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The Declaratory Judgment: Its Place as an Administrative Law Remedy in Nova Scotia

David Mullan

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1. Introduction

In recent years there has been considerable writing throughout the Commonwealth on the potential of the declaratory judgment as a remedy for reviewing unlawful administrative action.² It is not my purpose in this note to add to the already ample general discourse on this topic. Rather, I will be concentrating on some particular aspects of the remedy, aspects which have been brought into prominence by recent legislative changes and judicial decisions.

The new Nova Scotia Rules of Civil Procedure³ raise several interesting questions concerning the availability of the declaratory judgment as an administrative law remedy in this province, particularly in the area of the inter-relationship between declaratory relief and other forms of remedy. These matters were discussed in part by the Nova Scotia Supreme Court (Appeal Division) in *Lord*

*David Mullan, Associate Professor of Law, Dalhousie University.

1. Portions of this note are based on an address which I delivered on December 8, 1973 at the Dalhousie Continuing Legal Education Conference on Administrative Law Remedies. The text of that address has been published by the Dalhousie Law School Public Services Committee. See *Administrative Law Remedies* (ed. H. N. Janisch) (Halifax: Faculty of Law, Dalhousie University, 1974) at p. 44 — "What Use Can and Should be Made of Declaratory Remedy in Modern Administrative Law?" I would also like to express my thanks to my colleague Professor Hudson Janisch for his helpful comments on drafts of this note.

2. Aside from coverage of the subject in all the standard textbooks, the following represent the most important recent writing on declaratory relief: I. Zamir, *The Declaratory Judgment* (London: Stevens, 1962); D. T. Warren, "The Declaratory Judgment: Reviewing Administrative Action" (1966) 44 Canadian Bar Review 610; S. M. Thio, "*Locus Standi* and the Declaration" (1967) 30 Mod. L. R. 205; J. F. Garner, "*Locus Standi* in Actions for a Declaration" (1968) 31 Mod. L.R. 512; Garth Nettheim, "The Place of the Declaratory Judgment in Certiorari Territory" (1969) 6 Sydney L.R. 184; B. C. Gould, "*Anisminic* and Jurisdictional Review" [1970] Public Law 358 at pp. 368-371; G. I. Borrie, "The Advantages of the Declaratory Judgment in Administrative Law" (1955) 18 Mod. L.R. 138; I. Zamir, "The Declaratory Judgment v. The Prerogative Orders" [1958] Public Law 341.

3. The new Rules of Civil Procedure were made under section 42 of the Judicature Act, S.N.S. 1972, c.2 and came into force on 1st of March, 1972.

Nelson Hotel Ltd. v. City of Halifax.⁴ Particular attention will be paid to that decision not only in so far as it concerns the new Rules but also because of other more general aspects of the availability of the remedy which were dealt with by the court. Prominent among these was the problem of the standing requirements for the grant of the remedy and this is a matter also considered very recently by the Supreme Court of Canada in *Thorson v. Attorney-General (Canada)*.⁵ The potential impact of that decision on the declaration as an administrative law remedy will be discussed. Finally I will comment on the effect of the Federal Court Act⁶ on the availability of the declaration as a mode of questioning the decisions of federal statutory authorities.

2. *Declarations Under the Nova Scotia Rules of Civil Procedure*

The new Civil Procedure Rules in Nova Scotia have not altered the basic provision for the grant of declaratory relief.⁷ The new Rule 5.14 continues to be a direct copy of the equivalent English Rule of the Supreme Court⁸ and provides: "No proceeding shall be open to objection on the ground that only a declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any consequential relief is or could be claimed." While Rule 5.14 does not suggest radical changes in the law governing the availability of declaratory relief, there are other rules in the new code which lead in that direction. Furthermore, some of the rules relating to orders in the nature of the prerogative writs may have the effect of diminishing the advantages of the declaration over the prerogative writs as an administrative law remedy.

Prior to the new Rules, a declaration could not be sought in combination with one of the prerogative writs.⁹ Conversely, the

4. (1972) 4 N.S.R. (2d) 753; (1972) 33 D.L.R. (3d) 98 (N.S.S.C. — A.D.)

5. (1974) 43 D.L.R. (3d) 1 (S.C.C.)

6. S.C., 1970-71-72, c.1.

7. See Order XXV, r. 5 of the Rules of the Supreme Court made under the Judicature Act, R.S.N.S. 1950, c.32.

8. Ord. 15, r. 16.

9. See Zamir, *supra*, note 2 at p. 96, and *Klymchuk v. Cowan* (1964) 45 D.L.R. (2d) 587 (Man. Q.B.) — *Certiorari* could not be claimed along with a declaration and damages. See, however, Robert F. Reid, *Administrative Law and Practice* (Toronto: Butterworths, 1971) at p. 400 where he refers to a case in which declaratory relief and *mandamus* were combined in the one proceeding:— *Canadian*

prerogative writs could not be sought in combination with declaratory or injunctive relief nor in combination with a claim for damages.¹⁰ In some situations this made the declaration a more attractive remedy and ranked alongside its other advantages as the appropriate remedy for challenging the validity of legislation both primary and subordinate,¹¹ for reviewing the actions of domestic non-statutory bodies¹² and for calling into question exercises of power by the Crown.¹³ All these involved matters beyond the reach of the prerogative writs. Beyond this, as a further matter of procedure, it was difficult theoretically to obtain leave to adduce oral evidence on an application for one of the prerogative writs¹⁴ nor were the pre-trial aids of discovery and interrogatories available.¹⁵ In contrast, in an action for a declaration, oral evidence was always admissible and discovery and interrogatories were available.¹⁶ Here too was another procedural advantage in seeking declaratory relief, particularly where there was a disputed fact situation, not easily resolvable by affidavit evidence.

Under the new Rules, however, the situation has been changed significantly. First, Rule 5.01 allows for the joinder of "several causes of action in the same proceeding". A possible interpretation of this is that not only can a declaration now be sought in combination with an application for orders in the nature of the prerogative writs but also that damages can be claimed in combination with an application for such an order, thus offsetting

Oil Companies v. London [1956] O.R. 878 (Ont. H.C.). However, this possibility was not feasible in Nova Scotia where prior to the new Rules a writ of *mandamus* could only be sought from the Appeal Division of the Supreme Court, except in vacation. See *Re Fairbanks* (1969) 1 N.S.R. (1965-69) 616; 5 D.L.R. (3d) 657 (N.S.S.C.).

10. *Ibid.*

11. See e.g. *Nelson v. City of Dartmouth* (1964) 45 D.L.R. (2d) 183 (N.S.S.C.).

12. See e.g. *O'Laughlin v. The Halifax Longshoremen's Association* (1970) 15 D.L.R. (3d) 316 (N.S.S.C. — T.D.); reversed (1972) 3 N.S.R. (2d) 766; (1972) 28 D.L.R. (3d) 315 (N.S.S.C. — A.D.).

13. Section 15 (2) of the Proceedings Against the Crown Act, R.S.N.S. 1967, c.239.

14. See Zamir, *supra*, note 2 at p. 315, f.n. 74. See also Reid at pp. 325-328 and S. A. de Smith, *Judicial Review of Administrative Action* (London: Stevens, 3rd ed., 1973) at p. 379. For a recent example however where oral evidence was admitted without apparent question in a *certiorari* application see *Re McLeod and Maksymowich* (1973) 38 D.L.R. (3d) 251 (N.T.T.C.).

15. See *Barnard v. National Dock Labour Board* [1953] 2 Q.B. 18 at p. 43 (C.A.).

16. See Zamir, *supra*, note 2 at p. 315.

one of the significant advantages of the declaration under the former regime.

The first of these possibilities was dealt with in the *Lord Nelson Hotel*¹⁷ case, where an application for declaratory and injunctive relief was combined with an application for an order in the nature of the prerogative writ of prohibition. After setting out Rule 5.01, Jones J., in delivering the judgment of the court stated: "In view of these Rules there appears to be no impediment in this Province to combining an application for prohibition with an action for declaratory relief and an injunction. It does not follow, of course, that all three remedies will be granted. The appropriate form of relief is a matter for the trial Judge to determine."¹⁸

The thrust of this statement, as far as counsel drafting pleadings are concerned, is that there is generally no longer any cause to be concerned about the incompatibility between declaratory relief and orders in the nature of the prerogative writs. Indeed, the best move under the new Rules is probably to claim all feasible review

17. *Supra*, note 4. In the Nova Scotia Reports, the judgments of the Trial Division and the Court of Appeal are included together. The Trial Division decision is also reported at (1972) 31 D.L.R. (3d) 755.

18. *Ibid.*, at p. 774 (111). It is, as a postscript, interesting to note that a declaration was not granted ultimately when the *Lord Nelson* case returned to the Supreme Court. An order in the nature of prohibition was the only remedy found necessary in the end. See *Lord Nelson Hotel Ltd. v. City of Halifax (No. 2)* (1973) 39 D.L.R. (3d) 539 (N.S.S.C. — Gillis J.) This perhaps exemplifies the point that while declaratory relief has achieved parity with the other forms of relief under the new Rules, it will seldom be necessary for the court to make a declaration. As before, the more blunt instruments of quashing and prohibiting will be all that are necessary in the vast majority of cases. As a practical matter it also deserves to be noted that there are considerable doubts about the availability of a declaration for non-jurisdictional error of law (see footnote 76, *infra*). Moreover, even if the remedy is available for such errors, there are questions about its effectiveness. A declaration merely declares; it does not set aside. Non-jurisdictional error of law traditionally has been seen as rendering a decision voidable rather than void. Does this mean that a declaration in such cases can be ignored by the decision-maker and that the original decision, though voidable, remains effective? There may also be a problem, even if the decision-maker wishes to give effect to the declaration, in that the empowering statute may not confer authority on the decision-maker to alter or review the original decision. This is not seen as a difficulty where the original decision is void because of jurisdictional error. This has been taken to mean that there is simply no decision. Quashing is not strictly required and a declaration is sufficient. The original decision is regarded as a nullity which cannot form a basis for further action and may be ignored with impunity. (Discussed by de Smith, *supra*, note 14 at pp. 462-464). Suffice to say, for present purposes, that these questions have not been satisfactorily resolved in either Canada or the United Kingdom.

remedies and leave the determination of the appropriate relief until the hearing. Of course, the Rule will not excuse counsel having to establish to the satisfaction of the court their entitlement at common law to one or more of the specified remedies claimed in the pleadings. However, even this is not avoided under the much-vaunted Ontario Judicial Review Procedure Act.¹⁹ Section 2 of that statute still requires that the applicant for the new comprehensive judicial review remedy demonstrate his entitlement to relief by reference to the grounds for review under the historic remedial structure.²⁰ Indeed, it could be suggested cynically that the only advantage of the Ontario legislation over the Nova Scotia Rules in this matter is that the Ontario legislation dispenses with the need to use the names of the old remedies in drafting the pleadings.

Does it also follow from the judgment in the *Lord Nelson* case that a claim for damages may now be brought in combination with an application for an order in the nature of one of the prerogative writs? This of course would mean a significant diminution in the value of the declaration over those remedies.^{20a} However, despite the seemingly comprehensive language of Rule 5.01 and the judgment of Jones J. in the *Lord Nelson* case, this may not necessarily be so.

It is important to realize that under the new Rules declaratory relief can be sought in two separate forms — by way of an action²¹ or by way of an originating notice (application *inter partes*).²² In contrast, proceedings for orders in the nature of the prerogative writs can only be commenced by way of an originating notice.²³ Prior to the new Rules, damages could only be sought in combination with a declaratory action and the new Rules clearly contemplate that damages will continue generally to be claimed by way of action rather than by way of the simpler originating notice

19. S.O. 1971, c.48.

20. Section 2 refers specifically to all the old forms of remedy and states that the Divisional Court may award “any relief that the applicant would be entitled to” in those proceedings.

20a. It is worth noting that in Ontario, where damages or other forms of monetary relief are being claimed for unlawful administrative action such a claim cannot be combined with an application for judicial review to the Divisional Court under the Judicial Review Procedure Act. Such proceedings still have to be commenced on their own or in combination with an action for a declaration in the Ontario High Court.

21. Rule 5.14.

22. Rule 9.02.

23. Rule 56.02.

procedure.²⁴ This raises immediately two inter-related questions: (1) Can a claim for damages ever be combined with a claim for declaratory relief through the originating notice procedure, rather than by action? (2) Because claims for orders in the nature of the prerogative writs have to be commenced by originating notice rather than by way of action, does this preclude the possibility of claiming damages in combination with them?

While the judgment in the *Lord Nelson* case would seem to suggest superficially that Rule 5.01 allows for the combination of all forms of proceedings whether they be commenced by way of action or originating notice, it is reasonably clear that the judge probably did not intend to go that far. The declaration, as with the other remedies in that case, was sought by way of originating notice. As actions are heard in open court²⁵ and originating notice applications in chambers²⁶ it is fairly safe to predict that the same conclusion would not have been reached had this been a case of an attempt to combine an action for a declaration with an originating application for an order in the nature of prohibition. Notwithstanding the width of Jones J's statement there would seem to be an irreconcilable incompatibility in such a situation.

Thus, in so far as an action remains the usual method of claiming damages under the new Rules, there is probably little possibility of combining an action for damages with an application for an order in the nature of one of the prerogative courts. However, attention must also be paid to Rule 9.02. This provides as follows:

- A proceeding, other than a proceeding under Rule 57 and Rules 59 to 61,
- (a) in which the sole or principal question at issue is, or is likely to be a question of law, or one of construction of an enactment, will, contract or other document;
 - (b) in which there is unlikely to be substantial dispute of fact;
 - (c) which may be commenced by originating application, originating motion, originating summons, petition or otherwise under an enactment;
- shall be commenced by filing an originating notice (application inter partes) in Form 9.02A in a proceeding between parties, and by an originating notice (ex parte application) in Form 9.02B in an ex parte proceeding.

24. Rule 33, "Assessment of Damages", deals entirely with damages in the context of a trial.

25. Section 34 of the Judicature Act which allows for the exclusion of the public in certain cases clearly contemplates the hearing of actions in open courts.

26. Rule 37.01.

This Rule not only suggests that there are limitations on the ability to commence proceedings for declaratory relief by way of an action but also that, in many situations where damages are sought, an originating notice will be the appropriate method of proceeding. The section is mandatory in effect and presumably applies where damages are certain, liquidated or agreed and the dispute is essentially one of law without a substantial fact determination element. The difficult subclause of the Rule is 9.02 (c) and what exactly this means is not clear.²⁷ Arguably, in so far as there is no express prohibition in the Rules on seeking damages by way of originating notice, the subclause operates as no real restriction. If this interpretation is sustainable, then, having regard to Rule 5.01, as interpreted in the *Lord Nelson* case, there may be many occasions on which a claim for damages can be combined with an originating notice claiming relief in the nature of the prerogative writs, or declaratory relief, subject to the reservation that where there are substantial factual disputes the appropriate way of proceeding will still be by way of action in combination with a claim for a declaration.

The new Rules contain nothing specific on the use of oral evidence in applications for orders in the nature of the prerogative writs. However, Rule 9.02 (b) suggests inferentially that the originating notice procedure is not the place for the settlement of disputed issues of fact. Because of this, the courts may still be reluctant to allow oral evidence either as a supplement to or in the place of affidavit evidence in applications for orders in the nature of the prerogative writs. This probably means a continued role for the declaratory form of action in judicial review situations where there is a contest on the facts. Nevertheless, it is interesting to note that the Rules relating to discovery and interrogatories are on their face perfectly general in their operation,²⁸ applying to both actions and originating applications. This at least indicates some room for the resolution of factual disputes within the originating application procedure, albeit at the pretrial stage.

27. Discussed by the Appeal Division in *Province of Nova Scotia v. F. G. Connolly* (1972) 4 N.S.R. (2d) 271 at p. 281, where Cooper J. A. expressed doubts as to whether the subclause was governed by the *eiusdem generis* rule of statutory interpretation, thereby suggesting that it should be given a broad rather than restrictive meaning.

28. Rules 19.01 and 20.01. They may, of course, still be read as implicitly limited to proceedings commenced by way of action.

In summary, there has probably been some lessening in the significance of the declaratory form of action as an administrative law remedy in this province because of the new Rules: (1) The ability to combine all forms of administrative law remedy in one proceeding will tend to diminish the separate identity of all the remedies to a certain extent. (2) The availability of damages in certain situations in combination with orders in the nature of the prerogative writs affects the unique role of the declaration. (3) This is also true of the extension of discovery and interrogatories to applications for orders in the nature of the prerogative writs. Nevertheless, as already seen, the action for a declaration will still have considerable advantages as a method of resolving judicial review matters involving factual disputes. As well, the declaration will continue to be the appropriate direct method of challenging the validity of legislation, primary and subordinate, for reviewing the decisions of domestic or non-statutory bodies and for questioning exercises of power by the Crown. Finally, and perhaps, as far as the new Rules are concerned, this is the most significant factor, there is a limitation period of six months from the date of the decision under challenge, for commencing proceedings for an order in the nature of certiorari.²⁹ No such limitation obtains as far as the declaration is concerned. This means that, where more than six months have elapsed from the date of a decision, the declaratory form of action will, subject to the discretion of the court,^{29a} be the only appropriate direct method of obtaining review of that decision.

3. *Other Dimensions of the Lord Nelson Hotel Decision*

(a) *The Declaration as an Alternative to Orders in the Nature of the Prerogative Writs.* Aside from the guidance given in the *Lord Nelson* case as to the meaning of the new Rules, the decision has significance in two other respects. First, it deals with the availability of declaratory relief as an alternative to orders in the nature of the prerogative writs. Secondly, it attempts to elucidate the standing requirements necessary to obtain the remedy.

29. Rule 56.06.

29a. This discretion may of course be exercised against the applicant on the basis of undue delay in seeking relief. Nevertheless this is not as rigid as a strict six month limitation period in that a delay of greater than six months may well not be undue.

One of the major stumbling blocks to the development of the declaration as an administrative law remedy in Canada and, more particularly, Ontario, seems to have been the notion that a declaration was not available as an alternative to the prerogative writs. This proposition was accepted by the Ontario Court of Appeal in *Hollinger Bus Lines v. Ontario Labour Relations Board*³⁰ and, undoubtedly, this decision has had some impact.³¹ The effect of that decision was virtually to confine the availability of a declaration to situations where it was being sought together with ancillary relief such as damages or where it was being sought as an original remedy by someone seeking a declaration as to his rights.

Historically, there is some justification for believing that English courts at one time espoused this point of view.³² However, it is now quite clear that the availability of an alternative remedy, such as a prerogative writ, goes to the court's discretion to issue a declaration-not its competence.³³ Moreover, there is good reason for believing the *Hollinger* rule has not gained too much acceptance outside of Ontario. In a recent study of Supreme Court of Canada decisions in the area of administrative law, from 1949-71, Professor P. W. Hogg has demonstrated that on a number of occasions the Supreme Court of Canada has used the declaration as a review instrument where the prerogative writs were also clearly available.³⁴ In addition, Smith J. of the Manitoba Queen's Bench Division in *Klymchuk v. Cowan*³⁵ identified the problem of the availability of a declaration in the face of the prerogative writs as being a matter for the court's discretion, in line with the modern English authorities.

In the *Lord Nelson Hotel* case, Smith J's judgment in *Klymchuk v. Cowan* was approved by the court³⁶ so that one of the barriers to the development of the declaration as a commonly-sought administrative law remedy has been removed. Nevertheless, a

30. [1952] O.R. 366; [1952] 3 D.L.R. 162 (Ont. C.A.).

31. See e.g. Warren, *supra*, note 2 at pp. 616-617 and Reid, *supra*, note 9 at pp. 364-365.

32. See de Smith, *supra*, note 14 at pp. 460-462 and Zamir, *supra*, note 2 at pp. 96-97.

33. See Zamir, *supra*, note 2 at pp. 96-101 and pp. 229-230.

34. "The Supreme Court of Canada and Administrative Law, 1949 — 1971" (1973) 11 O.H.L.J. 187 at pp. 195-196.

35. *Supra*, note 9.

36. *Supra*, note 4 at pp. 109-110.

reservation should be entered. That part of Smith J's judgment cited by the Appeal Division concluded with the following sentence: "A declaration of invalidity should not normally be made in cases where certiorari is available and will afford a complete remedy."³⁷ This emphasizes that even though this is a matter of discretion rather than competence, the applicant for relief does still run a risk by seeking a declaration in certiorari territory.³⁸ This of course leads back to Rule 5.01. Presumably, in the light of the Appeal Division's interpretation of this Rule, the best course of action, where an order in the nature of certiorari and a declaration are both feasible remedies, will be to seek both rather than choose one or the other.

(b) *Locus Standi Required for Declaratory Relief.* Notwithstanding the significance of the court's interpretation of the new Rules and partial clarification of the place of the declaration in situations where other forms of relief are available, the dominant issue in the *Lord Nelson Hotel* case was one of *locus standi*. The form in which it was presented to the court was reduced to the basically simple problem of whether Lord Nelson Hotel Limited had standing to challenge a decision of Halifax City rezoning a piece of land neighbouring the site of the Lord Nelson Hotel. This rezoning had been the result of an application by a developer who wanted to build a seventeen storey hotel on the site, a use prohibited by the then-existing zoning.

In the Trial Division of the Nova Scotia Supreme Court, Gillis J. decided against Lord Nelson Hotel Ltd. on this issue.³⁹ He held that the company did not have standing to obtain any of the remedies being sought — a declaration, prohibition or an injunction. The principal reason for the decision against the applicant would seem to rest in the following two extracts from the judgment: First, "I am of the opinion, and find, that the rezoning of any piece of land is a public matter, a matter in which not individual persons but the general public have an interest."⁴⁰ Secondly, "The laws surrounding planning, I believe, expressly remove and deny, any cause of action which might lie under the common law, against the City,

37. *Ibid.* at p. 110 citing from *Klymchuk* at p. 593.

38. To use Professor Garth Nettheim's phrase, *supra*, note 2.

39. *Supra*, note 4 and 17.

40. *Ibid.*, at p. 776 (756).

because of or arising from the re-zoning.’’⁴¹ These two statements suggest that matters of planning are of a special class and outside the normal principles for the grant of standing to challenge statutory decisions. This interpretation is further bolstered by a statement to the effect that the Attorney-General as the guardian of the public interest is the only appropriate applicant in a case such as this.⁴²

The judgment is however confused in that at other points the judge seems to be viewing this question in terms of the normal tests applied by the courts in making a decision on *locus standi*, at least where a declaration and an injunction are being sought. ‘‘In order to have a *locus standi* in this application, the plaintiff, in my opinion, should have shown that it has a special interest, private interest, or sufficient interest standing apart from, and affecting it differently, from the way that are affected all the members of the general public who are or may be affected.’’⁴³ A reference to *Cowan v. C.B.C.*⁴⁴ also incorporates this test. Yet, if planning is a matter of solely public interest, as suggested by the judge, there would seem to be no place for the asking of this question. Private interests of all kinds would seem to be excluded necessarily if the sole protected interest is that of the public. Nevertheless, the additional question was asked and also answered in the negative. The company’s participation in the zoning hearings and its status as an abutting landowner did not give it the special kind of interest demanded by this test.

On both counts the trial judgment is suspect. If the common law of standing has been modified by a particular statutory regime, one would expect some indication of such a modification in the statute. None was mentioned by the judge. Secondly, the finding by the judge that the applicant did not have the special interest required to obtain relief is very difficult to reconcile with Canadian decisions where neighbours and abutting landowners have been granted standing in planning matters without hesitation on the part of the courts.⁴⁵

41. *Ibid.*, at p. 779 (758).

42. *Ibid.*, at p. 778 (757) Gillis J. also seems to suggest that *locus standi* can still be an issue even if the Attorney General is a party to the proceedings. This seems quite contrary to authority.

43. *Ibid.*, at p. 778 (757-758).

44. *Ibid.*, at p. 777 (756-757). *Cowan* is reported at [1966] 2 O.R. 309; (1966) 56 D.L.R. (2d) 578 (Ont. C.A.).

45. See e.g. *Wiswell v. Metropolitan Corporation of Greater Winnipeg* [1965] S.C.R. 512; (1965) 51 D.L.R. (2d) 754, *L’Association des Propriétaires des Jardins Tâché Inc. v. Dasken Enterprises Ltd.* (1971) 26 D.L.R. (3d) 79 (S.C.C.).

Because of this, the reversal by the Appeal Division was not unexpected. After reviewing various authorities on the question of *locus standi*,⁴⁶ Jones J. justified a finding of sufficient standing to seek all three remedies in the following terms: "I am satisfied that the recent application to rezone the Centennial lands does materially affect the interests of the appellant, both in relation to its hotel premises and the residential property situated on Spring Garden Road. The position of the appellant is strengthened by the fact that it exercised a right of appeal before the Planning Appeal Board."⁴⁷

However, the most significant point about this aspect of the judgment is that the authorities referred to by Jones J. as his justification for this conclusion contain different standing tests for particular remedies.⁴⁸ From this it can be inferred that notwithstanding the ability to join applications for various remedies under Rule 5.01, there is still not a universal or generally applicable test for determining *locus standi* in Nova Scotia. The peculiar standing requirements for each remedy continue to exist, so that at least in terms of the *Lord Nelson* decision, a stranger can never expect to be awarded a declaration even though he might sometimes be granted relief in the nature of *certiorari* and prohibition.⁴⁹ Rather the test for declaratory relief remains one of "material" or "peculiar affect".⁵⁰ Once again at this point, however, Ontario, despite its Judicial Review Procedure Act, is in no different position from Nova Scotia.⁵¹ Standing still continues to be determined by the law as to the particular mode of relief as it existed prior to the Act.

4. *Thorson v. Attorney-General (Canada)*

Since the *Lord Nelson* decision, however, the Supreme Court of Canada has delivered judgment in the case of *Thorson v.*

46. *Supra*, note 4 at pp. 768-773 (107-111).

47. *Ibid.*, at p. 773 (110).

48. At pp. 768-769 (107-108), Jones J. refers to various authorities which would seem to indicate that no special interest is required to seek orders in the nature of *certiorari* and prohibition.

49. Note, however, de Smith, *supra*, note 14 at p. 369 where it is noted that there is no reported case in which a "stranger" has in fact obtained *certiorari*. See also doubts expressed by D.C.M. Yardley, "Certiorari and the Problem of *Locus Standi*" (1955) 71 L.Q.R. 388.

50. *Supra*, note 4 at p. 771 (109).

51. *Re Township of Hamilton & Rito Investments Ltd.* [1973] 1 O.R. 246 (Ont. Div. Ct.).

Attorney-General (Canada).⁵² It is almost certain that the holding of the majority of the Supreme Court in that case will generate attempts to argue for a more liberal or extended law of standing for the declaration in an administrative law context.

As pointed out by the Appeal Division of the Nova Scotia Supreme Court in the *Lord Nelson* case,⁵³ an applicant for declaratory relief has been obliged traditionally to demonstrate that the action complained of either interfered with his private rights or, if a public right was involved, materially or peculiarly affected his interests. This is a standard that has been applied not only in an administrative law context but also in situations where a declaration has been sought as to the constitutionality of legislation, both primary and subordinate.⁵⁴ Moreover, in both kinds of case, it has been accepted generally that a person is not specially affected because the decision or legislation in issue potentially affects his liability as a taxpayer. The only exception to this principle has been in relation to ratepayers challenging the validity of the actions of municipalities.⁵⁵ In this context, their status as a ratepayer has in itself been held to be sufficient.

One of the main reasons normally advanced for the rigidity of the standing requirements where public rights were involved was the constitutional position of the Attorney-General as the protector of the public interest and thus the appropriate person to initiate litigation in such cases. This traditional role, however, is one that bears little relationship to reality, particularly where the legislation concerned or the decision in issue has been initiated by the government of which the Attorney-General is a member or where the matters complained of relate to the actions of Ministers of the Crown, government departments or agencies, or government-appointed tribunals. The practicalities of partisan politics and the ambivalence of his position as both a member of the Cabinet and a Law Officer of the Crown have virtually eliminated this function of the Attorney-General.

The only other alternative open to indignant citizens has been to try to persuade the Attorney-General to appear on the record as a

52. *Supra*, note 5.

53. *Supra*, note 4 at p. 771 (109).

54. Very well-discussed by Gordon Turriff, Note (1973) 7 U.B.C.L.R. 312, discussing *Jamieson v. Attorney-General of British Columbia* (1972) 21 D.L.R. (3d) 313; [1971] 5 W.W.R. 600 (B.C.S.C.).

55. *Macldreith v. Hart* (1907) 39 S.C.R. 657.

party to the proceedings, thus putting their own lack of standing beyond question by the Courts. However, the discretion of the Attorney-General to become involved in a relator action is unreviewable by the courts⁵⁶ and a refusal not only left the private individual without a cause of action but also left potentially *ultra vires* legislation and potentially unlawful administrative action immune from challenge except collaterally.

The applicant for a declaration in *Thorson v. Attorney-General (Canada)* was in this very position. The Attorney-General of Canada was not likely to challenge the validity of the Federal Official Languages Act as guardian of the public interest and he had refused to lend his support to an action brought by Mr. Thorson.⁵⁷ Accordingly, Thorson brought his own action for a declaration in the hope that the Supreme Court would reverse its position on the law of standing and taxpayers' class actions. This persistence was rewarded ultimately by a 6-3 judgment of the Supreme Court of Canada upholding his right to bring the action.^{57a}

Two questions emerge from the judgment for the purposes of the present discussion. First, how precisely has the law of *locus standi* been altered by the *Thorson* decision? Secondly, and this is no more than a refinement of the first question, does *Thorson* contain anything to indicate that questions of standing to seek a declaration should now be treated differently in an administrative law as well as a constitutional law context?

Laskin J's (as he then was) majority judgment in the *Thorson* case is a difficult one, for aside from acknowledging Thorson's standing to bring the action, the extent to which the previous law has been changed is not at all clear. One of the principle reasons for this dilemma is that Laskin J., after indicating considerable doubts⁵⁸ about the previous leading Supreme Court of Canada authority of *Smith v. Attorney-General of Canada*,⁵⁹ then distinguished the situation in that case from the situation before the court in *Thorson*.

In *Smith*, a taxpayer was seeking a declaration as to the validity of the Canada Temperance Act. His reason for doing this was because

56. See de Smith, *supra*, note 14 at p. 40-41.

57. *Supra*, note 5 at p. 7.

57a. The majority judgment was delivered by Laskin J. (as he then was) and was concurred in by Martland, Ritchie, Spence, Pigeon and Dickson JJ. Judson J. delivered a dissenting judgment, concurred in by Fauteux C. J., and Abbott J.

58. *Supra*, note 5 at p. 6 and pp. 8-9.

59. [1924] S.C.R. 331.

a Montreal firm, in the light of prohibitions in the Act, had been refusing to fill Smith's orders for liquor. The firm was simply unwilling to risk prosecution by transporting the liquor from Quebec to Ontario. Notwithstanding Smith's business interest in the matter and notwithstanding the argument that he or his supplier should not have to risk prosecution in order to have the constitutional issue decided by a court, the Supreme Court of Canada denied Smith standing to seek a declaration mainly on the ground that grave public inconvenience would result from allowing people in his position to come before the Courts.⁶⁰

In *Thorson*, Laskin J., in discussing *Smith*, asked the rhetorical question: "Why, in such a case, should Smith be disqualified as a plaintiff in a declaratory action and be compelled to violate the statute and risk prosecution in order to raise the question of its invalidity?"⁶¹ Superficially, this argument would seem to hold just as much weight in an administrative law as in a constitutional law context. Nevertheless, Laskin J. then went on to make it clear that his holding in *Thorson* was confined to cases involving constitutional validity and also, quite paradoxically, to suggest that the risk of prosecution argument was not really crucial. Indeed, the real reason for deciding to accord standing to *Thorson* seems, from parts of the judgment, to have been quite the converse of that argument: "The Official Languages Act is not a regulatory type of statute akin to the Canada Temperance Act which was involved in the *Smith* case . . . The Act creates no offences and imposes no penalties . . . Public officials only might be exposed to prosecution under S.115 of the Criminal Code."⁶² In other words, *Thorson* may have been given standing because, unlike *Smith*, he did not even have the opportunity to test the legislation by committing an offence under the impugned Act.

Because of this, the holding in the case may well be restricted to the following proposition: "Where there is a justiciable dispute as to the constitutional validity of legislation and no other method of testing its validity, the court may in its discretion grant standing to a private individual without considering the position of the Attorneys-General of Canada or the provinces."^{62a} Seen in this

60. *Ibid.*, at p. 337 (per Duff J.).

61. *Supra*, note 5 at p. 9.

62. *Ibid.*, at pp. 10-11.

62a. See, however, *McNeil v. Nova Scotia Board of Censors and Sullivan*

light, the decision affords no comfort for those who look to the judgment as having applicability to administrative law situations as well as constitutional challenges. Indeed, the judgment may even have the effect of reducing the availability of a remedy to ratepayers against municipalities in so far as it focusses attention on the discretionary nature of standing where the applicant is not materially or peculiarly affected.

Quite recently, the English Court of Appeal was also called upon to consider the role of the United Kingdom Attorney-General as the guardian of the public interest. This arose in the administrative law case of *Attorney-General (on the relation of McWhirter) v. Independent Broadcasting Authority*,⁶³ which is mentioned in passing by Laskin J. in *Thorson*.⁶⁴ Two judges of the Court of Appeal were of the view that in an appropriate case the court might allow a private citizen to institute proceedings on behalf of the public interest if the Attorney-General refused to lend his support in relator proceedings. However, the terms in which this proposition was put forward were extremely guarded. According to Lord Denning M.R.:

In the light of all this I am of the opinion that, in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave or his machinery works too slowly, then a member of the public, who has a sufficient interest can apply to the court itself. He can apply for a declaration and, in a proper case, for an injunction, joining the Attorney-General if need be, as defendant. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizens of this country; so that they can see that those great powers and influence are exercised in accordance with law.⁶⁵

Lawton L. J. was more cautious:

I agree with Lord Denning M. R. that if at any time in the future (and in my judgment it is not the foreseeable future) there was reason to think that an Attorney-General was refusing improperly to exercise his powers, the courts might have to intervene to ensure that the law was obeyed.⁶⁶

(N.S.S.C. — T.D., an unreported decision at Hart J. delivered April 30, 1974.) where the court accorded standing to a taxpayer in a situation where there was a regulatory statute with penal provisions. Hart J. decided that there was no effective way for an individual citizen to challenge the constitutionality of the legislation in question unless he was accorded standing in the declaratory proceedings.

63. [1973] 1 All E.R. 689 (C.A.).

64. *Supra*, note 5 at p. 7.

65. *Supra*, note 63 at p. 698.

66. *Ibid.*, at p. 705.

Basically, this *dicta* does not add up to very much. The passing remarks of two judges of the Court of Appeal over the vigorous dissent of another⁶⁷ scarcely amount to the creation of new rule in this area. Moreover, even if the proposition is accepted, the courts are predictably going to be extremely reluctant to find that an Attorney-General has wrongfully refused to lend his support to relator proceedings.

As far as Canada is concerned, there is little or no suggestion that the courts are even prepared to go this far. Not only does *Thorson* seem restricted to a constitutional law context but the Supreme Court of Canada has recently affirmed the unreviewability of the Attorney-General's discretion in matters involving the exercise of prerogative powers.⁶⁸ Moreover, notwithstanding the Appeal Division of the Nova Scotia Supreme Court's recognition of the standing of a neighbouring property owner in the *Lord Nelson* case, the Supreme Court of Canada has also recently refused to recognize the standing of a homeowner's association which did not itself own property in a case involving a challenge to a zoning decision.⁶⁹ For declaratory relief in an administrative law context the need for the applicant to demonstrate that he is specially affected remains a rigid requirement and, at least as far as the courts are concerned, the day of individual or group representation of the public interest in litigation would seem to be as far away as ever.

All of this is not by any means to suggest that the courts should dispense completely with standing requirements. However, I am inclined to advocate that an extension of the *Thorson* approach to an administrative law context would not be out of place. A well-tempered use of judicial discretion would probably be an adequate protection against the kind of difficulty envisaged by Cairns L. J. in the *McWhirter* case when he stated that: "The requirement for the consent of the Attorney-General is a useful safeguard against merely cranky proceedings and against a multiplicity of proceedings."⁷⁰ Moreover, as Laskin J. took pains to point out in *Thorson*, the lesser standing requirements in ratepayers' actions ". . . does not seem to have spawned any

67. Cairns L. J.

68. *Smythe v. The Queen* [1971] S.C.R. 680; (1971) 19 D.L.R. (3d) 480. The matter was canvassed fully by Wells C.J.H.C. at first instance; see [1971] 2 O.R. 209; (1971) 17 D.L.R. (3d) 389 (Ont. H.C. & C.A.).

69. See *Dasken Enterprises* case, supra, note 45.

70. *Supra*, note 63 at p. 703.

inordinate number of ratepayers' actions to challenge the legality of municipal expenditures.'⁷¹ Indeed, many of the arguments used by Laskin J. in *Thorson* point to the desirability of such a position in an administrative law context, notwithstanding the fact that he himself probably stopped short of taking such a position in his judgment.

5. *Declarations Under the Federal Court Act*

(a) *General Availability*

The Federal Court Act, which came into force in 1971, also has ramifications with respect to the availability of declaratory relief in this province. This Act subjects all statutory decision-makers appointed under federal statutes, with very few exceptions,⁷² to the exclusive judicial review jurisdiction of the new Federal Court. This has had the effect of excluding the previously-existing jurisdiction of the provincial superior courts in judicial review matters concerning federal statutory decision-makers.

The judicial review provisions of the Federal Court Act have a number of puzzling aspects and I have already, in another context, commented in detail on what essentially is a poor piece of drafting.⁷³ As far as declaratory relief specifically is concerned, its availability is affected by sections 18 and 28 of the Act which divide up the original jurisdiction of the Federal Court in judicial review matters between the Trial Division and the Appeal Division. Section 18 gives the Trial Division jurisdiction to issue a declaration along with all the other traditional forms of relief. Section 28 on the other hand creates a new remedy in matters where the Appeal Division or Court of Appeal has original jurisdiction. Entitled an "application

71. *Supra*, note 5 at p. 7.

72. The term 'federal board, commission or other tribunal' is defined widely and only excludes "person or persons appointed under or in accordance with a law of a province or under section 96 of the British North America Act, 1867". Moreover, even a section 96 appointee may be subject to the Act if he exercises power as *persona designata* under a federal statute. *Commonwealth of Puerto Rico v. Hernandez* (1973) 14 C.C.C. (2d) 209 (S.C.C.) Note, however, that provincial superior courts, notwithstanding the Act, retain authority to issue the writ of *habeas corpus* to federal boards, commissions and other tribunals where appropriate. See *Re State of Wisconsin and Armstrong* [1972] F.C. 1228 at p. 1232; (1972) 30 D.L.R. (3d) 727 at pp. 732-733 (F.C.A.) and *Re Commonwealth of Virginia and Cohen (No. 2)* (1973) 1 O.R. (2d) 262 (Ont. H.C.). (*Hernandez* does not seem to dismiss this possibility.)

73. "The Federal Court Act: A Misguided Attempt at Administrative Law Reform?" (1973) 23 U.T.L.J. 14.

for judicial review” it alone is available to the exclusion of Trial Division jurisdiction, in situations where judicial review authority has been conferred on the Appeal Division. In other words, by virtue of section 28(3), the original jurisdiction of the two divisions has been made mutually exclusive.

The major difficulty in this regard is in deciding in what circumstances the Trial Division has original jurisdiction and in what circumstances the Court of Appeal has original jurisdiction. The actual wording of section 28 is most awkward and confusing and, perhaps, the best that can be said is that (i) the Court of Appeal has exclusive jurisdiction over decisions already made, as opposed to matters or decisions which are pending, provided that, (ii) the decision-maker in question is obliged in some way to act in a judicial or a quasi-judicial manner in the course of taking the decision.

Where does this leave the Trial Division in terms of original jurisdiction and, more particularly, what scope does it leave for the declaration under the Federal Court Act? First, in all cases where decisions are pending, as opposed to where a final decision has already been made, the ability to seek a declaration from the Trial Division exists theoretically under the Federal Court Act, irrespective of how the decision is classified. Secondly, where there has been an actual decision, a declaration will only be available if that decision is not one with a judicial or quasi-judicial element — whatever that frightfully confusing term may mean. In other words, to use Professor Garth Nettheim’s phrase once again, there is no place under the Federal Court Act for the declaration in certiorari territory.⁷⁴

(b) *Effect of Statutory Appeal Rights*

Aside from sections 18 and 28, the Federal Court Act ostensibly only affects the availability of a declaration in two other respects and, presumably, for all other purposes, the common law will apply notwithstanding the fact that the Act creates a totally new jurisdiction. The first of these other relevant provisions is section 29 which provides that where there is a right of appeal created by a particular statute to the Federal Court, the Supreme Court, the Governor in Council or the Treasury Board such right applies to the

74. *Supra*, note 2.

exclusion of relief under both sections 18 and 28. In other words, in certain cases, the appeal route must be utilized and judicial review is specifically excluded as a possibility. This is opposed to the common law position, where the most that can be said is that the courts had a discretion, though not an obligation, to refuse to entertain an action for a declaratory judgment where there was a statutory right of appeal or, alternatively, a failure to exhaust that statutory right of appeal.⁷⁵

However, two points must be made about section 29. First, it is only applicable with respect to statutory appeals to the named bodies. It does not apply to other statutory appeals. There the common law continues. Secondly, it is also restricted in its application “to the extent” of the statutory right of appeal. In other words, if the statutory right of appeal is more limited than the grounds upon which a declaration is available, then a declaration may still be sought if the ground of complaint does not come within the statutory appeal provision but does come within the scope of a declaratory judgment. For example, assume the following situation: First, availability of a declaration for intra-jurisdictional error of law.⁷⁶ Secondly, statutory right of appeal for jurisdictional error only to Federal Court of Appeal. Thirdly, alleged intra-jurisdictional error of law by body not required to act in a judicial or quasi-judicial manner. In such a case the appropriate relief to seek, notwithstanding section 29, would be a declaration under section 18 of the Federal Court Act.

In brief summary, therefore, the general availability of a declaration under the Federal Court Act may be more restricted than it is at common law, at least with respect to the range of decision-makers against whom it is available. Nevertheless, within that restricted scope, the usual common law principles on such matters as grounds of availability, standing and, for most part, the effect of the availability of alternative remedies will continue to govern.

(c) *Declaratory Relief against the Federal Crown*

A matter of particular confusion in the drafting of the Federal Court Act is in relation to the availability of declaratory relief against the

75. See Reid, *supra*, note 9 at pp. 442-443 and de Smith, *supra*, note 14 at pp. 374-376.

76. Perhaps a dubious assumption in the light of *Punton v. Ministry of Pensions*

Crown, though so far this does not appear to have given any trouble in the decided cases. Before the enactment of the Federal Court Act, the availability of judicial review against the Crown in right of Canada was in a rather uncertain state.^{76a} Clearly, at common law, the prerogative writs were not available⁷⁷ and the only real possibilities were declaratory and injunctive relief.⁷⁸

Historically, the only way of questioning the actions of the Crown in the English courts was through the Petition of Right procedure, a procedure which originally required the *fiat* of the monarch and, latterly, that of the Attorney-General, whose discretion to issue his *fiat* was not reviewable in the courts. The procedure was accepted statutorily in Canada at the federal level,⁷⁹ though the need to obtain the *fiat* of the monarch's representative, the Governor-General, was dispensed with in 1951.⁸⁰

The availability of a Petition of Right depended on whether or not the relief being sought came within the definition of 'relief' in the Act. This defined 'relief' as including ". . . every species of relief claimed or prayed for in a petition of right, whether a restitution of any incorporeal right or a return of land and chattels, or payment of money, or damages or otherwise."⁸¹ As formulated this definition did not specifically include relief of a declaratory nature. However, in so far as declaratory relief amounted effectively to giving the kind of relief encompassed by the definition, then it seemed clear that declaratory relief was available against the Crown under the Petition

and *National Insurance (No. 2)* [1963] 2 All E.R. 693. See, however, Warren, *supra*, note 2 at pp. 642-643 and Zamir, *supra*, note 2 at pp. 157-166.

76a. See Gordon F. Henderson's "Federal Administrative Tribunals in Relation to the New Federal Court of Canada" [1971] Special Lectures of the Law Society of Upper Canada 55 at pp. 60-62 and, more particularly, B.L. Strayer, *Judicial Review of Legislation in Canada* (Toronto: University of Toronto Press, 1968), Chapter 4, "Crown Prerogative and the Power of Judicial Review", and also B. L. Strayer "Injunctions Against Crown Officers" (1964) 42 Canadian Bar Review 1.

77. *Certiorari* and prohibition:- *Border Cities Press Club v. Attorney General (Ontario)* [1955] O.R. 14; [1955] 1 D.L.R. 404 (Ont. C.A.). *Mandamus*:- *R. v. Lords Commissioners of the Treasury* (1872) L.R. 7 Q.B. 387.

78. There is no statutory prohibition against the award of an injunction against the Crown in right of Canada. However, at common law, the remedy is not available against the Crown. See de Smith, *supra*, note 14 at p. 397. See, however, Strayer, *supra*, note 76a where a strong case is made for the availability in Canada of injunctive relief against officers of the Crown in certain contexts.

79. 39 Vict., c.27 (1876).

80. S.C. 1951, c.33, s.1.

81. R.S.C. 1970, c. P-12, section 2.

of Right Act. The case of *Bradley v. The King*⁸² illustrates this. This decision involved the question of whether an individual had a right to compensation, within the terms of the Patent Act, if the Crown made use of a patented invention. In other words, was the Crown subject to the compensation provisions of the Patent Act? Bradley commenced proceedings in the Exchequer Court of Canada under the Petition of Right Act for a declaration as to his entitlement to such compensation from the Crown and the Supreme Court upheld his right to bring these proceedings because the award of a declaration in effect amounted to “. . . a judgment establishing his right to appropriate relief [the payment of money] in the only form in which it can be done in a judgment against the Crown.”⁸³

At the same time as the Supreme Court in *Bradley* made it clear that the Petition of Right procedure was available in such a case, it was also asserted⁸⁴ that a Petition of Right was not available for declaratory relief of the kind which was awarded in the leading English decision of *Dyson v. Attorney-General*.⁸⁵ In that case an individual was seeking a declaration to the effect that he did not have to heed certain requisition notices which were issued against him by the Commissioners of Finance. This amounted to the seeking of a bare or mere declaration and was neither linked with nor amounted to the kind of relief appearing in the definition of ‘relief’ in the Petition of Right Act.

The Supreme Court judgment also went on to state that such declaratory relief was not available from the Exchequer Court at all, whether by way of Petition of Right or by way of action under sections 18 and 19 of the Exchequer Court Act.⁸⁶ The question that then arose was whether this meant that *Dyson*-like declaratory relief was not available at all against the Federal Crown? Federally, there was no provision expressly authorizing the issue of declaratory relief against the Crown. Not only this but the Exchequer Court Act⁸⁷ also contained the following provision: “18. (1) The Court has exclusive original jurisdiction to hear and determine the following matters: (c) every claim against the Crown arising under any law of

82. [1941] S.C.R. 270; [1941] 2 D.L.R. 737.

83. *Ibid.*, at p. 277 and p. 743 (per Duff, C.J.).

84. *Ibid.*, at p. 276 and p. 742.

85. [1911] 1 K.B. 410 (C.A. — appeal on an interlocutory application to strike the proceedings out); [1912] 1 Ch. 158 (C.A. — appeal on award of declaratory relief).

86. *Supra*, note 82 at p. 275 and p. 741.

87. R.S.C. 1970, c. E-11.

Canada or any regulation made by the Governor in Council.” On its face this would seem to suggest that not only could a bare declaration not be sought against the Crown in the Exchequer Court but also that there was an express prohibition against seeking such relief from a provincial court.

Nevertheless those provincial courts which considered this question before the enactment of the Federal Court Act saw the matter in a different light and held that a bare declaration was available in provincial courts against the Federal Crown (or, more precisely, the Attorney-General of Canada as representative of the Crown in right of Canada).⁸⁸ The most detailed discussion of the matter appears in the judgment of Hogg J. of the Ontario High Court in *Greenlees v. Attorney-General for Canada*.⁸⁹ In reliance on the presumption that where a right exists there is a remedy, he justified the availability of such relief, though with little attention to the actual exclusionary words of section 18.⁹⁰ He also noted various constitutional authorities⁹¹ to the effect that the provincial courts exercise jurisdiction over federal matters for which a separate court has not been established under section 101 of the B.N.A. Act.⁹²

In summary therefore, at the time of the enactment of the Federal Court Act, the Exchequer Court of Canada had sole jurisdiction to issue declaratory relief against the Federal Crown under the Petition

88. See *Greenlees v. Attorney-General (Canada)* [1945] O.R. 411; [1945] 2 D.L.R. 641 (Ont. H.C.); *Gruen Watch Co. v. Attorney-General (Canada)* [1950] O.R. 429; [1950] 4 D.L.R. 156 (Ont. H.C.); *B.C. Packers v. Smith* [1961] O.R. 596; (1961) 28 D.L.R. (2d) 711 (Ont. H.C.); *Canadian Fishing Co. Ltd. v. C. Rhodes-Smith* [1962] S.C.R. 294; (1962) 32 D.L.R. (2d) 641. These cases are all cited by Gordon F. Henderson, *supra*, note 76a at pp. 61-62. Both *Greenlees* and *Gruen* went to the Ontario Court of Appeal but in neither case did that court consider this issue. See [1946] O.R. 90; [1946] 1 D.L.R. 550 (Ont. C.A.) and [1951] O.R. 360; [1951] 3 D.L.R. 18 (Ont. C.A.) (*sub nom. Bulova Watch Co. Ltd. v. Attorney-General (Canada)*).

89. *Ibid.*, at pp. 423-430 and pp. 652-659, respectively.

90. *Ibid.*, at p. 429 and p. 659, citing Viscount Haldane in *Board v. Board* [1919] A.C. 956 at p. 962; (1919) 48 D.L.R. 13 at p. 17-18. It should be noted that at that time section 18 of the Exchequer Court Act was section 19 (R.S.C. 1927, c. 34). Section 18 was also prefaced in the following way:- “The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject to a suit or action against the Crown, and for greater certainty . . .” cf. Section 17, R.S.C. 1970, c. E-11, which does not include this preface.

91. Notably W.H.P. Clement, *Canadian Constitution* (Toronto: Carswell, 3rd ed., 1916) at p. 595 and *Valin v. Langlois* (1879) 3 S.C.R. 1 at p. 19, per Ritchie C.J.C.

92. *Supra*, note 88 at pp. 429-430 and p. 659.

of Right Act where the relief sought was to the effect of granting or was linked to 'relief' as defined in that Act. In contrast, no jurisdiction existed in the Exchequer Court to issue a bare declaration against the Federal Crown though provincial courts had claimed such authority, despite the exclusionary wording of section 18 of the Exchequer Court Act.

It is now appropriate to consider the effect of the Federal Court Act in the light of this background. First, section 64(1) of the Federal Court Act not only repeals the Exchequer Court Act but also repeals the Petition of Right Act. Secondly, section 17(1) provides as follows: "The Trial Division has original jurisdiction in all cases where relief is claimed against the Crown and, except where otherwise provided, the Trial Division has exclusive original jurisdiction in all such cases." Thirdly the definition section of the Act, section 2 defines 'relief' in the following terms: "(m) 'relief' includes every species of relief whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise; . . ."

Perhaps the most significant aspect of these provisions in the new Act is that 'relief' is defined as including declaratory relief. Under the Petition of Right Act 'relief' was not defined so widely. Because of this, it would seem to be very difficult indeed to maintain that the provincial courts continue to possess any declaratory judgment jurisdiction against the Federal Crown. Section 17 appears patently clear in excluding this possibility by the use of the word 'relief'. Indeed, this interpretation has already been accepted by Donnelly J. of the Ontario High Court in *Denison Mines Ltd. v. Attorney-General of Canada*,⁹³ where a declaration was sought against the Attorney-General of Canada respecting the constitutional validity of a regulation promulgated under a Federal statute.

The interesting point that does arise, however, is whether the Trial Division itself has any jurisdiction to issue a declaration against the Federal Crown. Just because 'relief' is defined as including a declaration and just because the Trial Division is given exclusive original jurisdiction where 'relief' is being claimed against the Crown, it does not necessarily mean that declaratory relief is available against the Crown. Section 17 can be interpreted as saying that in so far as the right to obtain relief against the Crown

93. [1973] 1 O.R. 797 at pp. 800-802; (1972) 32 D.L.R. (3d) 419 at pp. 422-426 (Ont. H.C.).

exists, then it must be sought in the Trial Division. However, section 17 does not itself create heads of relief. Separate statutory justification for the kind of relief sought arguably must be established before the Trial Division can take jurisdiction. The effect of such an interpretation might not mean the end of declaratory relief in so far as such relief is tied to or in effect the kind of relief that is available under a particular statute. In other words, the *Bradley* type of case might still be susceptible to the granting of declaratory relief. However, in the absence of a specific statutory authorization to the contrary, such an interpretation would have the effect of ending the possibility of the issuance of a bare, *Dyson*-type declaration against the Federal Crown. Indeed, probably the strongest argument for such an interpretation stems from the fact that in *Dyson* there was a specific statutory authorization for the grant of declaratory relief.⁹⁴ No such specific authorization seems to exist in the Federal Court Act.⁹⁵

In the *Denison* case, Donnelly J. assumed that the depriving of provincial courts of jurisdiction to issue a declaration meant that the Federal Court took over that jurisdiction. "Section 17(1) of the Federal Court Act when read with s.2(m) is adequate to clothe the Trial Division of the Federal Court with exclusive jurisdiction where a declaration is sought in a matter that affects the Crown."⁹⁶ The principal basis for this assumption appears to be the extended definition of 'relief'.⁹⁷ However, structurally there is an important difference between the Federal Court Act and the Petition of Right Act. The Petition of Right Act spelt out specifically the availability

94. R.S.C., Order 25, rule 5, (now Order 15, rule 16) which provides:- "No action or proceeding 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." Note, however, this rule is not expressed to be binding on the Crown and the effect of this was not discussed at all in *Dyson*. (Discussed by de Smith, supra, note 14 at p. 429).

95. Prior to the Federal Court Act, the provincial courts which awarded declaratory relief against the Crown relied on their province's equivalent of the English rule. See e.g. section 18 (2) of the Judicature Act, R.S.O. 1970, c. 228. Of course, such use is subject to the same comment made by de Smith about *Dyson* — namely, that section 18 (2) is not expressed to be binding on the Crown and express provision to that effect is called for by section 11 of the Ontario Interpretation Act, R.S.O. 1970, c. 227. However, there is not even the equivalent of section 18 (2) in the Federal Court Act.

96. Supra, note 93 at p. 804 and p. 426.

97. Ibid., at p. 802 and p. 424.

of a Petition of Right where any relief as defined was being sought against the Crown.⁹⁸ The Federal Court Act does not contain any specific authorization for the issue of a declaration.

In the last analysis the way in which such authority may be established by the Federal Court-Trial Division is on the same basis that Hogg J. proceeded in the *Greenlees* case; namely, that where there is a right there must be assumed to be a remedy. Historically, however, there would be difficulty in using such an approach. It was quite clear that at the time of Confederation the English courts would not, in the absence of express statutory authorization, issue a purely declaratory order.⁹⁹ Indeed, the Exchequer Court of Canada was held to be similarly limited in the *Bradley* case.¹⁰⁰ Furthermore, it is somewhat difficult to argue for the existence of such an inherent jurisdiction in a court statutorily created in 1970 and particularly one which is expressed to be a continuation of the Exchequer Court of Canada.

One further complicating factor is added by section 17(4) (b) which provides that: “(4) The Trial Division has concurrent original jurisdiction . . . (b) in proceedings in which relief is being sought against any person for anything done or omitted to be done in the performance of his duties as an officer or servant of the Crown.”

Prior to the Act, aside from the Petition of Right procedure, declarations were not sought against the Crown directly. The normal practice, as indicated by *Greenlees*, was to sue the Crown for a declaration through the federal Attorney-General.¹⁰¹ In such a case the Attorney-General was clearly not being challenged “for anything done or omitted to be done in the performance of his duties as an officer or servant of the Crown”. He was no more than a nominal defendant. This was in fact accepted by the Ontario High Court in *Denison Mines*, where the Court held that such cases come within section 17(1) rather than section 17(4) (b).¹⁰² However, on other occasions prior to the Act, it seemed appropriate to seek relief against the Crown by way of an action for a declaration against a servant of the Crown. For example, in *The Canadian Fishing Co.*

98. See section 3 and Form A in the Schedule to the Act, which, when read together, necessarily indicate the availability by way of the Petition of Right procedure of all forms of relief as defined in the definition section, section 2.

99. See Zamir, *supra*, note 2.

100. *Supra*, note 82.

101. Discussed by Hogg J., *supra*, note 89 at p. 430 and p. 659.

102. *Supra*, note 93 at pp. 800-802, (422-423).

Ltd. v. Rhodes-Smith,¹⁰³ the Supreme Court of Canada awarded a declaration against the Director of Investigation and Research of the Restrictive Trade Practices Commission with respect to his actions as a servant of the Crown. The question that now arises is whether a litigant can avoid the exclusionary provisions of section 17(1) by naming the appropriate Crown servant as defendant and suing in a provincial court, since under section 17(4) (b), the Trial Division is only given concurrent, not exclusive, original jurisdiction with respect to actions against Crown servants or officers in matters relating to the performance of their duties.

Another problem with respect to the position of the Crown under the Federal Court Act is raised by section 18. As seen earlier this gives the Trial Division exclusive original jurisdiction to issue declaratory relief against 'any federal board, commission or other tribunal'. Subsection (b) also goes on to provide that it has exclusive original jurisdiction ". . . to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney-General of Canada, to obtain relief against a federal board, commission or other tribunal." Given the wide definition of the term 'federal board, commission or other tribunal' as including virtually every statutory decision-making power established by federal statute and given the creation of the ability to seek declaratory relief against the Attorney-General, rather than the person or body exercising the power, it may well be that this constitutes the specific authorization for the issue of declaratory relief against the Crown, an authorization which does not appear in section 17.

There are however certain difficulties with this approach. First, by virtue of section 16 of the Interpretation Act¹⁰⁴ the provisions of an Act do not bind the Crown ". . . except only as therein

103. *Supra*, note 88. Note, however, the doubts often expressed about the appropriateness of bringing an action for a declaration against a servant of the Crown when he is acting as such rather than as *persona designata* under a statute. See P. W. Hogg, *Liability of the Crown* (Melbourne: Law Book Co., 1971) at pp. 21-22; de Smith, *supra*, note 14 at pp. 454-455. See, however, Zamir, *supra*, note 2 at pp. 294-297 where he expresses the view that Crown servants may be sued in such cases instead of the Attorney-General as representative of the Crown. This issue was not discussed in *Rhodes-Smith*, and it may well be that the judgments in the Supreme Court of Canada proceeded upon the basis that the director was acting as *persona designata* and not as a servant or agent of the Crown.

104. R.S.C. 1970, c. I-23.

mentioned or referred to.’’ There is no specific statement in the Federal Court Act that it binds the Crown generally nor is there a specific provision in section 18 to the effect that the section binds the Crown. However, it may be possible to argue that the Crown is bound by the section by necessary implication. There are two strong points to this argument. First, there is the wide definition of the term ‘federal board, commission and other tribunal’, a term which is linked with the word ‘any’ in section 18 (a). Secondly, the only occasion where it is necessary to sue the Attorney-General for declaratory relief against another statutory decision-maker is where that statutory decision-maker is the Crown. Accordingly, unless section 18 is read as applying to the Crown, the latter part of section 18 (b) is completely lacking in substance. The only other difficulty with this whole argument is section 17(4) (b). If it was intended that section 18 bind the Crown and that the Trial Division have ‘exclusive, original jurisdiction’ in such matters, why does section 17(4) (b) only give the Trial Division ‘concurrent original jurisdiction’ over matters involving relief against Crown officers or servants with respect to the performance of their duties? Ultimately, perhaps, the only way of resolving all these difficulties is to regard section 17(4) as being applicable only to actions against Crown servants in tort and contract and that, in the face of other strong indications in the Act, declaratory relief of a public law nature should be available against the Crown, either by way of suit against the Attorney-General or, perhaps alternatively, by action against the servant exercising the authority of the Crown¹⁰⁵ under section 18.

105. In the reported cases, there has so far been only one instance where declaratory relief has been sought against the Crown. In *Robertson v. The Queen*, the Trial Division awarded a declaration as to the invalidity of certain regulations against the Crown, without any discussion of this point. This was affirmed by the Federal Court of Appeal. It is not clear from either decision whether the action was brought under section 17 or section 18. See [1972] F.C. 80 (T.D.) and [1972] F.C. 796; (1972) 30 D.L.R. (3d) 383 (F.C.A.). However, in *Minister of National Revenue and the Queen v. Creative Shoes Ltd.* [1972] F.C. 993; (1972) 29 D.L.R. (3d) 89, (*Sub nom Re Creative Shoes Ltd. v. Minister of National Revenue*) (reversed without reasons as against the Minister by the Supreme Court of Canada (1973) 38 D.L.R. (3d) 318), an action under section 18 for relief in the nature of certiorari, the Federal Court of Appeal held that the Crown was not a proper defendant in that the Crown did not come within the definition of ‘federal, board, commission or other tribunal’ in section 2(g). It may be, however, that this decision is really not determinative of the availability of declaratory relief against the Crown under section 18 in the sense that the decision-making process in issue in that case did not involve the exercise by the Crown of any statutory power. This position

At best, however, this is a somewhat artificial distinction though perhaps one that is rendered necessary by the poor drafting and lack of clarity in the legislation.

6. *Conclusions*

This note has focussed on recent developments in the law affecting the availability of declaratory relief as an administrative law remedy in Nova Scotia. In some ways writing about a separate administrative law remedy these days is misguided, particularly having regard to the increasing tendency of legislatures to favour a single comprehensive remedy and to make the procedures surrounding the remedies much more equitable and consistent. Nevertheless, by focussing on one remedy and one province, certain insights can be gained into the changing face of remedial administrative law.

In Nova Scotia, the new Rules of Civil Procedure and particularly Rule 5.01, allowing for a combination of remedies in the one proceeding, have led to a situation where the forms of proceeding have been diminished in importance and where the substance of the allegations is emphasized as the prime concern. Because of this, there will be some tendency for the individual identity of the old remedies to become lost which in most respects is a most desirable advance. However, despite the ability to combine remedies in the one proceeding, it will still be necessary for an applicant for relief to make out his case for a particular remedy by reference to the traditional rules governing their availability. In other words, the standardization process is by no means complete though, interestingly enough, this same situation continues to apply in Ontario, notwithstanding the enactment of the Judicial Review Procedure Act and the adoption of a single comprehensive judicial review remedy.

However, to argue that Nova Scotia has achieved quite painlessly much of what Ontario accomplished only after an extensive and expensive study is not to say that the present situation is completely satisfactory by any means. What still needs study are the actual grounds for judicial review and, more particularly, a rationalization of judicial review remedies with a properly worked-out system of

may well have been different if, for example, as in *Robertson*, the statute had involved the exercise of a statutory decision-making power by the Governor in Council.

statutory administrative appeals. It is here that the hard work has still to be done in this province. Moreover, the problems raised by the common law of standing in an administrative law context, as exemplified by *Lord Nelson* and *Thorson*, and also the problems raised by greater public demand for effective representation in agency decision-making and judicial scrutiny of the agencies, suggest very strongly that attention should be paid to a clarification of questions of standing to challenge administrative action on an individualized statute by statute basis. Quite clearly there is no standard answer to this question which can be applied in all contexts.

Finally, perhaps as a warning that any kind of legislative reform must be accompanied by careful statutory drafting, the lack of clarity in the availability of declaratory relief against the Crown in right of Canada ranks along with the other difficulties created by the judicial review sections of the Federal Court Act. Notwithstanding the fact that the Act marks some movement towards simplicity in certain aspects of the availability of relief, it only adds to existing confusion in other areas and cries out for amendment.