LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON CIVIL RIGHTS

(Project No. 3)

PART IV

A PROCEDURE FOR JUDICIAL REVIEW OF THE ACTIONS OF STATUTORY AGENCIES

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TO THE HONOURABLE ALEX B. MACDONALD, Q.C.
ATTORNEYGENERAL FOR BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON CIVIL RIGHTS
(Project No. 3)

PART IV A PROCEDURE FOR JUDICIAL REVIEW OF THE ACTIONS OF STATUTORY AGENCIES

This Report has been prepared in the Commission's study on Civil Rights, which is Project No. 3 in the Commission's Approved Programme.

It is the result of an examination by the Commission of the existing law relating to the procedures by which the courts ordinarily review the legality of the actions or omissions of agencies of government. In the Commission's opinion the present procedural law is unnecessarily complicated, and the Report contains recommendations which are designed to clear away some of the complications without altering the main body of substantive law of judicial review.

CHAPTER I INTRODUCTION

A. General

In a recent Canadian text appears the following statement on the law relating to judicial review of administrative action:

> There is an uncomfortably high incidence of apparently meritorious cases being rejected on dry, narrow, inflexible, jurisdictional or procedural grounds. Nowhere today does the law appear more threadbare, pedantic, hidebound and cobwebbed. The shudders evoked by tales from other ages of special pleading, and the tyranny of the forms of action, with their unyielding concern for form over substance, may well be justified by a similar aridity in today's jurisprudence. In an era when the proceedings of courts should exhibit an extreme desire to get to the merits of any case a propensity for narrow technicality and logic-chopping in this field is sadly out of place.

In the last five years in other jurisdictions in Canada and the Commonwealth reforms have been effected, and proposals for reform have been made, which recognize the need for some rationality in the procedures by which the jurisdiction of the courts over the actions of those exercising statutory powers may be invoked. In this Report the Commission makes recommendations of a largely procedural nature which are designed to eliminate some of the more anomalous features of the process of judicial review of the actions of statutory agencies.

It is important for us to emphasize at the outset that the Commission does not attempt in this Report to face what may be characterized as the substantive issues of judicial review. These substantive issues include such matters as the grounds upon which judicial review ought to be available; the relationship of judicial review to statutory appeal procedures; the effect of privative clauses; standing to apply for judicial review; the discretionary nature of judicial review; and the question of a specialized tribunal to exercise judicial review powers. In particular we have not engaged in the continuing debate on the proper role of judicial review in the governmental process. For the purposes of this Report we have accepted the premises upon which the existing law is based, namely that review of the exercise of statutory powers is, to a degree, desirable and that the courts continue to be qualified to conduct this review.

The fact that these issues are not confronted in this Report is not any indication that they are thought to be unimportant. On the contrary, they are among the most crucial of concerns in administrative law, giving rise to complex and difficult questions of policy and principle. Yet it has seemed to us that the defects and inconsistencies in the existing procedural law surrounding judicialreview are sufficiently numerous to warrant immediate attention, and that reform in this area may be proposed independently of a definitive, and therefore timeconsuming, resolution of the wider issues. moreover, the procedures for obtaining writs of certiorari, prohibition and mandamus have changed little since the nineteenth century, and bearing in mind the review of the *Supreme Court Rules* which is nearing completion, we think it incumbent upon us to make early recommendations with respect to the prerogative writs so that the review of the Rules is not delayed.

The limited goals we have set ourselves in this Report are simply, to borrow a phrase used by the English Law Commission, to whose Working Paper in this area we will have occasion to refer a number of times, "to suggest how the form and procedure of judicial control might be improved."

There is ample precedent for the course of action we have chosen. It was adopted in New South Wales in 1970, in the *Federal Court Act* in 197071, in Ontario in 1971, by the English Law Commission in the same year and in New Zealand in 1972. We count ourselves fortunate in having had the benefit of the writings associated with these changes, and most of our proposals are based on principles already established in these jurisdictions.

One further selfimposed limitation on the scope of our exercise ought to be set out. Although the prerogative writs of habeas corpus and quo warranto also exist for the protection of the individual against the state, it does not seem to us appropriate that they should be considered in this study. A proceeding for a writ of habeas corpus, although a vital remedy, is principally concerned with safeguarding the physical liberty of the subject and, when not accompanied by an application for certiorari in aid, is not closely allied with the ordinary situation in which the citizen seeks review of the exercise of statutory powers. The writ of *quo warranto* may be granted in only limited circumstances and its invocation is rare. We refer to it again, however, in a limited context, at the conclusion of Chapter VII.

B. ___Consultation

In 1972 Miss Mary F. Southin, Q.C., was asked by the Commission to prepare a research paper on the existing law of judicial review in British Columbia and to suggest appropriate areas for reform. The paper has been of assistance to us in assessing the present position in this Province, but in fairness to Miss Southin we must point out that our proposals for reform go further than her recommendations to us.

In the early part of 1974 the Commission prepared a working paper setting out tentative suggestions for change, which now form the basis for this Report. The working paper was circulated for comment and criticism among members of the Administrative Law, Civil Justice and Civil Liberties Subsections of the British Columbia Branch of the Canadian Bar Association, and among other interested groups and persons. The number of replies received was small, but the most strongly articulated criticism was that the Commission had not confronted the substantive issues of judicial review earlier referred to. Few criticised the proposals themselves.

The Commission fully acknowledges the existence of the case to be made for a comprehensive consideration of the substantive issues of judicial review, but stands by its original view that procedural reform is separable and may proceed independently. The other, more technical, criticisms are dealt with as they arise throughout the Report.

C. The Report

In constructing this Report we have followed the approach of the English Law Commission in their working paper. That is, for the purposes of perspective we first set out in skeletal form what we believe to be the existing general law relating to the use of the prerogative writs of certiorari, prohibition and mandamus, and to the use of injunctions and declarations in checking administrative action or inaction. This portion is succeeded by an evaluation of similar reforms in other jurisdictions, and we conclude with our own proposals for reform.

CHAPTER II CERTIORARI AND PROHIBITION

A. Introduction

Applications for the writs of certiorari and prohibition are the most common devices by which the citizen seeks to ensure that those exercising statutory powers do so according to law. An application for certiorari is appropriate when a decision made pursuant to a statutory power or duty to decide has been made in error; an application for prohibition is appropriate before the decision has been made.

It is customary in discussing the prerogative writs to treat certiorari and prohibition together, as there appears to be "no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage."

B. Grounds for Certiorari and Prohibition

It is not the purpose of this paper to venture into the sizeable and confused jurisprudence on what constitutes an error for which certiorari or prohibition will lie. This is, and will continue to be, a matter of debate in the courts and in the journals. The English Working Paper summarizes the position by stating that certiorari will lie where an inferior court or administrative tribunal has acted in excess or abuse of jurisdiction or contrary to the rules of natural justice. It will also lie where there is an error of law on the face of the record. Prohibition lies to prevent tribunals from acting or continuing to act in excess or abuse of jurisdiction or contrary to the rules of natural justice.

What it is important to emphasize here are the limitations which the courts have from time to time seen fit to impose on the appropriateness of certiorari and prohibition as remedies when compared with mandamus, an injunction or a declaration. The most significant is the statement that certiorari and prohibition will lie only where a body charged with the exercise of a statutory power is obliged to act in a "judicial" or "quasijudicial" manner. This doctrine, having its modern origin in the decision of the English Court of Appeal in *R*. v. *Electricity Commissioners,* may require a plaintiff to engage in the very difficult exercise of deciding whether the error which he seeks to correct was one occurring in the course of the discharge of a function which is recognizable as "judicial" or "quasijudicial." In *Ridge* v. *Baldwin* the House of Lords appeared to remove the necessity to characterize a function as "judicial" or "quasijudicial" as a prerequisite to the issue of certiorari or prohibition, but the requirement is still imposed from time to time in both English and Canadian cases.

7. *Re A Plebiscite Under the Natural Products Marketing (British Columbia) Act* (1967), 63 D.L.R. (2d) 443; *Cann* v. *Metropolitan Winnipeg* (1977), 6 W.W.R. 346; *R*. v. *Read ex p. McDonald* (1969), 1 D.L.R. (3d) 118.

9. *Howe Sound Co*. v. *International Union of Mine, Mill and Smelterworkers,* [1962] S.C.R. 318; *Re McComb and Vancouver Real Estate Board* (1960), 32 W.W.R. 385. Note however that in the special case of nonstatutory arbitrations, a common law motion to quash will lie in circumstances similar to those in which certiorari would lie. *See R*. v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw,* [19321 1 K.B. 338; *R*. v. *Board of Arbitration, ex p. Cumberland Railway Co*. (1968), 67 D.L.R. (2d) 135; *Port Arthur Shipbuilding Co. v. Arthurs et al*., [19671 S.C.R. *85; A. P. T. E. C*. v. *C. B. C.* , [1974] 1 W.W.R. 430. The distinction between what is "judicial" or "quasijudicial" and what is not is extremely hard to draw, not to say elusive, and appears to be an unnecessary bar to a court's consideration of the merits of the issue.

A further limitation on the application of certiorari and prohibition is that they do not lie to quash or restrain the proceedings of nonstatutory tribunals or bodies, even though they may exercise adjudicative functions.

C. Procedure

The procedure relating to the writs of certiorari and prohibition is contained in Order 59 (Crown Practice (Civil)) of the *Supreme Court Rules, 1961*. Order 59 has its origin in the English *Crown Office Rules (Civil)* of 1886, which were introduced in British Columbia in 1906. The procedure as it is set out in Order 59 has changed very little since 1906. Rule 28 provides that:

Every application for a writ of certiorari shall be made by motion to show cause why the writ should not issue: Provided that where, from special circumstances, the Court or Judge may be of the opinion that the writ should issue forthwith, the order for the writ to issue may be made *ex parte* in the first instance or otherwise as the Court or Judge may direct.

Rule 28A provides that:

> Every application for a writ of certiorari shall set forth fully the grounds on which the application is made.

Rule 37 provides that:

> On the return of the motion to show cause, the Court, if it shall think fit, may make it part of the order for the writ to issue that the judgment, order, conviction, or other proceeding shall be quashed on the return without further order.

As to prohibition, Rule 81 provides that:

> An application for a writ of prohibition shall be made by motion to show cause why the writ should not issue, and six days' notice thereof in writing shall be given to the person sought to be prohibited and to the Attorney-General.

Under Rule 82 the order may be made *ex parte* in the first instance on special circumstances being shown, and under Rule 83 every application for a writ of prohibition must set out fully the grounds on which the application is made.

Rule 5 applies Order 38 of the *Supreme Court* Rules, relating to affidavits, to proceedings for certiorari, prohibition and the other prerogative writs.

It will be seen that the Rules, at least as they apply to certiorari, contemplate a twostage procedure. If, on the motion to show cause, the party to whom the motion is directed fails to establish cause, then the writ will issue. The writ commands the production of the order or decision in question before the court in order that it may decide whether the order or decision should be quashed. Traditionally the effect of the court's decision that there has been error is a mere quashing of the offending decision. In British Columbia, however, there is authority for the proposition that a court may quash and at the same time remit the question in issue to the tribunal for a decision in the light of the court's ruling.

As has been pointed out, the existing procedural rules in this Province are based on the English position in 1886. In England, however, changes were brought about in 1938 following the recommendation of the Business of the Courts Committee in 1936 that the prerogative writs themselves be abolished and replaced with applications for orders in the nature of certiorari, mandamus or prohibition. Section 7 of the *Administration of Justice (Miscellaneous Provisions) Act* of 1938 provided that:

(1) The prerogative writs of mandamus, prohibition and certiorari shall no longer be issued by the High Court.

(2) In any case where the High Court would, but for the provisions of the last foregoing subsection, have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done, or a writ of prohibition prohibiting any proceedings or matter, or a writ of certiorari removing any proceedings or matter into the High Court or any division thereof for any purpose, the Court may make an order requiring the act to be done, or prohibiting or removing the proceedings or matter, as the case may be.

(3) The said orders shall be called respectively an order of mandamus, an order of prohibition and an order of certiorari.

(4) No return shall be made to any such order and no pleadings in prohibition shall be allowed, but the order shall be final, subject to any right of appeal therefrom.

(5) In any enactment references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.

Rules of Court made under this section provide for initiation of proceedings by application *ex parte* for leave and originating motion.

D. Limitation

The Certiorari Procedure Act provides in part that:

> No writ of certiorari shall be granted, issued forth, or allowed to remove any conviction, judgment, order or other proceeding had or made before any Justice or Justices of the Peace to the Supreme Court, unless such certiorari be moved or applied for within six calendar months next after the conviction, judgment, order, or other proceeding is had or made ...

This provision will be strictly applied where it is not alleged that there is "want of jurisdiction" in the tribunal, although it appears that if the writ of certiorari is sought in aid of a writ of habeas corpus extensions of time may, in the court's discretion, be granted.

A similar limitation provision with respect to certiorari appears in the *Supreme Court Rules, 1961*. Rule 33 of Order 59 provides that:

> No writ of certiorari shall be granted, issued, or allowed to remove any judgment, order, conviction, or other proceedings had or made by or before any Justice or Justices of the Peace, Magistrate, inferior Court, tribunal, board, body corporation, or other person or persons whatsoever, unless, in the case of a judgment, order, conviction, or other proceeding had or made before any Justice or Justices of the Peace, Magistrate, or inferior Court, such writ of certiorari be applied for within six calendar months next after such judgment, order, conviction, or other proceeding shall have been so had or made ...

This provision has been held to apply only to proceedings in inferior courts, and in the case of tribunals, boards, bodies corporate and other persons, it appears that the applicant will be barred only if he has delayed beyond "a reasonable time."

The question of being barred by time would not seem to arise on an application for prohibition because of the nature of the remedy.

E. Locus Standi

A person who is a party to the proceedings complained of undoubtedly has standing to apply for certiorari or prohibition, but beyond that it is not safe to generalize. On the one hand there is some support for the proposition that Canadian courts will be almost as strict on the question of standing to apply for the prerogative writs as they have traditionally been on standing to apply for declarations and injunctions. On the other hand there is much authority in the English cases for the view expressed in the English Working Paper that: "... it is unusual for the courts in practice to be very exacting about the requirement of *locus standi* to apply for [the] prerogative orders." In *R*. v. *Surrey Justices* Blackburn J. said:

> In other cases where the application is by the party grieved ... we think it ought to be treated ... as *ex debito justitiae;* but where the applicant is not a party grieved (who substantially brings error to redress his private wrong), but comes forward as one of the general public *having no particular interest in the matter, the Court has a discretion*, and if it thinks that no good would be done to the public by quashing the order, it is not bound to grant it at the instance of such a person [emphasis added].

In the English Working Paper a number of recent cases are cited which support a liberal interpretation of the term "party grieved."

In a recent decision of the Supreme Court of Canada, *Thorson* v. *AttorneyGeneral of Canada et al. (No. 2),* Laskin J. (as he then was), in delivering the majority judgment, referred obiter to "the cases on certiorari and prohibition which, even in a non-constitutional context, have admitted standing in a mere stranger to challenge jurisdictional excesses, although the granting of relief remains purely discretionary..." The fact that the granting of standing to apply for certiorari and prohibition to a stranger is a matter within the discretion of the court appears to have been established in British Columbia by the decision of the Court of Appeal in *R*. v. *Vancouver Zoning Board of Appeal, ex p. North West Point Grey Home Owners Association*. Although standing was not granted to "nonaggrieved members of the public" in that case, two judges acknowledged that they had a discretion in the matter.

In the case of the prerogative writs the fact that the person or persons against whom the relief is sought cannot be described as a legal entity has not prevented the bringing of proceedings.

F. Discretion in Granting Certiorari and Prohibition

It has always been held to be axiomatic that the courts have a wide discretion in the matter of granting or withholding certiorari and prohibition. Reid has said:

> In general it appears to mean that certiorari may be withheld notwithstanding the absence of any legal disqualification if, in the court's opinion, some good reason exists for not granting it. Thus, an applicant may be in a position to prove a denial of natural justice, or an error of jurisdiction but may be refused certiorari if some other, equally effective, remedy, such as an appeal, might be or has been taken. Similarly, an otherwise meritorious application may be refused on the ground that certiorari or prohibition would, in the court's opinion, bring no substantial benefit to the applicant.
>
> Reid catalogues the essentially fluctuating nature of the Canadian decisions on the granting and withholding of the remedies. As, however, within the limited confines of this exercise it is not appropriate to attempt a rationalization of the law on this point, we do not set out the jurisprudence.

G. Crown Immunity

Whether certiorari and prohibition will lie against the Crown is not free from doubt, although the issue is not perhaps as pressing as it might at first appear, as de Smith points out that they are available against departments of State and individual Ministers." In Canada the cases conflict. In *Border Cities Press* Club v. *AttorneyGeneral for Ontario* the Ontario Court of Appeal held that certiorari could not lie against the LieutenantGovernor in Council in the exercise of power to make ordersincouncil. In *Re Gooliah and Minister of Citizenship and Immigration,* how-

ever, (in which the *Border Cities* case was not cited) it was held, somewhat tentatively, by the Manitoba Court of Appeal, that the fact of the Crown's being a party to the proceedings was not a bar to the issuing of certiorari. The proceedings which were being impugned were those of a Special inquiry Officer under the *Immigration Act,* but the court did not appear to place any particular emphasis on the fact that the Special Inquiry Officer himself might have been made the respondent. Monnin J.A. cited the British Columbia Court of Appeal decision in *Regina* v. *White* in support of the proposition, pointing out that in that case no objection had been taken to the impleading of the Crown on a certiorari application as well as the tribunal whose order was impugned. The White decision was reversed in the Supreme Court of Canada, but not on this point.

The new *Crown Proceedings Act* does not provide any definitive resolution of the question.

H. Relationship to Other Remedies

The relationship of certiorari and prohibition to the action for a declaration or an injunction is referred to in more detail later in this Report. For the purposes of this Chapter it is sufficient to point out that certiorari and prohibition must be obtained by the procedure which we have earlier set out, whilst declaratory or injunctive relief against those exercising statutory powers must be sought by way of writ of summons.

CHAPTER III MANDAMUS

A. Introduction

Mandamus, it is traditionally said, will lie to compel the performance of a public duty owed to a person legally entitled to require the performance of the duty in question. 2. (1951) 4 W.W.R. (N.S.) 385, per O'Halloran J.A. at 388. The origin of the remedy was discussed in *McLeod* v. *Board of School Trustees of Salmon Arm* where it was stated that "mandamus is the appropriate remedy where there is no other way to enforce obedience to the law when in justice and good government there ought to be a remedy."

Mandamus will be granted most commonly where the body or person required to perform the duty has refused to perform it, but it has also been granted where there has been performance coloured with impropriety. The remedy has been available where performance has been arbitrary, has been carried out without a proper hearing, or has been pursuant to an improper delegation of power or to subordinate legislation which is *ultra vires* the empowering statute.

B. Grounds for Mandamus

The orthodox statement is that mandamus lies to compel the exercise of an imperative duty only, and does not lie where it is in the discretion of the official whether he will exercise a power. As Reid points out, this description of the scope of mandamus may lead to confusion, because the duty may be to exercise a discretion, in which case mandamus would lie to compel fulfilment of the duty. In this sense it is correct to say that it will lie to compel the proper exercise of a discretionary duty. Reid therefore suggests that "it may be more accurate to frame the question as being whether a statute imposes a duty or merely confers a power." To add to the confusion it is often said that mandamus lies to compel the performance of ministerial acts or functions. The difficulty arising from the use of this term is that when it is used in the context of certiorari and prohibition it usually means "administrative" as opposed to "judicial." It also has the same meaning in the context of mandamus with this difference that in the context of the latter it "indicates functions that must be exercised upon fulfilment of such requisite conditions as are laid down. There is thus no discretion over whether or not they must be exercised." It is perhaps most accurate to say that man-

damus lies to compel both a judicial and quasijudicial decision on the one hand and an administrative function on the other, provided the latter is nondiscretionary in the sense explained.

The ground for an application for mandamus is, simply stated, a refusal to perform a duty in the sense just described. What is essential, however, to a successful application is that the applicant must show that he has demanded proper performance and that that performance has been refused. In *Re Dunlop and Halifax City Charter* it was held that:

The applicants are not entitled to relief by way of mandamus unless they show to this court that they had demanded specifically the relief sought and that such demand had been refused. It is not sufficient that a demand was made in general terms.

If, however, it is clear that a demand would be fruitless, none need be made.

As in the case of certiorari and prohibition, the prerogative writ of mandamus does not appear to lie against nonstatutory tribunals such as arbitration boards or officials of private organizations.

C. Procedure

The procedure for mandamus in British Columbia, like that for certiorari and prohibition, is essentially unchanged from that laid down in the English *Crown Office Rules (Civil)* of 1886. The *Supreme Court Rules, 1961* appear to contemplate a notice of motion to show cause why a writ should not issue, followed by a first writ of mandamus, followed in turn by a return to the writ and pleadings, followed ultimately by a second writ of mandamus. We can discover no modern reported Canadian case where this full procedure has been used, although in the judgment of O'Halloran J.A. in *McLeod* v. *Board of School Trustees of Salmon Arm* there is an indication that the full procedure may have been contemplated.

Rule 60 of Order 59 provides that:

> Every application for a prerogative writ of mandamus shall be made by motion to show cause why the writ should not issue and shall set forth the grounds on which the application is made.

Rule 68 states in part that:

> The writ may be made returnable forthwith, or time may be allowed to return it, either with or without terms, as the Court thinks fit.

Rule 69 provides:

> Every person by law compellable to make any return to a writ of mandamus shall make his return to the first writ.

Rule 136 provides:

> When any return is made to the first writ of mandamus, the applicant may plead to the return within such time and in like manner as if the return were a statement of defence delivered in an action.

Rule 71 provides:

> Where under Rules 70 and 136 the applicant obtains judgment, he shall be entitled forthwith to a peremptory writ of mandamus to enforce the command contained in the original writ, and the judgment shall direct that a peremptory writ do issue.

In the situation where a writ of mandamus is disobeyed, it is open to the applicant to attach for contempt.

Reference is made in Chapter I to the change in the English position brought about in 1933 by section 7 of the *Administration of Justice (Miscellaneous Provisions) Act* of 1938.

D. ___Limitation

In the absence of statute there is no precise time within which an application for mandamus must be made. It has been held, however, that: "Although there is no ... time limit within which an application for ... mandamus must be brought the Court may in its discretion refuse the application unless it is brought within a reasonable time."

E. Locus Standi

As with certiorari and prohibition it is unsafe to generalize on the question of standing to apply for mandamus. In *Hughes* v. *Henderson and Portage Law Prairie* Ferguson J. applied the statement found in *Halsbury* that: "The Court will ... only enforce the performance of statutory duties by public bodies on the application of a person who can show that he has himself a legal right to insist on such performance."

The unsettled state of the law may, however, best be described by reference to a decision cited in the English Working Paper. In *R*. v. *Hereford Corpora*tion, *ex p*. *Harrower* Lord Parker C.J. said: "It is said that a far more stringent test applies in the case of [standing to apply for] mandamus and that an applicant must have, as it is put, a specific legal right." in this context mandamus was refused to applicants *qua* electrical contractors from whom in breach of their statutory duties, the local authority had omitted to invite tenders for the installation of electrical equipment. Mandamus was, however, granted to them *qua* ratepayers.

F. ___Discretion in Granting Mandamus

The granting of mandamus is, like the granting of certiorari and prohibition, discretionary. Reid again catalogues the cases where the discretion has been exercised, and notes the difficulty in rationalizing the jurisprudence. We have already stated that it is not part of this exercise to attempt to lay down guidelines for the exercise of discretion in granting remedies against the misuse of statutory power, and we do not pursue the matter further.

G. ___Mandamus and the Crown

One of the more serious common law limitations on mandamus as a remedy is that its use against the Crown appears to be more restricted than the use of certiorari and prohibition.

This matter has already been referred to in some detail by the Commission in another of its Reports,

25. *Ibid*. at 34. in which it was recommended that the immunity be withdrawn. Section 2(c) of the new *Crown Proceedings Act* provides that:

> ... the Crown is subject to all those liabilities to which it would be liable if it were a person; ...

but whether this is sufficient to justify the issue of mandamus against the Crown is not free from doubt.

H. ___Relationship to Other Remedies

While mandamus may have the disadvantage of being more widely unavailable against the Crown, it surpasses certiorari and prohibition in its availability to check the exercise or nonexercise of both administrative and judicial functions by those charged with duties under statute, although mandamus is not a remedy to undo what has already been done, the proper remedy in that instance being certiorari. Like certiorari and prohibition mandamus must be sought by a special procedure, unlike the declaration and the injunction, which must be sought in an action commenced by way of writ of summons.

CHAPTER IV DECLARATIONS

A. Introduction

At common law no procedure existed for the making of declaratory judgments. In the Court of Chancery, before 1852, binding declarations of right could be made only when some other form of relief was granted. By the *Chancery Procedure Act* of 1852, however, the Court was empowered to make binding declarations of right without granting consequential relief, and the same power was later conferred on the High Court of Justice.

In British Columbia a provision similar to that contained in the English legislation of 1852 is found in *the Supreme Court Rules, 1961*.

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

It is to be noted that the action for a declaration was not, unlike the prerogative writs, originally thought appropriate for use against administrative abuse. It arose as a remedy in the area of private law, where its role remains equally as important as its comparatively recent role in the area of public law. In its public law aspect it has the advantage of certiorari and prohibition in that it does not appear to be confined to checking only judicial or quasijudicial functions.

B. The Scope of the Action for a Declaration in Administrative Law

In the area of administrative law the action for a declaration is perhaps most useful in testing the legality of subordinate legislation. The appropriateness of the action in this area was established in *Dyson* v. *AttorneyGeneral,* and since that decision Canadian courts have entertained questions on the validity of:

> ... orders in council, legislation, bylaws of various bodies, including municipal, or domestic tribunals, assessments to tax, the application of limitation periods, expropriations of land; they may challenge the jurisdiction of a tribunal (on the ground that it infringed the jurisdiction of the courts); a tribunal's failure to give notice to an affected party, the purpose of classifying an agreement as not a "collective agreement", or they may impugn an election of an AttorneyGeneral to proceed by indictment for alleged income tax offences.

A distinction is drawn in the English Working Paper 7. [1951] O.R. 360 (C.A.). between a court's original jurisdiction to give declaratory relief and its supervisory jurisdiction. A court exercises original jurisdiction where it makes a simple declaration of the applicant's legal position, such as that granted in *Bulova Watch Co*. v. *Attorney-General of Canada*. In that case the court was asked to, and did, declare that there was no excise tax payable on certain goods, and that the appellant was entitled to have the goods shipped from abroad, passed through customs

and delivered without the necessity of taking out a manufacturer's or excise licence. Where, however, it appears that the Legislature has decided that a question of right or entitlement should be decided by a body other than the courts, original jurisdiction to make an order declaring the right or entitlement of the plaintiff will be limited. In *Helman* v. *Brown* the plaintiff sought a declaration that he was entitled to the Provincial homeowner grant, despite a determination by a Collector appointed under the *Provincial Homeowner Grant Act* that he was not. It was held in the Supreme Court of British Columbia that as the deciding power under the Act had been entrusted to the Collector, the court was prevented from substituting its own judgment by way of declaration.

Where the court is asked to make a declaration in situations where deciding power has been allocated elsewhere, it will be confined to its supervisory jurisdiction, which is similar to jurisdiction in certiorari. In other words, the court may declare a decision invalid for jurisdictional error (including breach of the rules of natural justice). The declaration is more valuable than certiorari to the extent that the court may go beyond a mere quashing and define the plaintiff's rights. The declaration is less valuable than certiorari to the extent that although it lies in the case of jurisdictional error, it does not lie for error of law on the face of the record. That proposition is most succinctly stated in *Punton* v. *Ministry of Pensions* and *National Insurance,* and was held to follow logically upon the decisions in *Barraclough* v. *Brown* and *Healey* v. *Minister of Health*. As the British Columbia decision in *Helman* v. *Brown* was based on *Healey* v. *Minister of Health,* there is reason to suppose that the principle laid down in Punton would be applied here.

The action for a declaration is again seemingly wider in scope that certiorari and prohibition to the extent that it never appears to have been held that it is confined to judicial or quasijudicial functions.

The action will apparently lie to declare decisions of domestic tribunals *ultra vires*.

C. Procedure

It appears to be generally accepted, despite the wide wording of 0. 25, r. 5 of the *Supreme Court Rules, 1961* and some slender and elderly judicial authority to the contrary, that a declaration may be sought only by an action commenced by writ of summons, unless specific authorization for commencement by originating motion may be found in the Rules.

D. Locus Standi

The law concerning the necessary *locus standi* to bring an action for a declaration is now in a state of flux. Until recently the most commonly cited authority was the decision of the Supreme Court of Canada in *Smith* v. *AttorneyGeneral of Canada* in which it was stated that the appellant could not question the validity of certain legislation because he had no interest beyond that of "hundreds of other citizens" and was "not in jeopardy by reason of any act of his or of any threat of a penalty unless he submits to an unreasonable demand." This decision, and others like it, gave rise to the comparatively common view that the courts would exercise sparingly their discretion to accord *locus standi* in doubtful cases involving declarations. The only notable exception to this principle arose in the case of actions for declarations concerning the money powers of municipalities.

23. *Ibid*. 1718.

A recent decision of the Supreme Court of Canada has, however, marked a retreat from this position. *In Thorson* v. *AttorneyGeneral of Canada et at (No. 2)* a federal taxpayer was granted standing to apply for a declaration that the *Official Languages Act* and its accompanying *Appropriation Acts* were unconstitutional. In delivering the majority judgment Laskin J. (as he then was) said:

> In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised ... Relevant as well is the nature of the legislation whose validity is challenged, according to whether it involves prohibitions or restrictions on any class or classes of persons who would thus be particularly affected by its terms beyond any effect upon the public at large. If it is legislation of that kind, the Court may decide ... that a member of the public ... is too remotely affected to be accorded standing. On the other hand, where all members of the public are affected alike ... the Court must be able to say that as between allowing a taxpayers' action and denying any standing at all when the Attorney General refuses to act, it may choose to hear the case on the merits.

It is as yet, of course, too early to measure the effect of this decision on the general law governing standing to apply for declarations concerning provincial legislation or administrative action, but it has been applied in at least two recent cases of significance. In *Re MacNeil et al.* v. *Nova Scotia Board of Censors et al.* a taxpayer sought to impugn the constitutional validity of provincial legislation by way of an action for a declaration, and in the Nova Scotia Supreme Court Hart J. said:

In the case at bar the applicant is a taxpayer claiming the exercise of the Court's discretion to permit the hearing and determination of a justiciable issue. He says that there is no other effective process available for determining the point since the Attorney-General has not proceeded after requests and there appear to be no persons with a special interest willing to proceed. I consider the factual situation similar to the *Thorson case,* even though the nature of the legislation differs slightly and I exercise the discretion of the Court in favour of hearing the parties on the constitutional issue.

In *Stein* v. *City of Winnipeg* a taxpayer sought an interim injunction to restrain the City of Winnipeg from conducting a programme of spraying alleged to be in contravention of the terms of the City *of Winnipeg Act*. The Manitoba Court of Appeal was unanimous in its view that the *Thorson* case, and the nature of right sought to be enforced under the *City of Winnipeg Act,* permitted a taxpayer to have standing to apply for the injunction.

It is interesting to note that the argument that liberal rules of standing would invite an intolerable multiplicity of actions was not afforded great weight in either *Thorson* or *Stein*, and it was stated in both cases that such a result could be controlled by the use of judicial discretion.

An action for a declaration may be dismissed where the persons against whom relief is sought are thought to lack legal personality.

E. Discretion in Granting Declarations

The granting of declarations is, of course, discretionary. Reid points out that:[30]

> ... discretion has been exercised in favour of the grant of a declaration to avoid multiplicity; but against it if the action possibly involved penal consequences as a result of machinery provided in the statute; where it would have no practical effect; where no useful purpose would be served; in certain circumstances where other remedies had not been exhausted; where the declaration would affect provincial funds; even when not "highly convenient."

30. N. 4 *supra*.

F. The Declaration and the Clown

Despite the longestablished principle of *Dyson* v. *The AttorneyGeneral* whereby the validity of numerous actions of the Crown and its agents may be questioned by impleading the AttorneyGeneral in an action for a declara-

tion, this principle was limited at common law by the co-existent principle that where the result of the declaration would relate to Crown property or Crown funds, the principles of Crown immunity applied. In other words, litigants might not achieve by an action for a declaration what they would otherwise require a petition of right to achieve. This principle is now expressly negated by section 11(2), (4), and (6) of the new *Crown Proceedings Act* and declarations are now widely available against the Crown.

CHAPTER V THE INJUNCTION

A. Introduction

It has been said of the injunction that:

2. At 407.

3. E.g., *Re Braaten* (19G7), 59 W.W.R. 531.

4. *International Claimbrokers* v. *Kinsey and A.G. (B.C.)* (19 6 6) , 5 5 W. W. R. 6 72.

5. At 409-410 and nn. 1826.

6. *Smith* v. *Macdonald,* [19511 O.R. 167.

7. *Johnson* v. *Hall* (1957), 23 W.W.R. 228.

8. [1903] 1 Ch. 109, 114.

> ... [It] is primarily a remedy in private law. It lies at the discretion of the court to enjoin a party from breaking his obligations e.g., by breaking a contract or committing a tort such as trespass or nuisance ... Because there is no separate system of public law in this country, and because the ordinary law of the land, both substantive and adjectival, applies to public bodies and administrative authorities, as it does to the private citizen, the injunction will lie to prevent the administration from breaking the law in much the same circumstances as it will lie to restrain an individual.

As Reid has said, the jurisprudence concerning injunctions has paralleled that concerning declarations, and the two are frequently sought in the same action.

B. The Scope of the Injunction in Administrative Law

Although the injunction originated as a private law remedy, it has been adapted to control administrative action in much the same way as the prerogative writs and the declaration. In other words, a person or body exercising statutory powers may be enjoined from acting in excess of jurisdiction (including a breach of the rules of natural justice). Similarly, a person or body may be enjoined from relying on a jurisdiction which has been conferred on him *ultra vires*.

C. Locus Standi

In *Boyce* v. *Paddington Borough Council* Buckley J. said of the injunction:

A plaintiff can sue without joining the AttorneyGeneral in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with ... and secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

The Ontario Court of Appeal in *Cowan* v. *C.B.C.*

10. (1974), 43 D.L.R. (3d) 1.

11. [1974] 5 W.W.R. 484.

12. *Att.Gen. ex ret. McWhirter* v. *I.B.A.*, [1973] 2 W.L.R. 344.

13. *Ibid.* at 356.

14. *Hollinger Bus Lines* v. *Ont. Labour Relations Board*, [1952] O.R. 366; *see also Westiake* v. *The Queen*, [1971] 3 O.R. 533.

specifically applied this statement of the law in relation to injunctions and to actions for declarations.

Since *Thorson* v. *AttorneyGeneral of Canada et al. (No. 2),* to which we have referred in Chapter III, it may be that the law as stated in the *Cowan* case is in a process of change. Although the more expansive rule as to standing enunciated in *Thorson* arose out of an application for a declaration, it has since been applied in an action for an injunction in *Stein* v. *City of Winnipeg* to which we have also already referred in Chapter III.

It is worth noting that in a recent decision of the English Court of Appeal, Denning M.R. stated that:

> ... in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, then a member of the public, who has a sufficient interest, can himself apply to the court itself ... I would not restrict the circumstances in which an individual may be held to have a sufficient interest.

The fact that a person or body against whom the injunction is sought does not have legal identity will prevent the action from proceeding.

D. ___Discretion in Granting Injunctions

The injunction, like the declaration, is remedy which a court has a discretion to grant or withhold, and we refer to the brief sketch of the position already given in Chapter III.

E. The Injunction and the Crown

The doctrine of Crown immunity and its application to the injunction has been set out at length in a Report already submitted.

16. *Ibid.* at 31.

17. S.B.C. 1974, c. 24, s. 11(2). It is sufficient to say here as a general proposition that where a plea of Crown immunity is successfully entered, an injunction will not be granted. We have recommended that the Crown ought to be capable of being enjoined, although this recommendation is not reflected in the new *Crown Proceedings Act*.

CHAPTER VI THE RELATIONSHIP OF THE PREROGATIVE WRITS TO THE DECLARATION AND THE INJUNCTION

In the preceding pages we have endeavoured, for the sake of comparison and contrast, to set out briefly and generally the existing state of the law, to the extent that it may be ascertained, concerning the prerogative writs and the remedies of declaration and injunction. It is appropriate here to repeat the purpose of this exercise for those who may believe that our treatment of the existing law has not been detailed enough. The exercise is not designed to be an exhaustive analysis of the authorities on judicial review of administrative action. It is, rather, an attempt merely to isolate the disparities between each of the remedies in order to determine whether the disparities have a utilitarian

foundation, and whether they may be conveniently and usefully disposed of for the purpose of removing technical difficulties in the way of judicial review.

In this chapter we attempt to set out the disparities in an encapsulated form, before proceeding to an evaluation of changes elsewhere and our own proposals for reform.

(1) The remedies of certiorari and prohibition may be available only where the action questioned is the result of the exercise of a judicial or quasi-judicial function. The remedies of mandamus, declaration and injunction, on the other hand, have been said to apply both to judicial and to ministerial functions. In some decisions the courts have held that declarations and injunctions, although available to check the exercise of judicial functions, should not lie where certiorari or prohibition are more appropriate. In *Credit Fancier* v. *Board of Review*

2. [1952] O.R. 366 (Ont. C.A.).

3. (1967), 61 W.W.R. 484 (Alta. S.C.). it was held that the decision complained of could be quashed by use of certiorari and that therefore an action for a declaration would not lie and should be struck out. This decision was cited with approval in *Hallinger Bus Lines Ltd*. v. *Ontario Labour Relations* Board, in which it was held that an action would not lie for a declaration that the Board, in adjudicating upon a matter before it, had acted without jurisdiction, or in excess of jurisdiction, or for an injunction to restrain it from proceeding further. Relief in these circumstances could, it was said, be obtained only by means of the prerogative writs. These cases should, however, be contrasted with the decision in Driver Salesmen etc. *Union* v. *Board of Industrial Relations*, in which it was held that: "A substantial amount of judicial support is found for the proposition that an action for a declaration is *prima facie,* an appropriate alternative remedy to certiorari to quash for want of jurisdiction."

(2) The prerogative writs of certiorari, mandamus and prohibition may not be issued against non-statutory tribunals, while actions for declaration and injunction may be brought against tribunals of this kind.

6. *Sollinger Bus Lines Ltd*. v. *Ont. Lab. Rel. Bd*. n. 2 *supra; Westlake* v. *The Queen*, [1971] 3 O.R. 533 (Ont. H.C.).

7. For a detailed exposition of what agencies of the Crown may claim the benefit of the immunity, *see* Law Reform Commission of British Columbia, *Legal Position of the Crown* (1972) .

8. *Crown Proceedings Act,* S.B.C. 1974, c. 24, s. 11(2), (4) and (6).

9. *Cf. Re Gooliah and Minister of Citizenship Etc*. (1967), 63 D.L.R. (2d) 224, and *Border Cities Press Club* v. *AttorneyGeneral for Ontario*, [1955] o.p. 14.

10. *Re Oil, Chemical and Atomic Workers and Polymer Corporation,* (1966) 1 O.R. 744.

(3) The prerogative writs will issue against entities which do not have the capacity to be sued, but an action for a declaration or an injunction may not be brought against such entities.

(4) The doctrine of Crown immunity protects the Crown and its servants from being enjoined in most circumstances. Although it is not clear under the *Crown Proceedings Act* whether mandamus will issue in future against the Crown, the rule against actions for declarations against the Crown is abolished by the legislation. The extent of the doctrine of Crown immunity in relation to certiorari and prohibition is uncertain.

(5) While the writ of certiorari will issue to quash a decision where there is an error of law on the face of the record, it appears that an action for a declaration may not succeed on this ground alone.

(6) The writs of certiorari, prohibition and mandamus must be sought according to special procedures, similar in kind to the originating motion, while in general declarations and injunctions are granted in actions commenced by way of writ of summons. It appears that no joinder of the two kinds of proceedings is possible. The remedies available by way of the prerogative writs can be obtained more speedily than declarations and final injunctions.

(7) In some circumstances a notice of motion to show cause why a writ of certiorari should not issue must be issued within six months of the rendering of the decision which the applicant seeks to quash. A writ of mandamus, and a writ of certiorari in other circumstances, must be sought without unreasonable delay.

(8) A writ of certiorari will have the effect of quashing the decision in respect of which it is issued. A declaratory judgment *has* no substantive effect.

CHAPTER VII PROPOSALS FOR CHANGE

A. Introduction

In embarking upon proposals for change in England in the law of administrative remedies, the English Law Commission listed the following factors as guidelines.

2. *Report on Appeals in Administration* 301 (1973 L.R.C. 16).

(i) The remedies' primary object is not to assert private rights, but to have illegal public actions and orders controlled by the courts ...

(ii) There should be available to an applicant challenging the validity of illegal administrative action whatever form of relief is most appropriate in the circumstances. All the existing varieties of relief should be obtainable in the same form of proceedings. As we have seen, the evil of the present system is not that there are many different forms of relief, but that it is impossible to apply for them, or some of them, by the same procedure.

(iii) Any challenge to the legality of administrative acts and orders clearly involves and affects a wide range of intereststhe interest of the person making the challenge, the interest of the administration and the interests of the persons relying on the challenged order. In view of this consideration it may be that various features of any procedure for judicial review of administrative action should differ from those governing ordinary civil litigation; in particular it may be better to have a remedy which enables the matter to be disposed of quickly rather than a more elaborate procedure with full interlocutory process.

We endorse these views (although we acknowledge the possibility that a speedy procedure may in some circumstances be less effective in the final result than a full action) and have directed our attention towards a uniform procedure by which the existing substantive law of judicial review may be invoked. In doing so we have been cognizant of the possible criticism that in recommending procedural reform the established substantive law may be distorted. We believe, however, that this danger is one which may be avoided by a carefully worded statute. The New South Wales Law Reform Commission, in considering this issue has said:

The law relating to judicial review has developed, not according to any general theory, but by empirical consideration of particular problems and types of problems. For this reason, the existence of defects in that law is not surprising. But now that the procedural law has been reformed the substantive law should develop more freely.

B. The Application for Review and Its Scope

The citizen who seeks certiorari, prohibition, mandamus, a declaration or an injunction is seeking "to *quash* the particular administrative decision or order, to enjoin the administrative authority from exceeding its jurisdiction or powers, to command the authority to act where it is under a duty to do so, or to *declare* the action or order invalid and of no effect.

Section 2(1) of *The Judicial Review Procedure Act, 1971*

5. 2 Statutes of New Zealand 1972, Part I. This Act appears as Appendix B to this Report.

6. The common law motion to quash the decision of private arbitration boards would still, of course, remain. *(See* Ch. I, n. 9), and declaratory and injunctive relief will remain available at common law for other private bodies and persons.

of Ontario provides that:

On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review;" the court may, notwithstanding any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.

2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

This provision is duplicated in all important respects in section 4(1) of the *Judicature Amendment Act 1972* of New Zealand.

C. Statutory Power

In considering this provision we had occasion to ask ourselves whether the single judicial review procedure should apply to persons or bodies who exercise functions similar in nature to those exercised by persons or bodies in pursuance of statutory authority. Should, for example, the governing body of a club, having expelled a member without observing the rules of natural justice, have its decision quashed? Under the existing law, such bodies may now be subject to an action for a declaration or an injunction, but the prerogative writs do not issue against them. On the one hand it may seem arbitrary not to bring such bodies into the ambit of the procedure when bodies exercising the same functions, but under statutory authority, would be included. Yet we are faced with a definitional problem of some magnitude if an attempt is made to define those nonstatutory bodies which ought to be included. The common law is by no means clear on what nonstatutory bodies may be enjoined or the subject of declarations; and we hesitate to embark on a hazardous definitional exercise. It might be agreed among many that an incorporated society which is, for example, dispensing public money (although not under the authority of statute) is so like a statutory tribunal that it ought to be subject to the new procedure. Would it, on the other hand, be regarded by many people as desirable that a small, informal social group be treated in exactly the same way as a statutory tribunal? We are not, after all, suggesting that nonstatutory bodies be immune from judicial process, but merely that the procedural reform which we recommend not extend beyond those persons and bodies comparatively easily identified by virtue of their status under statute.

In the *Ontario Act* "statutory power" is defined in section 1(g) as:

(g) ... a power or right conferred by or under a statute,

(i) to make any regulation, rule, bylaw 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.

The "statutory power of decision" mentioned in section 1(g)(ii) is defined in section 1(*f*) as:

(f) ... a power or right conferred by or under a statute to make a decision deciding or prescribing,

(i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not, and includes the powers of an inferior court.

The distinction between "statutory power" and "statutory power of decision" has significance in various other provisions of the *Ontario Act* and will be referred to again in this Chapter.

One implication, however, deserves consideration here. A critic

8. Law Reform Commission of British Columbia, *Procedure Before Statutory Agencies* (1974).

9. S.B.C. 1967, c. 45, as amended.

of the *Ontario Act* has pointed out that section 2(1) of the Act, in referring to declarations and injunctions in the context of a statutory power, may exclude the review under the Act of the legality of the so called "investigative" functions which agencies may perform under the authority of statute.

We have discussed the nature of investigative functions at length in a previous Report, but essentially they involve situations where an inquiry is made under the authority of statute 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. An example is an investigation under section 23 of the *Securities Act*, where the investigator reports to the Superintendent of Brokers, and it is the Superintendent or the AttorneyGeneral who takes the action which the report may require.

The common law allows the bringing of an action for a declaration or an injunction by the person investigated to determine whether the investigator has jurisdiction over him.

11. Mullan, *op. cit.* n. 7 *supra,* 1423.

12. In the same article, *ibid*., Professor Mullan mounts a substantial argument that the definition of "statutory power of decision" includes all functions set out in the definition of "statutory power". On the basis of the "plain meaning" rule of statutory construction, however, it seems to us that the definition of "statutory power of decision" relates, to use Professor Mullan's own words (at 151), "only to the functions of decision making bodies required to make a decision after a consideration of evidence and argument presented by affected parties."

13. At 59 *et seq*.

Yet it has been said that: " ... the definition of 'statutory power' appears to be contemplating only exercises of power which have final and determinative effect. It would not seem to include statutory functions of an investigative and recommendatory nature."

We agree that the Ontario definition of "statutory power" is deficient in this respect, and in the context of the general recommendation which we later make that there be legislation in this Province similar in kind to that in force in Ontario, we recommend that the definition of "statutory power" be expanded by a reference to "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."

D. Originating Notice

The Ontario and New Zealand Acts provide, and the English Working Paper suggests, that the single procedure for review be by way of originating notice, and that the rules of court applicable to proceedings by way of originating notice apply to the new procedure.

This suggestion raises immediately a number of issues, not the least of which is the matter of "direct review" and "collateral review." In the English Working Paper a distinction is drawn between a situation where a citizen claims that, for instance, he has been refused a licence through jurisdictional error in the licensing authority (direct review), and the situation where the citizen claims damages (or an injunction or declaration) for an actionable tort. An example of the latter situation would be where a citizen brings an action in trespass against an expropriating agency, claiming that the agency was acting outside its authority in making the expropriation. The question arises whether, in the course of the action for damages, the determination whether the agency was acting *ultra vires* ought to be determined by the procedure for judicial review. If it is not, then the same issue will be determined by different means, depending on the context in which it arises. Similarly, if the claim for damages is small enough and the action is brought in a County. Court, the same issue may be determined by different courts. In other words, if the citizen seeks merely to enjoin the expropriating authority he would, under the Ontario and New Zealand provisions and the English proposals, do so by application for review. Yet if he were to seek damages from the agency, he would do so in an action. Thus, precisely the same issue would be decided according to different procedures and, conceivably, in different courts.

Leaving aside for the moment the question of differing procedures and courts, there are doubtless a number of counsel who would be loath to see the action for a declaration or an injunction (regardless of whether damages may be claimed or not), with its attendant advantages of full interlocutory process, absorbed into an originating notice procedure. These matters have caused us some difficulty in our attempt to rationalize the procedure of judicial review.

In the English Working Paper the writers tentatively favoured consistency in the determination of similar issues. It was suggested that "any case involving the legality of the exercise of the powers of public authorities should be channelled into the appropriate court by a Queen's Bench or Chancery Master, or a County Court Judge ... The Master, [or] County Court Judge, ... would decide whether the procedure should be by affidavits or the ordinary civil procedure."

The *Ontario Act* does not touch on the matter of administrative legality being decided in the context of an action for damages only. It does, however, make provision for the situation where an action for a declaration or an injunction, with or without damages, is in issue. Section 8 provides that:

> Where an action for a declaration or injunction, or both, whether with or without a claim for other relief, is brought and the exercise, refusal to exercise or proposed or purported exercise of a statutory power is an issue in the action, a judge of the High Court way on the application of any party to the action, if he considers it appropriate, direct that the action be treated and disposed of summarily, in so far as it relates to the exercise, refusal to exercise or proposed or purported exercise of such power, as if it were an application for judicial review and may order that the hearing on such issue be transferred to the Divisional Court or may grant leave for it to be disposed of in accordance with subsection 2 of section 6.

The reference to the Divisional Court is not important in British Columbia circumstances, but section 8 has been explained in the following terms:

> The provision in section 2(1) that an application for judicial review may be brought to obtain relief that might be obtained in an action for a declaration or injunction in relation to the exercise of a statutory power does not prevent an action for such a declaration or injunction from being brought. Although an application for judicial review is summary and in general more expeditious and less costly than such an action, bringing an action might be thought to be of advantage to a person as a delaying tactic. The court is authorized in a proper case in effect to convert the action into an application for judicial review to be disposed of summarily.

Recognizing that there is probably no totally satisfactory solution to what is essentially a problem created by conflicting values, we have come to the conclusion that where administrative illegality is raised in an action for damages without more, traditional civil procedure should continue to apply. The magnitude of the problem of multiple jurisprudence faced in England is diminished here to a degree by the fact that the jurisdiction of a County Court and the Provincial Court is limited, and many actions for damages involving administrative illegality would, in any event, be heard in the Supreme Court (where we suggest that applications for review be heard).

Where an action for a declaration or an injunction is brought, with or without a claim for damages, we have concluded, after some debate and with some difficulty, that the Ontario solution is probably the most appropriate. Its disadvantages are obvious. It detracts from the notion that there ought to be a single procedure in which administrative illegality is raised, and at the same time places a burden on the judiciary of deciding when it would be proper to convert a procedure by way of action into a procedure on originating notice. Similarly, counsel would be uncertain when it would be proper to commence an action for a declaration or injunction. On the other hand, in many applications where judicial review is requested no pleadings are necessary as the facts are commonly not in dispute and the real issue is as to the law. Counsel may be encouraged to proceed by way of application for review on originating notice by (a) the shorter time within which a decision may be rendered, and (b) the fact that declaratory and injunctive relief will be available by that procedure. Therefore, although we remain troubled by the conceptual difficulty of the Ontario solution, we would hope that difficulty would turn out to be more theoretical than practical.

In the English Working Paper a twostage procedure is suggested

16. R.S.C. O. 18, r. 19.

17. At 95 *et seq*.

18. The judicial *Review Procedure Act, 1971,* n. 4 *supra,* s. 6(1).

19. *Ibid*. s. 6(2).

20. N. 5 *supra,* s. 15.

by which the applicant for judicial review would be required to apply for leave before commencing proceedings. The reasons given for this suggestion are that (a) the application for leave to apply for orders in the nature of certiorari, prohibition and mandamus already exists in England, and (b) relaxed *locus standi* requirements (suggested elsewhere in the English Working Paper) would increase the likelihood of frivolous or vexatious claims against the administration which it ought not to be required to spend time and money defending. We do not believe that a twostage procedure is necessary in British Columbia. Applications for leave do not now play a part in proceedings for judicial review, and we do not at this stage wish to involve ourselves in the matter of rationalizing the rules relating to *locus standi*. If it were to appear at a later stage that the courts and the administration were being overburdened with frivolous or vexatious applications for review, a twostage procedure could then be introduced without difficulty.

We need only add here that while at present we favour the originating notice procedure for judicial review, we do not wish to fetter the work of the committee now studying a revision of the *Supreme Court* rules, and we express a deference to any analogue of the originating notice procedure which they may devise if it is ultimately accepted.

E. **The Court**

In Ontario applications for judicial review are heard in the Divisional Court,

22. R.S.B.C. 1960, c. 374.

23. R.S.B.C. 1960, c. 82.

24. *E.g., Re Lipp's Certiorari Application* (1969), 69 W.W.R. 564. *R.* v. *Hillingdon London Borough Council, ex p. Royco Homes Ltd.*, [1974] 2 W.L.R. 805, [1974] 2 All E.R. 643.

25. *E.g., E.* v. *British Columbia Turkey Marketing. Board, ex p. Rosenberg* (1967), 61 D.L.R. (2d) 447.

26. *Stark* v. *College of Physicians & Surgeons (1966)* 56 D.L.R. (2d) 185. except in cases of urgency in which event an application may be made to a judge of the High Court. In New Zealand applications are heard by the Administrative Division of the Supreme Court, and in England it is proposed that they be heard in the Divisional Court of the Queen's Bench Division because of its experience and consistent decisionmaking in the field of administrative law. Each of these tribunals has been chosen with the knowledge or hope that it is, or will become, practised in the application of administrative law principles. It may be that in the future the question of the need for a specialized tribunal of the kind in British Columbia ought to be examined to the extent that it has been in other common law jurisdictions; but for the time being it is our view that if our proposals are accepted, applications for review ought to be heard in the Supreme Court of British Columbia.

It is appropriate to raise here the question whether jurisdiction should also be conferred on Local judges of the Supreme Court under section 18 of the *Supreme Court Act*. We recognize that although jurisdiction to conduct judicial review has not hitherto been conferred on Local Judges, it might be of convenience to some litigants if a change were to be made. There seems to us, however, to be a compelling argument of principle against it. Sections 125 to 131 of the County *Courts Act,* to which we refer in more detail later in this Chapter, are concerned with the reviewability on certiorari, prohibition and mandamus of the decisions of the County Courts. If judicial review jurisdiction were conferred on Local Judges of the Supreme Court then it would be possible for one judge of a County Court, sitting in his capacity as Local Judge, to be requested to review the decision of another. This seems to us to present an untenable position.

F. Statutory Appeals

The *Ontario Act*, by referring to "any right of appeal" in section 2(1) recognizes that it is common for the statutes which give life to statutory bodies to provide also for a particular form of appeal from the determinations of those bodies. The views of the courts on statutory appeals have usually been tinged with ambivalence. On the one hand the courts have said that judicial review is not an appeal, but lies rather where a tribunal has acted without jurisdiction. They have not, therefore, in a number of cases, felt themselves bound to oblige an applicant to exhaust his statutory rights of appeal before entertaining applications for review. On the other hand, the courts have not been anxious to ignore statutory rights of appeal, and have stated that judicial review is not to take the place of an appeal, and that, in the absence of special circumstances, where an appeal is available that remedy should be exhausted before an application for judicial review is appropriate.

It is our view that the wording of the *Ontario Act* does not give sufficient recognition to the desirability of obliging an applicant for review to exhaust his statutory appeal rights before proceeding against a tribunal or official by way of judicial review, unless special circumstances (such as urgency) exist. We suggest, therefore, that if our proposals are accepted, specific recognition be accorded to the principle that an application for review, where a statutory right of appeal exists, is, as the prerogative writs have been described, an "extraordinary remedy."

One critic of this particular proposal in our working paper set out a number of situations in which strict adherence to the principle of exhaustion of remedies might be inappropriate, and concluded by asking:

> If the statutory body has acted in excess or abuse of jurisdiction or contrary to the rules of natural justice why shouldn't certiorari or prohibition lie to set the matter straight and permit the statutory body, if it can, to proceed with a proper hearing in the first instance, which may then be taken to the appellate body?

We agree that there will be some circumstances in which exhaustion is not appropriate, and it is for this reason that we have framed our proposal in terms of a presumption rather than a rule. Yet we are attracted by the remarks of a commentator who, in criticizing section 2(1) of the *Ontario Act* said:

> Frequently in the past, the prerogative writs were described as 'extraordinary' remedies and this terminology emphasized the historically special and reserve nature of judicial review. Indeed, in terms of time, expertise, cost and convenience there are compelling arguments for the exhaustion of all avenues of appeal before seeking review. Invocation of the administrative appeal process will generally be less expensive, more expeditious and even perhaps lead to a better decision than judicial review, particularly where the statutory right of appeal is to a specialist administrative appeal authority rather than to a court.

G. General

We propose that there be a single procedure for applications for judicial review of the kind now available in Ontario and New Zealand, and suggested in England. If a provision similar to section 2(1) of the *Ontario Act* and section 4(1) of the *New Zealand Act* were approved here, it would have the following, in our view desirable, effects.

(1) It would obviate the necessity for an applicant to characterize any particular exercise or nonexercise of a statutory function as "judicial" or "quasijudicial" before commencing proceedings, without prejudicing his opportunity to obtain whatever relief is appropriate to his circumstances.

(2) Any of the grounds for relief which are available under any of the existing five remedies would be available to support a single application for review.

(3) The court would be empowered to quash, command, enjoin or declare as the result of a single application, thus avoiding the situation where the relief available depends on the form of proceeding brought.

H. Privative Clauses

Section 12(1) of the *Ontario Act* provides that:

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

This provision has as its chief aim the preservation of the effect of privative clauses.

29. S.B.C. 1968, c. 59.

30. S.B.C. 1973, c. 122.

31. S.B.C. 1973, c. 122. An example of such a clause in British Columbia is found in the *Workers' Compensation Act,* section 79 of which provides that the Workers' Compensation Board.

> ... has exclusive jurisdiction to inquire into, hear, and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Board thereon is final and conclusive and is not open to question or review in any Court, and no proceedings by or before the Board shall be restrained by injunction, prohibition, or other process or proceeding in any Court or be removable by certiorari or otherwise into any Court ...

A further, more contemporary, example is found in the *Labour Code of British Columbia Act,* section 33 of which provides that:

> The [Labour Relations] board in respect of [some] matters ..., has and shall exercise exclusive jurisdiction to determine the extent of its jurisdiction ... [in those matters], or to determine any fact or question of law that is necessary to establish its jurisdiction.

and section 34(2) of which provides that:

> A decision, order, or ruling of the board made under this Act in respect of a matter in which jurisdiction is conferred by this Act, or is determined under section 33 to be conferred by this Act, is final and conclusive, and is not open to question or review in any court, and no proceedings by or before the board shall be restrained by injunction, prohibition, or any other process or proceeding in any court, or be removable by certiorari or otherwise into any court.

The question of the necessity for privative clauses is an exceedingly complex one, completely transcending the scope of this Report. While it may be that a comprehensive review of such clauses in British Columbia legislation is in order at some future time, we are clear in our minds that for the purposes of the procedural reform proposed here, the effect of existing privative clauses should be preserved to their fullest extent.

The Ontario section also has the effect of converting references to the prerogative writs in other contexts to references to an application for judicial review. For example, section 96 of the *Summary Convictions Act* restricts the application of certiorari where an order of the Provincial Court or a Justice of the Peace is invalid by virtue of minor irregularity, informality or insufficiency. A provision similar to section 12(1) of the *Ontario Act* would not change the substantive effect of the *Summary Convictions Act* provision, but would merely convert the reference to "certiorari" to "application for judicial review."

A provision similar to the Ontario section would without more, however, cause some minor difficulty with sections 125 to 131 of the *County Courts Act*

33. *Ibid*. ss 125129.

34. *Ibid*. s. 130.

35. R.S.B.C. 1960, c. 49.

36. *See Re C.F.R.B. Ltd. and AttorneyGeneral of Canada et. al. (No*. 1), [1973] 1 O.R. 57.

where distinctions are drawn between the applicability of certiorari and prohibition on the one hand, and mandamus on the other. In essence, certiorari and prohibition will lie against County Courts, but mandamus will not. We do not wish to evaluate here the question whether it remains appropriate for County Court decisions to be capable of being impugned by way of judicial review as well as by way of appeal, but content ourselves with noting that if our proposals are accepted, some amendment to the *County Courts Act* will be necessary. Although it runs counter to the unifying spirit of our proposals, it may be that the most convenient way of approaching the amendment of the Act is to speak in terms of an application for judicial review in the nature of certiorari, prohibition or mandamus.

We are more specific later on the matter of references to the prerogative writs in the *Supreme Court Rules, 1961* and on the matter of the *Certiorari Procedure Act*. We should point out, however, that there are references to certiorari, prohibition and mandamus in Part 23 of the *Criminal Code* which, of course, it is not within the competence of the Provincial Government to change. Section 438 of the *Criminal Code* provides in part that:

(1) Every superior court of criminal jurisdiction and every court of appeal, respectively, may, at any time with the concurrence of a majority of the judges thereof present at a meeting held for the purpose, make rules of court ...

(2)(c) ... to regulate in criminal matters the pleading, practice and procedure in the court including proceedings with respect to *mandamus, certiorari* ... prohibition ...

The *Criminal Rules, 1961* made under the authority of what is now section 438 of the *Code* provide that:

The practice and procedure in relation to the following matters, viz.: certiorari ... mandamus, prohibition ... shall be the same as that provided for in civil proceedings, so far as applicable, and where not applicable shall be analogous thereto.

It seems to us that if our proposals for a single procedure were implemented, the procedure for bringing certiorari, prohibition and mandamus in criminal matters would change accordingly, but needless to say the substantive law surrounding the prerogative writs would not and could not be altered thereby.

I. Crown Immunity

In our summary of the existing law, appearing in the earlier chapters of this Report, we referred to the fact that despite the new *Crown Proceedings Act,* there is still some uncertainty in the extent of the Crown's immunity to judicial review. We have, however, already made a report on the legal position of the Crown, and do not wish to pursue the matter in this Report. Yet it is worthwhile pointing out, as has Professor Mullan in his critique of the *Ontario Act*, that the uncertainty of the Crown's position *vis a vis* certiorari, prohibition and mandamus will carry over to applications for judicial review where analogous relief is sought. Another of Professor Mullan's concerns in this area also deserves mention here. While, under the *Crown Proceedings Act,* declaratory relief is available against the Crown, injunctive relief is not. If our proposals are enacted, and the Act binds the Crown (as it would by virtue of section 13 of the *Interpretation Act,*) a question would arise as to whether the new Act impliedly repealed the prohibition on the award of injunctive relief against the Crown. We suggest, therefore, if our present proposals are accepted and assuming that our earlier recommendation concerning injunctive relief and the Crown will not be accepted, that the new Act be made subject expressly to the provisions of the *Crown Proceedings Act*.

J. Appeals

In Ontario appeals from a determination of the Divisional Court on an application for judicial review lie to the Court of Appeal.

If our proposals are accepted there would seem to be no reason why an appeal should not lie to the Court of Appeal from a decision in the Supreme Court in accordance with the *Court of Appeal Act*.

46. *The Judicature Amendment Act 1972*, s. 4(5) and (6), 2 Statutes of New Zealand 1972; English *Working Paper,* at 73.

K. Grounds for Judicial Review

We have already stated that the purpose of this Report is to propose procedural reform and not to attempt a rationalization of the grounds upon which an application for judicial review may be founded. This notwithstanding, one section of the Ontario Act deserves attention. Section 2(2) provides that:

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

The purpose of this section is to overcome the rule that on an application for declaratory relief in the context of administrative illegality, the court may consider jurisdictional error, but may not consider error of the law on the face of the record. We can see no valid reason for the impediment, and suggest that if our proposals are accepted, there be a similar provision in the British Columbia legislation. It will be noted that the change refers to the exercise of a statutory power of decision, and not to the exercise of a statutory power. It is only in the case of an exercise of a statutory power of decision that there is likely to be a record on the face of which error will be discernible.

This section does not appear in the *New Zealand Act*, but it is possible to take the view that the effect of the provision is implied in section 4(1) of that Act. It might also be implied in section 2(1) of the *Ontario Act*, but we think it safer to be explicit.

I. Nature of Relief Claimed

We have already suggested that on an application for review the court ought not, on technical grounds, to be impeded in awarding relief in the nature of a setting aside, a command, an injunction or a declaration. The court should be able, if it is appropriate in the circumstances, and if the relief is in fact claimed by the applicant, to award all or any of the above.

Section 2(4) of the *Ontario Act* provides that:

> Where the applicant on an application for judicial review is entitled to a judgment declaring that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may, in the place of such declaration, set aside the decision.

In our summary of the existing law we pointed out that only on an application for certiorari could an impugned decision be set aside. In the case of an action for a declaration the successful plaintiff may not have a decision set aside. We agree that this distinction should not be maintained in the face of a single procedure for judicial review.

In the New Zealand legislation and in the English Working Paper a further refinement is suggested. This is that a court should not be restricted, when faced with an erroneous decision, to the courses of either setting aside a decision or declaring rights. The courts should also, it is suggested, have a discretion to remit the matter to the appropriate tribunal or official. It is pointed out that this might be regarded as the appropriate course where the ground of review is breach of the rules of natural justice. We agree that in addition to the power to set aside, command, enjoin or declare, the court should also have, in its discretion, a power to remit.

M. Parties to an Application

In our summary of the existing law we referred to a number of cases where judicial review had been prevented by the fact that the person or body exercising a statutory power did not have a legal identity. Section 9 of the *Ontario Act* makes provision for this situation in the following terms:

> (2) For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power may be a party to the application.
>
> (3) For the purposes of subsection 2, any two or more persons who, acting together, may exercise a statutory power, whether styled a board or commission or by any other collective title, shall be deemed to be a person under such collective title.

We suggest a similar provision if our proposals are accepted.

In the English Working Paper

48. 48 Stat. 926 (1934), 47 U.S.C., s. 402(b).

a suggestion is made concerning a statutory formula for *locus standi* to bring an application for review, although no such formula is attempted in the Ontario or New Zealand legislation. The writers of the English Working Paper favour tentatively a general formula such as that set out in the *Federal Communications Act* in the United States. This provides that:

> An appeal may be taken ...
>
> (1) By an applicant ... whose application is refused ...
>
> (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

In aid of this general formula the writers of the English Working Paper suggest that a number of guidelines be set out, such as:

(1) the nature of the powers or duties in respect of which illegality is alleged;

(2) the relative seriousness of the illegality; and,
(3) having regard to those matters, whether it is reasonable for the applicant to seek review.

While we agree that the law relating to *locus standi* and judicial review is uncertain, we have reservations about replacing one set of uncertainties with another. It seems to us that a general formula of the kind suggested has a superficial attraction, but in the ultimate event we are not sure that a litigant faced with the interpretation of such a formula will be any more competent to judge his position than he now is, bearing in mind that the formula and the guidelines are sufficiently wide to support any number of interpretations.

Professor Mullan has pointed out that the Ontario formulation of a single procedure in section 2(1) does not take explicit account of differing tests as to *locus standi* depending on the kind of remedy sought by judicial review. We agree that this observation points up a degree of inconsistency when the expressed intention of the *Ontario Act* and our proposals is to unify judicial review procedure, but we are not embarrassed by this. We have said that the question of *locus standi* is a substantive and complex one, and we do not believe that it can or need be resolved in the terms of reference we have set ourselves for this Report. Bearing in mind the fact that the courts are beginning to take an active view of the issue, we are content for the time being to adopt a passive approach, and allow the courts to decide for themselves whether they will continue to tailor the law of *locus standi* to the kind of relief sought.

N. Discretion of Court

We have noted in our summary of the existing law that the courts have preserved a discretion in the granting or withholding of relief.

In both the Ontario and New Zealand legislation the following provision appears:

> Where, in any of the proceedings enumerated in subsection 1, the court had before the coming into force of this Act a discretion to refuse to grant relief on any grounds, the court has a like discretion on like grounds to refuse to grant any relief on an application for judicial review.

The writers of the English Working Paper adopt the same approach, but would refine the exercise by including a nonexhaustive list of grounds upon which the discretion might be exercised. The following are cited:

(i) that the grant of the remedy would be futile;

(ii) that an equally efficacious administrative appeal or other statutory remedy has not been used; or

(iii) that the applicant's conduct has been so unmeritorious that he does not deserve to obtain relief.

These grounds are already part of the common law, and on the whole we do not see a substantial benefit arising out of a nonexhaustive list of grounds upon which the court may exercise discretion to grant or withhold relief. If it were possible to devise an exhaustive list in the nature of a code, the exercise might gain added value, although there would still be uncertainties arising out of the interpretation of the code. But it appears to us to be fruitless to attempt to codify all situations in which the courts ought to exercise their discretion in this area, and we prefer to propose that in British Columbia the Ontario and New Zealand position be adopted.

0. Limitations of Time

Section 5 of the *Ontario Act* provides that:

> Notwithstanding any limitation of time for the bringing of an application for judicial review fixed by or under any Act, the court may extend the time for making the application, either before or after expiration of the time so limited, on such terms as it considers proper, where it is satisfied that there are prima facie grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay.

We have seen that both the *Certiorari Procedure Act* and the *Supreme Court Rules, 1961* set a limit of six months for the issue of a writ of certiorari relating to proceedings before "any Justices of the Peace, Magistrate or inferior Court." We have also seen that the Supreme Court is willing, in many instances, to extend this time period in circumstances very much like those set out in the *Ontario Act*.

It has been said that a time limit beyond which certiorari may not issue is necessary because there must be finality in court proceedings. Leaving aside the fact that the courts themselves have made considerable inroads on this doctrine, we believe that where judicial review is in issue, rather than a right of appeal, the argument as to finality loses some of its force. It has been said many times that judicial review is not an appeal, and what was done without jurisdiction or *ultra vires* does not gain validity with the passing of time. Provided that safeguards as to prejudice and hardship are preserved, as they are in the Ontario legislation, we are of the opinion that no great harm, and conceivably much good, will arise from giving the courts a discretion to extend statutory time limits in applications for judicial review.

P. Interim Relief

Both in the Ontario legislation and the English Working Paper, provision is made for the granting of interim relief.

Section 4 of the *Ontario Act* provides that:

On an application for judicial review, the court may make such interim order as it considers proper pending the final determination of the application.

We 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 required frequently. Situations might, however, arise where it would be appropriate, and provided that it remains a matter of discretion and not of right, we propose that it be available.

The term "interim relief" obviously includes an interim injunction, and in keeping with our earlier comments concerning injunctions and the Crown, we suggest that the award of interim relief be made subject to the provisions of the *Crown Proceedings Act*.

58. Mundell, Manual *of Practice on Administrative Law and Procedure in Ontario* 51 (1972).

Q. Miscellaneous

1. Power to Validate

Section 3 of the *Ontario Act* provides that:

> On an application for judicial review in relation to a statutory power of decision, 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 the decision has already 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.

In a commentary on the *Ontario Act*, it is pointed out that this provision is designed to correct a situation which might arise where a court decides as a matter of discretion that relief ought to be refused although a decision is nonetheless void. The court is empowered to rectify minor procedural error. A similar power is contained in section 3 of the *Certiorari Procedure Act* and we propose its extension to all situations involving judicial review.

2. Stating of Grounds

With a single procedure for judicial review leading to the granting of a number of types of relief it is important that the applicant state at the outset of the procedure the grounds upon which review is sought and the type or types of relief which he claims.

Both the Ontario and New Zealand Acts provide that:

> It is sufficient in an application for judicial review if an applicant sets out in the notice the grounds upon which he is seeking relief and the nature of the relief that he seeks without specifying the proceedings enumerated in subsection 1 of section 2 [of the Ontario Act] in which the claim would have been made before the coming into force of this Act.

3. Repeals

If the proposals in this Report are accepted, it will be necessary for appropriate portions of Order 60 of the *Supreme Court Rules, 1961* (relating to Crown Practice (Civil)) to be repealed and replaced with provisions which would reflect the new procedure. This, however, is no doubt a matter which should await the conclusion of the current revision of the *Supreme Court Rules*.

Our proposals would also call for the repeal of the *Certiorari Procedure Act*. We have suggested that the application for judicial review should not be subject to a specific limitation period, and that the mower to validate technical defects in the proceedings of tribunals subject to review be extended. These suggestions, if accepted, would make the *Certiorari Proce*dure Act unnecessary.

One further matter ought to be considered, although it is not directly related to the purpose of this Report. In 1897, following the revision of the Statutes of British Columbia completed in that year, the Legislature enacted the *Crown Franchises Regulation Act,*

64. *Crown Franchises Regulation Act,* R.S.B.C. 1960, c. 88.

65. *Ibid.* s. 3. the Preamble to which states that it is:

> An Act to Provide for the more easy Trying and Determining the Rights to Charters, Franchises, and Offices held from the Crown.

The most significant portion of the Act (which in its entirety remains unaltered and in force) provides that:

> The AttorneyGeneral [or a relator] may bring, maintain, and recover judgment in an action against
>
> (a) any person who usurps, intrudes into, or unlawfully holds or exercises a public office, or a franchise from the Crown, or an office in a corporation incorporated under the laws of this Province;
>
> (b) any public officer who dies or suffers any act which by virtue of any law or Statute works a forfeiture of his office;
>
> (c) any persons who do and exercise acts as and powers of a corporation without being legally incorporated.

It seems clear enough that the Act was intended to be a codification of the common law and early statutes surrounding writs in the nature of *quo warranto*, and we believe the modern occasions for *quo warranto proceedings* to be so infrequent that it is not appropriate to subvert the Act to the procedure which we recommend for proceedings involving certiorari, prohibition and mandamus. The existence of the Act does, however, call into question the appropriateness of the portion of the Supreme *Court Rules, 1961* relating to *quo warranto*. Rules 5159, 134 and 135 of Order 59 accord more closely with the common law conception of *quo warranto* than the conception embodied in the *Crown Franchises Regulation Act,* which speaks of the bringing of an action to which, presumably, the ordinary rules relating to actions would apply.

We propose, therefore, that Rules 5159, 134 and 135 of order 59 of the *Supreme Court Rules, 1961* (all relating to informations in the nature of a *quo warranto*) be repealed, leaving the ordinary rules concerning actions governing proceedings under the *Crown Franchises Regulation Act*.

CHAPTER VII CONCLUSION

A. Summary of Proposals

1. *There should be a single procedure for the determination of administrative illegality, under which relief now granted by means of the writs of certiorari, prohibition and mandamus, and injunctive and declaratory orders would be available.*

2. *The procedure should apply to all those tribunals and persons exercising statutory powers whose actions or omissions may now be called into question by means of the writs of certiorari, prohibition or mandamus, or by means of actions for declarations or injunctions.*

3. *The procedure should be by way of originating notice or alternatively, any analogous procedure which may arise out of the current revision of the Supreme Court Rules, 1961.*

4. *Where administrative illegality is raised in an action for damages, the ordinary rules of civil litigation should apply.*

5. *Where administrative illegality is raised in an action for a declaration or an injunction, whether or not damages are claimed, a court should have a discretion to order that the issue of administrative illegality be determined by the procedure which we propose.*

6. *Applications for review of administrative action should continue to be heard in the Supreme Court of British Columbia.*

7. *Where a statute provides a right of appeal from the exercise of a statutory power it shoud be made explicit that judicial review is appropriate only in special circumstances.*

8. *The procedure which we recommend should not alter the present law relating to the effect of privative clauses.*

9. *The procedure which we recommend should not alter the present law relating to Crown immunity, and any enactment which may arise but of our proposals should be made subject to the* Crown Proceedings Act.

10. *There should be a right of appeal to the Court of Appeal from a decision of the Supreme Court on issues of administrative law determined by the procedure which we propose.*

11. *It should be explicit that where an applicant seeks judicial review under the procedure which we propose, the court may consider in all cases an error of law on the face of the record as a ground for the granting of relief.*

12. *On an application for judicial review a court may, in addition to, or instead of, granting other relief, remit a decision to the original deciding body for reconsideration.*

13. *It should be explicit, subject to the doctrine of Crown immunity, that any person or persons exercising statutory powers may be a party to an application for judicial review.*

14. *The granting of relief upon an application for judicial review should remain a matter for the discretion of the court.*

15. *Applications for judicial review should not be barred by the effluxion of time unless (a) there are special statutory provisions to the contrary or (b) substantial prejudice or hardship will result to any person affected by reason of the delay.*

16. *Courts should, upon applications for judicial review, be empowered to grant appropriate interim relief, subject to the* Crown Proceedings Act.

17. *Courts should have the power to validate administrative acts which are by law invalid as a result of technical defects.*

B. Acknowledgments

The Commission would like to thank those people who took the time and trouble to reply to the invitation to comment on and criticize the Commission's working paper. Our thanks go to the Commission's Director of Research, Mr. Keith B. Farquhar, who was responsible for much of the research upon which the working paper and this Report is based, and for the drafting of both documents.

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