim injunction may be obtained ex parte under Rule 387.

13.3 The legislation in Ontario and British Columbia gives the court discretion to make interim orders pending the final

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[128] LRCC at 39.

[129] David J. Mullan, "Reform of Judicial Review of Administrative Action - The Ontario Way" (1974), 12 Osgoode Hall L.J. 125 at 153.

[130] See para. 3.21.

determination of the application.[131] The British Columbia Law Reform Commission expressed the hope

> ... that in proposing a single procedure by way of originating notice for judicial review, the time in which a resolution of any matter might be obtained would be shortened to an extent that interim relief would not be frequently required.[132]

13.4 The provision in New Zealand was similar to that in Ontario and British Columbia until 1977 when it was made more specific by amendment. The current provision authorizes an interim order (a) to prohibit the respondent from taking further action "consequential on the exercise of the statutory power", (b) to prohibit or stay "any proceedings ... in connection with any matter to which the application for review relates" and (c) to continue in force, pending the final determination of the application for review, a licence that the public authority has revoked or suspended.[133] The order "may be made subject to such terms and conditions as the court thinks fit, and may be expressed to continue in force until the application for review is finally determined or until such other dates, or the happening of such other event, as the court may specify".[134]

13.5 In England a distinction is made between applications for prohibition or certiorari and applications for other relief. Where the court grants leave to apply for prohibition or certiorari the administrative proceedings are automatically

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131 Ont 4; BC 10.

132 BCLRC at 38.

133 NZ 8(1)(a), (b) and (c).

134 NZ 8(3).

stayed until the application is determined or the court orders otherwise.[135] Where the application is for other relief, the court "may at any time grant in the proceedings such interim relief as could be granted" in an ordinary civil action.[136]

13.6 We think that interim relief should be available under the new procedure for claims either of prerogative or non-prerogative relief. We recommend that the provision be based on the Ontario and British Columbia sections. Our recommendation is broad enough to include the power of the court to grant an interim injunction now contained in Alberta Rule 392. This recommendation changes the substantive law.

> Recommendation 30. We recommend that the court be empowered to make such interim order as it considers proper upon motion made either in the application for judicial review or at any time pending the final determination of the application for judicial review.
>
> [See our proposed Rule 753.15 at p. 108.]

b. Against the Crown

13.7 An injunction cannot be obtained against the Crown, although final relief in the form of declaration is possible.[137] There is no form of interim order to preserve the status quo pending the final declaration.

13.8 Legislation in New Zealand provides for, and recommendations in England and Canada propose, an interim order

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[135] Eng Rule 3(10)(a).

[136] Eng Rule 3(10)(b).

[137] Proceedings Against the Crown Act, R.S.A. 1980, c. P-18, s. 17.

to stay the activities of the Crown pending decision on an application for judicial review.[138] We do not make any recommendation for interim orders against the Crown at this time. We will consider the issue at a later phase of our project.

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[138] NZ 8(2) and (3); LC 73 at 24; LRCC at 40-41.

Chapter 14. Appeal from Decision of Reviewing Court

14.1 Rule 740 provides that an appeal lies from the order of the Court of Queen's Bench to the Court of Appeal on motions for prerogative relief. Rule 741 allows a judge of the Court of Appeal to make any direction required to give effect to an order of that Court. Rule 505 provides that an appeal ordinarily lies to the Court of Appeal. This Rule would apply to applications for non-prerogative relief in ordinary civil actions.

14.2 We can see no reason to vary the ordinary appeal procedure in Alberta.

> Recommendation 31. We recommend that an appeal from an order granted on an application for judicial review lie to the Court of Appeal, and that any direction required to give effect to an order of the Court of Appeal be permitted to be made by a judge of the Court of Appeal.

[See our proposed Rules 753.17 at p. 110 and 753.18 at p. 111.]

Chapter 15. Consequential Amendments

a. Crown Practice Rules in Civil Matters

(1) Prerogative Remedies in General

15.1 To carry out our recommendation that applications for mandamus, prohibition, certiorari and quo warranto be brought under the new procedure[139] but that the old procedure be preserved in the alternative for an application for habeas corpus,[140] Rule 738 must be amended.

> Recommendation 32. We recommend that Rule 738 be amended to provide:
>
> (1) An order in the nature of habeas corpus may be granted upon application by notice of motion returnable before the court.
>
> (2) An order in the nature of mandamus, prohibition, certiorari, quo warranto or habeas corpus may be granted upon application for judicial review under Part 56.1.
>
> (3) The writs of mandamus, prohibition, certiorari, habeas corpus and quo warranto shall not be issued, but all necessary provisions shall be made in the judgment or order.
>
> [See section 3 of our proposed Rules to Amend the Alberta Rules of Court at p. 113.]

(2) Certiorari, Mandamus and Quo Warranto

15.2 Rules 742-53 pertaining to certiorari, mandamus and quo warranto should be repealed. All of the relevant provisions of these Rules have been incorporated into the new procedure.

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[139] See paras. 7.2 to 7.7.

[140] See paras. 7.8 to 7.11.

Recommendation 33. We recommend the repeal of Rules 742 to 753.

[See section 4 of our proposed Rules to Amend the Alberta Rules of Court at p. 113.]

b. Prerogative Remedies in Criminal Matters

15.3 Section 438 of the Criminal Code (Canada)[141] empowers judges to make rules with respect to prerogative remedies sought in criminal proceedings. In Alberta, these Rules have been promulgated as Part 60 of the Alberta Rules of Court. These Rules are very similar to the Rules in Part 56 governing prerogative remedies in civil proceedings and Rule 825 provides that the Rules in Part 56 apply to matters which are not provided for in Part 60.

15.4 Our recommendations for a new procedure for civil matters should not create any procedural difficulties for the existing procedure in criminal matters. We do not recommend change.

c. Transitional Operation of Rules

15.5 The transitional operation of the old and new Rules is governed by clause 32(1)(b) and subclause 32(1)(c)(iii) of the Interpretation Act.[142] They state:

> 32(1) If an enactment is repealed and a new enactment is substituted for it, ...
>
> > (b) every proceeding commenced under the repealed enactment shall be continued under and in conformity with the new enactment so far as may be consistent with the new enactment;

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[141] R.S.C. 1970, c. C-34.

[142] R.S.A. 1980, c. I-7.

> (c) the procedure established by the new enactment shall be followed as far as it can be adapted ...
>
> (iii) in a proceeding in relation to matters that have happened before the repeal.

The effect is to preserve both sets of Rules for proceedings commenced before the new Rules come into force, but to apply the new Rules in preference to the old ones insofar as they can be suitably adapted to the purpose. We find this transitional result satisfactory.

Chapter 16. Implementation of New Procedure

16.1 Because the Rules of Court Committee is charged with the responsibility to make recommendations for the revision of the Rules of Court, we recommend that our proposed amendments to the Rules should not be promulgated until that Committee has had an opportunity to consider them.

16.2 A few of the Rules we recommend (i.e. those in respect of the power of the court to set aside in lieu of declaration, to remit a matter for reconsideration, to cure a minor technical defect and to make interim orders) fall on the substantive side of the boundary between procedure and substance. To ensure the validity of the amended Rules, we recommend that, immediately after their promulgation, section 47(1) of the Judicature Act[143] be amended to include them. Section 47 now provides:

> (1) In this section, "Alberta Rules of Court" means the Alberta Rules of Court, filed as Alberta Regulation 390/68 as amended prior to November 4, 1976.
>
> (2) The Alberta Rules of Court are hereby validated notwithstanding that any provision therein may affect substantive rights.

Recommendation 34. We recommend the following steps for implementation of the new procedure:

(1) consideration by the Rules Committee;

(2) order in council promulgating amendments to the Alberta Rules of Court;

(3) amendment of section 47(1) of the Judicature Act to provide:

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[143] R.S.A. 1980, c. J-1.

In this section, "Alberta Rules of Court" means the Alberta Rules of Court filed as Alberta Regulation 390/68 as amended prior to November 4, 1976 and the amendments thereto filed as Alberta Regulation [here insert number of Regulation promulgating Part 56.1 of the Alberta Rules of Court.]

[As to Recommendation 34(3), see our proposed Act to Amend the Judicature Act at p. 115.]

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T.W. MAPP
D.B. MASON
R.S. NOZICK
R.M. PATON

_____
CHAIRMAN

_____
DIRECTOR

March 19, 1984

PART III TABLE OF RECOMMENDATIONS

We recommend that a single procedure for making an application for judicial review be introduced in Alberta.

[Recommendation 1]

We recommend that the single procedure for making an application for judicial review be introduced in the Alberta Rules of Court as Part 56.1: Judicial Review in Civil Matters.

[Recommendation 2]

We recommend the adoption of our proposed Rules 753.1 to 753.19 (set out in Part IV of our Report).

[Recommendations 3 to 31]

We recommend the amendment of Rule 738 and the repeal of Rules 742-753.

[Recommendations 32 and 33]

We recommend the following steps for implementation of the new procedure:

(1) consideration by the Rules Committee;

(2) order in council promulgating amendments to the Alberta Rules of Court;

(3) amendment to section 47 of the Judicature Act validating the new Rules.

[Recommendation 34]

PART IV PROPOSED AMENDMENTS

Rules to Amend the Alberta Rules of Court

1. The Alberta Rules of Court (Alta. Reg. 390/68) are amended by this regulation.

2. The following is added after Part 56:

PART 56.1

JUDICIAL REVIEW IN CIVIL MATTERS

[Definitions]

753.1 In this Part,

"person" includes a board, commission, tribunal or other body whose decision, act or omission is subject to judicial review, whether comprised of one person or of two or more persons acting together and whether or not styled by a collective title.

Source: Ont 9(3)

[Application for Judicial Review]

753.2 A proceeding under this Part shall be known as an application for judicial review.

[Initiation of Application]

753.3 An application for judicial review shall be taken by originating notice.

Source: Rule 404

[See Recommendation 4 on p. 36.]

[Scope of Application]

753.4(1) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in proceedings for any one or more of the following remedies:

(a) an order in the nature of mandamus, prohibition, certiorari, quo warranto or habeas corpus; or

[See Recommendations 5 on p. 41, 6 on p. 42 and 7 on p 44.]

(b) a declaration or injunction.

Source: Eng Act 31(1).

[See Recommendation 8 on pp. 50-51.]

(2) The court may grant a declaration or injunction if it considers that the judicial review procedure is just and convenient having regard to all the circumstances of the case including

(i) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition, certiorari or quo warranto, and

(ii) the nature of the persons from whose decisions, acts or omissions relief may be granted by such orders.

Source: Eng Act 31(2).

[See Recommendation 8 on pp. 50-51.]

(3) Subrule (1) applies whether the remedy under which the applicant would be entitled to the relief is or is not specifically named in an application.

Source: Ont 9(1); NZ 9(3); BC 14.

[See Recommendation 20 on p. 70.]

(4) Before the court may grant relief under subrule (1), it must be satisfied that the grounds for the remedy under which the applicant would be entitled to the relief have been established.

[See Recommendation 21 on pp. 70-71.]

[Setting Aside in Lieu of Declaration]

753.5 Subject to Rule 753.11, where the applicant on an application for judicial review is entitled to a declaration that a decision or act is unauthorized or invalid the court may, instead of making a declaration, set aside the decision or act.

Source: Ont 2(4); NZ 4(2); BC 7.

[See Recommendation 11 on p. 61.]

[Remission of Matter for Reconsideration]

753.6(1) On an application for judicial review the court may direct the person from whose decision, act or omission relief is claimed to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application for judicial review relates.

[See Recommendation 12 on p. 62.]

(2) In giving a direction under subrule (1), the court shall

(a) advise the person from whose decision, act or omission relief is claimed of its reasons, and

(b) give that person such directions as it thinks appropriate.

Source: BC 5.

[See Recommendation 13 on p. 63.]

(3) Where the person from whose decision, act or omission relief is claimed has made a decision, the court may direct a reconsideration and determination under subrule (1) only if the decision has been set aside.

[See Recommendation 14 on p. 63.]

[Validation of a Minor Technical Defect]

753.7 On an application for judicial review, where the sole ground for relief established is a defect in form or a technical irregularity, if the court finds that no substantial wrong or miscarriage of justice has occurred, the court may refuse relief and, where a decision has been made, may make an order validating the decision, notwithstanding such defect, to have effect from such time and on such terms as the court considers proper.

Source: Ont 3; NZ 5; BC 9.

[See Recommendation 15 on p. 64.]

[Contents of Application]

753.8(1) An originating notice taken under this Part shall be in Form G.1 modified in such manner as may be necessary having regard to the nature of the application.

Source: Rule 405(1)

[See Recommendation 18 on p. 69 and Form G.1 on p. 114.]

(2) Every originating notice taken under this Part shall include a concise statement of the grounds upon which relief is claimed in the proceedings and the nature of the relief claimed.

Source: Rule 405(2).

[See Recommendation 19 on p. 69.]

(3) Every originating notice taken under this Part shall be supported by an affidavit or affidavits or other evidence, including the evidence of the record, verifying the facts relied on in the application for judicial review.

[See Recommendation 22 on pp. 71-72.]

(4) Affidavits containing statements as to the belief of the deponent with the source and grounds thereof may be admitted for the purpose of subrule (3).

Source: Rule 305(3).

[See Recommendation 23 on p. 72.]

[Service]

753.9(1) The application for judicial review shall be served upon

(a) the person from whose decision, act or omission relief is claimed,

(b) the Attorney General,

(c) every person who appears to be interested in or likely to be affected by the proceedings.

Source: Rule 739(1) and (3); Ont 9(4); BC 16.

[See Recommendation 24 on p. 75.]

(2) The court may require the application for judicial review to be served upon any person not previously served.

Source: Rule 739(2).

[See Recommendation 25 on p. 75.]

[Right to be heard on Application]

753.10(1) The court may direct any person to be added or struck out as a party to proceedings for judicial review.

Source: NZ 10(2)(b).

[See Recommendation 26 on p. 76.]

(2) The Attorney General is entitled as of right to be heard in person or by counsel on the application.

Source: Ont 9(4); BC 16.

[See Recommendation 28 on p. 77.]

(3) Any person not served with the application for judicial review may show that he is affected by the proceedings and thereupon may, in the discretion of the court, take part in the proceedings as though served.

Source: Rule 739(4).

[See Recommendation 27 on p. 76.]

[Time for Bringing Application]

753.11(1) Where the relief sought is an order to set aside a decision or act, the application for judicial review shall be filed and served within six months after the decision or act to which it relates.

[See Recommendation 16 on p. 68.]

(2) Rule 548 does not apply to this Rule.

Source: Rule 742.

[See Recommendation 17 on p. 68.]

[Demand for Record on Application for Order to Set Aside]

753.12(1) Where the relief claimed on an application for judicial review is an order to set aside a decision or act, the applicant shall demand the return of the record.

(2) The demand for the return of the record shall take the form of an endorsement on the application for judicial review addressed to the person from whose decision or act relief is claimed and it shall be to the following effect, adapted as may be necessary:

> "You are required forthwith after service of this notice to return to the clerk of the Court of Queen's Bench at .....(as the case may be) the judgment, order or decision (or as the case may be) to which this notice refers and reasons therefor together with the process commencing the proceedings, the evidence and all exhibits filed, if any, and all things touching the matter as fully and entirely as they remain in your custody, together with this notice.
>
> "Date. . . . . .
>
> "To A.B., provincial judge at. . . (or as the case may be)
>
> "Signed C.D. . . . . (Solicitor for the Applicant)."

Source: Rule 743(1).

(3) All things required by this rule to be returned to the clerk of the Court of Queen's Bench shall for the purposes of the application constitute part of the record.

Source: Rule 743(2).

[See Recommendation 29 on p. 79.]

[Return of Record on Application for Order to Set Aside]

753.13(1) Upon receiving the application for judicial review endorsed in accordance with rule 753.12 the person from whose decision or act relief is claimed shall return forthwith to the office mentioned therein the judgment, order or decision (or as the case may be) together with the process commencing the proceedings, the evidence and all exhibits filed, if any, and all things touching the matter and the notice served upon him with a certificate endorsed thereon in the following form:

> "Pursuant to the accompanying notice I hereby return to the Honourable Court the following papers and documents, that is to say
>
> "(a) the judgment, order, decision (or as the case may be) and the reasons therefor;
>
> "(b) the process commencing the proceedings;
>
> "(c) the evidence taken at the hearing and all exhibits filed;
>
> "(d) all other papers or documents touching the matter.
>
> "And I hereby certify to this Honourable Court that I have above truly set forth all the papers and documents in my custody and power relating to the matter set forth in the originating notice."

Source: Rule 744(1).

(2) The certificate prescribed in subrule (1) has the same effect as a return to a writ of certiorari.

Source: Rule 744(4).

(3) If the proceedings are not in the possession of the person required to transmit them, he shall, in lieu of the certificate, so state and explain the circumstances.

Source: Rule 744(2).

(4) If the proceedings have not been received by the officer to whom or the clerk of the office to which they are by law required to be transmitted, that officer or clerk shall return a certificate of the fact.

Source: Rule 744(3).

(5) The parties to an application for judicial review may agree as to the contents of the return of the record of the proceedings in which the decision was made or act done.

(6) The court may, by direction, override an agreement made between parties pursuant to subrule (5).

(7) The court may dispense with the return of the evidence or exhibits or part of them.

Source: Rule 744(5).

(8) A copy of this rule shall appear upon or be annexed to the application for judicial review served upon the person from whom the return is required.

Source: Rule 744(6).

[See Recommendation 29 on p. 79.]

[Demand for and Return of Record on Application for Other Relief]

753.14(1) Where relief other than an order to set aside a decision or act is claimed on an application for judicial review and the applicant is of the opinion that the record is necessary to establish the claim, he may demand the return of the record by endorsing the application for judicial review in accordance with subrule (2) of Rule 753.12.

(2) Upon receiving the application for judicial review endorsed in accordance with subrule (1), the person from whose decision or act relief is claimed may

(a) return the record in which case subrule 753.12(3) and Rule 753.13 apply, or

(b) apply to the court to dispense with the requirement to make the return.

(3) Where objection is taken under clause (b) of subrule (2), the court may in its discretion order or refuse to order the return of the record or any part thereof.

(4) Where the court orders the return of the record, subrule 753.12(3) and Rule 753.13 apply except as altered by the order of the court.

[See Recommendation 29 on p. 79.]

[Interim Orders]

753.15 The court may make such interim order as it considers proper upon motion made either in the application for judicial review or at any time pending the final determination of the application for judicial review.

Source: Ont 4; BC 10.

[See Recommendation 30 on p. 83.]

[Conversion of Procedure]

753.16(1) If the relief claimed in a proceeding begun by statement of claim or originating notice under Rule 410 or another procedure ought to be claimed on an application for judicial review, the court, on application or its own motion, may direct that the proceeding be continued as an application for judicial review.

Source: Eng Rule 9(5).

(2) If the relief claimed on an application for judicial review ought to be claimed in a proceeding begun by statement of claim or originating notice under Rule 410 or another procedure, the court, on application or its own motion, may direct that the proceeding be continued under that other procedure.

Source: Ont 8; NZ 7; BC 13.

[See Recommendation 9 on p. 54.]

(3) The court may give such further directions as are necessary to cause the proceedings to conform to the procedure by which they are to be continued.

[See Recommendation 10 on p. 54.]

[Appeal to Court of Appeal]

753.17 An appeal from an order granted on an application for judicial review lies to the Court of Appeal.

Source: Rule 740.

[See Recommendation 31 on p. 85.]

[Direction by Judge of Court of Appeal]

753.18 Any direction required to give effect to an order of the Court of Appeal may be made by a judge of the Court of Appeal.

Source: Rule 741.

[See Recommendation 31 on p. 85.]

[General Rules to Apply]

753.19 Except where provided specially in this Part, the general rules, including the originating notice Rules in Part 33 and those relating to abridgment or extension of time, apply to all matters under this Part.

Source: Rule 737.

[See Recommendation 3 on pp. 34-35.]

3. Rule 738 is amended

(a) in subrule (1) by striking out

"mandamus, prohibition, certiorari" *and* "or quo warranto";

(b) by renumbering subrule (2) as subrule (3); and

(c) by adding the following after subrule (1):

(2) An order in the nature of mandamus, prohibition, certiorari, quo warranto or habeas corpus may be granted upon application for judicial review under Part 56.1.

[See Recommendation 32 on p. 86.]

4. Rules 742 to 753 are repealed.

[See Recommendation 33 on p. 87.]

FORM G.1
(RULE 753.8)

ORIGINATING NOTICE
OF APPLICATION FOR JUDICIAL REVIEW
IN THE COURT OF QUEEN'S BENCH OF ALBERTA

BETWEEN:

A.B.

Applicant,

- and -

C.D.

Respondent.

TO: (the person or persons on whom service is to be made)

TAKE NOTICE that an application for judicial review will be made on behalf of A.B. of the ..... of ..... in the Province of ..... (occupation), the above-named applicant, before the presiding Justice in Chambers at the Court House (or Law Courts) in the City of ....., on ....day, the ..... day of ..... 19 ..., at the hour of .....o'clock in the ....noon or so soon thereafter as counsel may be heard for an Order that:

(here set out a concise statement of the grounds upon which relief is claimed and of the nature of the relief claimed).

AND FURTHER TAKE NOTICE that in support of the application will be read the affidavit (or affidavits) of ....., copies of which are served herewith;

Dated at the ..... of ....., in the Province of Alberta, the ..... day of ....., 19 ...

Clerk of the Court (SEAL)

This originating notice was taken out by ..... solicitor for the applicant whose address for service is .....

(OR--if the applicant sues in person)

This originating notice was taken out by the applicant whose address for service is .....

Source: Form G under Rule 405(1).

Act to Amend the Judicature Act

1. The Judicature Act is amended by this Act.

2. Section 47(1) is amended by adding "and the amendments thereto filed as Alberta Regulation [here insert number of Regulation promulgating Part 56.1 of the Alberta Rules of Court]" *after* "November 4, 1976."

[See Recommendation 34(3) on pp. 89-90.]

PART V APPENDICES

Appendix A

Toward a Definition of "Statutory Power": Some Policy Issues

Date: April, 1982

1. Prerogative Powers

In the tentative opinion of the Western Australia Law Reform Commission (Working Paper, Project No. 26 - Part II), it is appropriate to apply the same legal standards to the judicial review of prerogative powers (exceptional powers of the sovereign) as are applied to statutory powers. The Commission (at 103-104) explains that the courts generally will only determine whether or not a prerogative power exists, and if so, the extent of its operation. However, in Laker Airways Ltd. v. Department of Trade [1977] 2 All E.R. 182, Lord Denning, M.R. (at 193) was prepared to review the exercise of a prerogative power to determine whether or not the power had been used "improperly or mistakenly". The majority, Roskill L.J. (at 206) and Lawton L.J. (at 210-211), took the narrower view that an Act of Parliament had fettered the prerogative power and that it was that Act which governed the rights and duties of the plaintiff and not the prerogative power.

2. Private or domestic bodies

Many persons or bodies perform functions which are analogous to those exercised in pursuance of statutory authority and make decisions which affect the position of individuals. These are entities which, in the main, were not created by statute and which do not derive their powers directly from statute. The range includes bodies such as university tenure committees, union executives, non-statutory arbitration boards and private clubs, to give a small sampling. The class also includes bodies such as boards of directors of limited companies which derive their existence from statute but nevertheless are private authorities: see Canada Metal Co. Ltd. v. Canadian Broadcasting Corporation et al. (No. 2) (1975) 11 O.R. (2d) 167 (C.A.); A.G. of Canada v. Lavell [1974] S.C.R. 1349 at 1379 per Laskin C.J.C.

The prerogative remedies do not lie against such non-statutory tribunals: Port Arthur Shipbuilding Co. v. Arthurs et al., [1969] S.C.R. 85; Re Vanek and Governors of the University of Alberta (1975) 57 D.L.R. (3d) 595; Re Minister of Education et al. and Civil Service Association of Alberta et al. (1977) 70 D.L.R. (3d) 696. Declaration and injunction as well as damages are appropriate remedies for failure to observe the strictures of natural justice which recent authorities suggest

can be applied to such bodies on the basis of the contract: the member of the club or association in consideration of his paying dues and observing the rules is entitled to a fair and just application of the rules, in accordance with his contract of membership: Chisholm v. Jamieson et al. [1974] 6 W.W.R. 169 (B.C.S.C.); Lee v. The Showmen's Guild of Great Britain [1952] 2 Q.B. 329.

By limiting the definition of "statutory power" to "a power or right conferred by or under statute," Ontario and British Columbia leave the availability of the remedies of declaration and injunction to control the behaviour of private or domestic bodies to the procedures governing private law. The British Columbia Law Reform Commission (at 27) was dissuaded from going further by the lack of clarity at common law as to those bodies which may be enjoined or the subject of declaration and the magnitude of the task of defining those non-statutory bodies which ought to be included.

[In at least two Ontario decisions consensual arbitrators have been held to come within the ambit of the judicial review legislation because of the reference to an order "in the nature of" certiorari in s. 2(1): Re Ontario Provincial Police Association Inc. and the Queen (1974) 46 D.L.R. (3d) 518 (Ont. Div. Ct.); Re Major Holdings & Developments Ltd. and Incorporated Synod of the Diocese of Huron (1979) 94 D.L.R. (3d) 474 (Ont. Div. Ct.). Professor Mullan (writing for Man. L.R.C. at 36) finds this "difficult to justify, the more obvious explanation for those words being the abolition of the actual writs in Ontario in the nineteenth century and their replacement by a simplified single-stage process giving relief of the kind supplied previously by the writs".]

In 1977, the New Zealand definitions of "statutory power" and "statutory power of decision" were extended to include a power or right conferred "by or under the constitution or other instrument of incorporation, rules, or by-laws of any body corporate" (Judicature Amendment Act 1977 (No. 32 of 1977), s. 10(1) and (3)). Professor Mullan (for Man. L.R.C.) suggests that this extension may be over-inclusive insofar as it opens the way to review at least by declaration and injunction of a significant body of decision-making within private corporations incorporated under general companies legislation. It may be under-inclusive insofar as it continues to exclude unincorporated voluntary associations in connection with which public law type issues may arise where declaratory and injunctive relief against ultra vires decisions would be available at common law.

3. Investigative function

A statute may authorize the making of an inquiry for the purpose of ascertaining facts (and sometimes the law as it applies to those facts) so that a recommendation may be made to another statutory agency which has a final power of decision. On the traditional view, the prerogative remedies are not available to review such a recommendation because it is preliminary and does not affect rights and therefore does not satisfy the first

branch of the two-pronged test set out in Calgary Power Ltd. et al. v. Copithorne [1959] S.C.R. 24. Nevertheless, at times courts have regarded mere recommendations to be of such significance that they do affect "rights" and therefore are reviewable in the context of prerogative relief. The basis for the latter determination is far from clear. The bringing of an action for a declaration or an injunction by the person investigated to determine whether the investigator has jurisdiction over him is permitted under the existing law. The remedy of prohibition also is available in certain circumstances.

In Ontario, the definition of "statutory power" does not extend to investigations or inquiries. The British Columbia Law Reform Commission (at 28) regarded this as an oversight, recommending the inclusion in the definition of "a power or right conferred by or under a statute to make any investigation or inquiry into the legal rights, powers, privileges, immunities, duties or liabilities of any person or party." The legislation (s. 1) in that province incorporates the recommendation. On the advice of the Public and Administrative Law Committee, the New Zealand definition was amended in 1977 to do the same (Judicature Amendment Act 1977 (No. 32 of 1977), s. 10(2)).

4. Policy-making

The Ontario definition of "statutory power" refers to a power or right "to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation" (s. 1(g)(i)). The New Zealand definition contains a similar clause although it refers to a power or right "to give any notice or direction" instead of "to give any other direction". The definition in British Columbia stops at "a power or right to make a regulation, rule, by-law or order." The differences appear to be matters of drafting only.

5. Exclusions

a. Governor General and Lieutenant Governor.

The Western Australia Law Reform Commission suggests that it may be appropriate specifically to exclude decisions of the Lieutenant Governor from the scope of the procedure. The Commission's concern seems to be that if the availability of relief is extended by creating new grounds for review, or providing new forms of relief, the existing powers of the Lieutenant Governor should not be trammelled upon. Compare s. 28(6) of Canada's Federal Court Act which exempts a decision or order of the Governor-in-Council.

b. Cabinet

Although the Law Reform Commission of Canada has concluded (Report No. 14) that the ambit of review should be broad and that exceptions should be kept to a minimum, it recommends that Cabinet should be exempted when it is acting within its power in its general political capacity or, as with other bodies, when exercising powers of a legislative character. Cabinet should not

be exempt when it is acting as an administrative authority under statutory power: Attorney General of Canada v. Inuit Tapirisat of Canada et al. (1980) 115 D.L.R. (3d) 1.

c. Officers of superior courts

Professor Mullan (for Man. L.R.C. at 64) questions whether the actions of officers of superior courts, such as masters and taxing officers, should be subject to judicial review under the new procedure. The cases are split on the issue whether the Ontario Act affects the inherent power of the High Court to review activities of its own officers. In Mullan's view, the new procedure should replace the present inherent jurisidiction.

d. Miscellaneous

The Federal Court Act (s. 28(6)) exempts decisions and orders of the Treasury Board, a superior court and the Pensions Appeal Board and decisions in respect of a proceeding for service offences under the National Defence Act from the operation of s. 28(1).

Appendix B

Difficulties with the Definition of Statutory Power in Ontario and British Columbia

Date: April 22,1982

The function of the definition of "statutory power" in the Ontario and British Columbia legislation is to separate public law matters from private law matters so as to identify those declarations and injunctions that should be available in the same proceedings as the prerogative orders (i.e. to separate declarations and injunctions in respect of acts and decisions of public officials from declarations and injunctions in respect of acts and decisions of private citizens or of public officials acting in a private capacity).

The function of the definition has not been recognized in all cases. Narrow judicial interpretation of the term has resulted in some applicants being denied a remedy by virtue of a holding that a public official was not exercising a statutory power.

1. Ministerial discretion

In an early case under the Ontario Act, the Divisional Court held that the exercise of a ministerial function involving no element of discretion or independent judgment fell outside the Act: Re Lamoureux and Registrar of Motor Vehicles (1973) 31 D.L.R. (3d) 669, [1973] 1 O.R. 573 (Ont. C.A.); rev'd on other grounds. (Legislation provided for the suspension of a motor vehicle licence on conviction of a criminal offence.)

This limitation precludes review by way of declaration even if the public administrator has misconstrued the legislation or wrongly denied a right or privilege (although mandamus may be available). It appears to be misguided. The matter could be clarified by amending Ontario s. 1(g)(iv) to refer to the right or power to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party "whether or not the doing of the act or thing involves the exercise of discretion". The same issue could arise in relation to Ontario s. 1(g)(iii) and could be solved in the same way.

2. Investigations

The Ontario definition of "statutory power" makes no mention of investigations. Case law has conflicted on the question whether a recommendation by a statutory decision-maker amounts to an exercise of a statutory power. Recently the Ontario Court of Appeal has resolved the difficulty by applying the common law criteria to determine whether conduct comes within the scope of the Act. Those criteria entail that the decision require the ascertainment of facts, the application of law to those facts, and the making of a decision that is binding on the parties: Re

Downing and Graydon et al. (1979) 21 O.R. (2d) 292 (Ont. C.A.). Previously the Divisional Court had excluded review at the investigatory stage in Re Florence Nightingale Home and Scarborough Planning Board [1973] 1 O.R. 615 (Ont. Div. Ct.) and included it in Re Chadwill Coal Co. Ltd. and McRae et al. (1976) 14 O.R. (2d) 393 (Ont. Div. Ct.).

British Columbia has avoided the difficulty by adding paragraph (e) to the definition. It extends to a power or right "to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability."

3. Conferral of power or right "by an enactment"

Case law throws doubt on the power of the court, in proceedings for a declaration or an injunction, to review decisions of bodies set up by a public official to investigate or make recommendations where those bodies are not expressly referred to in statute. Must the enactment directly create the committee or other decision-maker? If the legislation is interpreted to answer this question in the affirmative, many decisions currently open to review probably can only be attacked in an action (which would not be the most appropriate form of proceeding in most cases). (The availability of certiorari here is uncertain.)

The doubt is raised by the decision of the Ontario Court of Appeal in Re Raney et al. and the Queen in Right of Ontario (1975) 4 O.R. (2d) 249 (Ont. C.A.). The Court excluded from the ambit of the Act review of the conduct of a committee appointed by the Minister of Trnasportation and Communication to provide information about and give a qualification rating to applicants entitling them to bid on contracts to a certain amount.

If review is excluded on the basis of the definition of "statutory power", it is impossible for the Court to get into the real issues of fairness, the right to make representations and so on. Review also should be available to determine whether the decision-maker acted without jurisdiction. A better approach would have been to regard the committee as part of the decision-making process engaged in by the Minister who had power to enter into contracts pursuant to the statute.

The latter approach is suggested in Re Webb and Ontario Housing Corporation (1978) 93 D.L.R. (3d) 187 (Ont. C.A.). In that case, the applicant's tenancy was terminated after several levels of review by the Ontario Housing Corporation. The Court looked at the entire decision-making process and not at an isolated part of it to find that the applicant had been treated fairly.

4. Relationship between "statutory power" and "statutory power of decision"

(1) Basis of jurisdiction

The courts have displayed confusion about the relevance of a finding of exercise of a "statutory power of decision" to the jurisdiction of the court to hear the application for judicial review. In fact, the exercise of a "statutory power of decision" is only one of the four (five, in B.C.) possible conditions precedent to jurisdiction contained in the definition of "statutory power". The confusion is added to in Ontario because the requirements of the Statutory Powers Procedure Act apply only to the exercise of a "statutory power of decision." However, it has been eliminated by recent decisions which concentrate more on the duty to hold a hearing than on the exercise of a "statutory power of decision": Re Downing and Graydon et al. (1978) 79 D.L.R. (3d) 310 (Ont. Div. Ct.) rev'd (1979) 21 O.R. (2d) 292 (Ont. C.A.); and Re Webb and the Ontario Housing Corporation (1978) 93 D.L.R. (3d) 187 (Ont. C.A.).

In the British Columbia case of Island Protection Society v. The Minister of Forests [1979] 4 W.W.R. 1 (B.C.S.C.), consideration was given to the definition of "statutory power of decision" and the facts were found to come within it. On the facts, it would have been a simpler matter to rely on the power to make an order found in paragraph (a). (Compare Hydro Electric Commission of Mississauga v. City of Mississauga et al. (1975) 13 O.R. (2d) 511 holding that "[a] by-law having a sole or specific effect or object is unquestionably an exercise of statutory power".)

(2) Overlap

Professor Mullan points out that many of the decision-making powers embraced in the definition of "statutory power" seem to come within the definition of "statutory power of decision". For example, most if not all subordinate legislation made under Ontario s. 1(g)(i) will affect the "rights, powers, privileges, immunities, duties or liabilities" of a person. This is the more true when one notes that the definition of "statutory power of decision" includes both "deciding" and "prescribing." The latter term suggests that the definition applies not only to individual determinations as to entitlement under the existing law but also to the creation, modification or extinction of rights, powers, privileges, immunities, duties and liabilities which is the function of subordinate legislation-making powers.

Similarly, a decision or order requiring a person to do or to refrain from doing something under Ontario s. 1(g)(iii) may be seen as something which decides or prescribes that person's rights, etc. It may be possible to make a distinction based on the notion that here the empowering legislation has already decided or prescribed the person's rights and that an order to do or refrain from doing something is simply an invocation of the statutory authority already existing notwithstanding any element of discretion in its exercise.

Difficulties of the same kind arise in relation to paragraph 1(g)(iv). The doing of "an act or thing that would, but for such power or right, be a breach of the legal rights of any person" likewise seems to presuppose "a decision deciding or prescribing rights."

(3) Approach to interpretation

Problems also have arisen from the taking of a narrow conceptual approach to the interpretation of the definition of "statutory power of decision". Early along, the Ontario Divisional Court held that the court must find a "legal" right or privilege before the definition applies. The right or privilege to have a child attend a particular school is not a "legal right or privilege": Re Robertson et al and Niagara South Board of Education (1973) 41 D.L.R. (3d) 57 (Ont. Div. Ct.). The court seems to have overlooked the reference to "benefit" in paragraph (ii) of the definition.

Robertson has since been disapproved of in Island Protection Society v. The Minister of Forests [1979] 4 W.W.R. 1 (B.C.S.C.) and criticized in Re Grant et al. and Municipality of Metropolitan Toronto (1978) 21 O.R. (2d) 282 (Ont. Div. Ct.). The latter case concerned the right or privilege of a police constable to claim reimbursement for certain legal costs from the municipal council which could award them in its discretion.

The British Columbia Court of Appeal has decided that the decision of the warden to discontinue visiting privileges to correctional institutions came within the definition of "statutory power of decision": Culhane v. Attorney-General of British Columbia (1980) 108 D.L.R. (3d) 648 (B.C.C.A.); rev'g (1979) 93 D.L.R. (3d) 616 (B.C.S.C.). The trial court had held that the warden was acting in a purely administrative capacity and therefore not exercising a statutory power of decision.

(4) Function of separate definitions

The functional necessity for separating the definition of "statutory power of decision" from the broader definition of "statutory power" is questionable. The narrower term is used as a means of limiting the extension of the power given to the court to set aside a decision for error of law on the face of the record in a proceeding for a declaration (Ont., s. 2(3)). As well, it affects certain remedial powers of the court which are to some extent conferred and to a greater extent clarified by the legislation. These include the power to set aside in circumstances where a declaration is warranted (Ont., s. 2(4); B.C., s. 7); the power to cure a technical defect as an adjunct to exercise of the discretion to refuse relief (Ont., s. 3; B.C., s. 9); and the power to remit the matter to the decision-maker for further consideration (B.C., ss. 5, 6). In addition, the definition has implications for determination of and the obligation to file the record (Ont., s. 10; B.C., s. 17).

The aim of the definition seems to be to identify those decisions which are required to be made after consideration of evidence and argument presented by affected parties.

(i) Error on the face of the record

If relief in the nature of certiorari was available at common law for error on the face of the record, declaration is available now under statute where there has been exercise of

"statutory power of decision". The purpose of the provision is to expand the occasions where relief is available beyond decisions of a judicial or quasi-judicial nature (previously a prerequisite to relief by way of certiorari). This liberality is suggested by the presence of the words "benefit", "licence" and "whether he is legally entitled thereto" in paragraph (ii) of the definition of "statutory power of decision." Moreover, the Ontario case of Re Grant et al. and the Municipality of Metropolitan Toronto (1978) 21 O.R. (2d) 282 (Ont. Div. Ct.), which was decided in the context of the Ontario Statutory Powers Procedure Act, holds that statutory power of decision includes administrative or executive decisions.

Substitution of "statutory power" for "statutory power of decision" would eliminate most of the confusion. From a practical standpoint it is often possible for a court to characterize an error of law as jurisdictional and therefore amenable to declaration: Anisminic Ltd. v. Foreign Compensation Commission et al. [1969] 2 A.C. 147 (H.L.). In all probability there will be a record to review in the narrower circumstances contemplated by the definition of "statutory power of decision" in any event.

(ii) Lack of evidence

(iii) Remedial powers

There is some question whether the sections which purport to empower the court to set aside a decision instead of merely issuing a declaration (Ont., s. 2(4); B.C., s. 7) and to cure defects in form and technical irregularities which do not cause a substantial wrong or miscarriage of justice (Ont., s. 3; B.C., s. 9) really do expand the scope of the court's remedial authority. They do lend clarification to some points of possible confusion. For example, the power of the court to refuse relief at common law is in doubt if the defect is in respect of a mandatory procedural requirement rather than one which is merely directory. Decisions go both ways.

With respect to the power to set aside, there appears to be no legitimate reason why the authority should not extend to subordinate legislation. With respect to the power to cure a technical defect, defects in subordinate legislation would seem to have as much claim to statutory protection as similar defects in relation to other kinds of decision-making authorities.

With regard to the power of the court to remit the decision for reconsideration, the common law leaves doubt about the power to direct reconsideration of a particular part of the decision-making process. The section clarifies that reconsideration of a part of the decision may be ordered. The functional difference, however, is minimal because even at common law the tribunal was likely to concentrate its attention on the offending part of its decision.

The definition of "statutory power of decision" does not appear to encompass investigatory and recommendatory functions. Rather, it seems to be confined to its operation to bodies making

final and binding decisions. This is hard to justify in the context of the power to remit. If an investigatory body proceeds in an unlawful manner, the court ought to be able to direct a new investigation and give directions as to its conduct. If "statutory power of decision" is retained as a separate category of "statutory power", this shortcoming could readily be removed by making reference to a decision deciding, prescribing, "or affecting" the rights, etc. of a person(see e.g. N.Z. 1977 Amendment). At the same time, it should be noted that this extension would make it even more difficult to conceive of any decision-making powers embraced by one of the other defined categories of "statutory power" which would not also fall within the definition of "statutory power of decision". In other words, it would enhance the degree of overlap between the two.

Professor MacCrimmon concludes that little justification can be found for narrowing the scope of application of the remedial powers. Over all, separate definition of "statutory power of decision" does not appear to be essential to the achievement of the objective of judicial review procedure legislation.

5. Conclusion

The primary objective of the Ontario and British Columbia statutes is, of course, to consolidate all the common law remedies for judicial review of administrative action into one form of proceeding. The scope of the definition of "statutory power" is important only in relation to the procedure for obtaining review. The question of entitlement is a separate one. In light of this fact, it might be better to ask when the more summary procedure of judicial review is appropriate for determination of the case, whatever the nature of the review and whether or not it is being sought in relation to the exercise of a "statutory power." Professor MacCrimmon concludes her discussion of the matter by expressing a preference for the English approach.

Sources

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