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Federal Judicial Review Jurisdiction under the Federal Court Act: when is a "federal board, commission or other tribunal" not a "federal board, commission or tribunal"?

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I. Introduction

The precise scope of the judicial review jurisdiction of the Federal Court has always been a matter of some doubt and controversy.¹ Over the past decade problems have arisen with respect to federal reviewability of decisions of the Governor-in-Council,² of section 96 judges,³ of Canadian Crown corporations,⁴ of various officials in the North-West Territories,⁵ and of decision-makers acting pursuant to the federal power over Indians.⁶ In many of these cases, seemingly conflicting judicial decisions as to the effect of section 2(g) of the *Federal Court Act*⁷ have been rendered: sometimes

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1. See Mullan, *The Federal Court Act* (1977), at 17-22 and footnotes therein. See also Pepin and Ouellette, *Principes de contentieux administratif* (1979), at 287-291; Reid and David, *Administrative Law and Practice* (2nd ed.) (1978), at 474-475; Kavanaugh, *A Guide to Judicial Review* (1978), at 124-129; Mullan, *Administrative Law* (2nd ed.) (1979), at 262-265; Macdonald, "Federal Judicial Review Jurisdiction under Section 2(g) of the Federal Court Act: the Position of Section 96 judges" (1979), 11 *Ott. L. R.* 689; Mullan, "History and Constitutional Basis of the Federal Court of Canada" in *Report of the Canadian Bar Association Special Commission of Inquiry Into Jurisdiction of Federal Court* (undated)

2. *Re Clark et al. and A.-G. Canada* (1977), 17 O.R. (2d) 593 (H.C.); *Inuit Tapirisat of Canada and the National Anti-Poverty Organization v. The Governor-in-Council* (1979), 24 N.R. 361 (F.C.A.)

3. *A. G. Canada v. Morrow*, [1973] F.C. 889 (T.D.); *Herman v. A. G. Canada* (1978), 22 N.R. 235 (S.C.C.)

4. *Canada Metal Co. Ltd. v. C.B.C.* (1975), 11 O.R. (2d) 167 (H.C.); *Joyal v. Air Canada*, [1976] C.S. 1211; *Bourgault v. C.M.H.C.*, [1978] C.S. 501

5. *Re Forter Arctic Ltd. and Liquor Control Board of N.W.T.* (1971), 21 D.L.R. (3d) 619 (N.W.T.S.C.); *Re Pfeiffer and Commis. of N.W.T.* (1977), 75 D.L.R. (3d) 407 (N.W.T.S.C.)

6. *Lavell v. A. G. Canada*, [1971] F.C. 347 (C.A.); *A.-G. Can v. Canard*, [1976] 1 S.C.R. 170; *Gabriel v. Canatonguin*, [1978] 1 F.C. 124 (T. D.)

7. R. S. C. 1970 (2nd Supp.), c. 10. The expression S. 2(g) is used for convenience to refer to the unnumbered definition of "federal board, commission or other tribunal" contained in section 2 of the Act.

courts have been uncertain as to the meaning of the attributive phrase "jurisdiction or powers conferred by or under an Act of the Parliament of Canada"; sometimes they have been troubled by the limiting clause "other than . . . any such person or persons appointed . . . under section 96 of the *British North America Act*, 1867". Moreover, the full effect of section 101 of the *B.N.A. Act* on the judicial review jurisdiction of the Court has yet to be established.⁸ Finally, in several decisions, judges have questioned whether the Federal Court indeed has exclusive jurisdiction where an issue of constitutional division of powers is raised.⁹

Nevertheless, until recently courts appear to have experienced much less difficulty in interpreting that part of the exclusionary provisions of section 2(g) of the *Federal Court Act* which states "other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province". In fact, the meaning of the clause has rarely been discussed in detail in a reported judgment.¹⁰ Both federal and provincial courts consistently have found, in cases of federal inter-delegation, that the determination of whether a body is "constituted or established by or under a law of a province" depends primarily on the true construction of the Parliamentary legislation by which federal jurisdiction or powers are granted. If the federal statute actually creates a federal body (even though its members perform analogous functions under provincial law) or expressly appoints an individual to a federal office (even though he holds a similar office by virtue of provincial law) judicial review will lie in the Federal Court.¹¹ If, however, the federal statute

8. For a narrow reading of the expression "Laws of Canada" in s.101 see *Quebec N. Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S. C. R. 1054 and Hogg, *Comment*, (1977), 55 Can. Bar Rev. 550. If this decision is taken to its letter, it might mean that the part of section 2(g) which states "or purporting to exercise" jurisdiction is unconstitutional as conferring powers on the Federal Court to hear matters not arising from "some existing Federal Law". See *infra* text following note 60 for a discussion of this point.

9. *Hamilton v. Hamilton Harbour Commissioners*, [1972] 3 O.R. 61 (H.C.) and Gibson, *Comment*, (1976), 54 Can. Bar. Rev. 372; see also *Law Society of B.C. v. A.-G. Canada* (1978), 92 D.L.R. (3d) 53 (B.C.S.C.).

10. Of the approximately thirty reported decisions where this particular aspect of the section 2(g) definition was directly raised as an issue, only the *C.P. Transport*, [1976] 5 W.W.R. 541 (Sask. C.A.) case deals with the point in any detail, although *Walker v. Gagnon*, [1976] 2 F.C. 155 (T.D.), *Lingley v. Hickman*, [1972] F.C. 171 (T.D.) and *Vardy v. Scott* (1976), 66 D.L.R. (3d) 431 (S.C.C.) also raise the question in passing. See further the brief discussion in *Lavell v. A.-G. Canada* (1973), 38 D.L.R. (3d) 481 at 505.

11. For examples of provincial appointees exercising federal powers who are also

merely delegates federal powers to a person appointed, or a body established under a provincial law, review will lie in the appropriate provincial Superior Court.¹² Hence, regardless of whatever other provincial statutory role, function or office the recipient of a power delegated by a federal statute might perform, the locus of judicial review when he exercises federal powers must be determined upon a true construction of the federal enactment.¹³

While such an approach to the exclusionary terms of section 2(g) may be relatively easy to state in the abstract, at least two recent cases seem to illustrate that even this heretofore more tranquil aspect of the definition of "federal board, commission or other tribunal" is capable of generating difficulties in interpretation. In early 1976, the meaning of the second arm of the exclusionary clause (*i.e.* other than a person or persons appointed under or in accordance with a law of a province) came directly before the Supreme Court for the first time.¹⁴ In three short paragraphs at the end of his judgment, Dickson, J. held that a provincial Magistrate taking depositions under the *Extradition Act*¹⁵ performed a simple administrative task under the Act which was not "integral to the comprehensive extradition scheme created by statute and treaty". He concluded:

The Magistrate, appointed under a law of a Province and exercising only peripheral powers when the *Extradition Act*, analogous to his usual judicial duties, remains subject to the supervisory jurisdiction of provincial Superior Courts.¹⁶

In other words, with respect to persons who may exercise delegated

held to be expressly appointed by Federal legislation (and therefore subject to Federal Court review), see *Walker v. Gagnon*, [1976] 2 F.C. 155 (T.D.), and *Martinoff v. Gossen*, [1979] 1 F.C. 327 (T.D.).

12. Cases where provincial boards exercising federal powers have been held not to be constituted as federal boards include: *C.P. Transport v. Highway Transport Board*, [1976] 5 W.W.R. 541 (Sask. C.A.); *Re Bicknell Freighters Ltd.* (1977), 77 D.L.R. (3d) 417 (Man. C.A.); *National Freight Consultants Inc. v. Motor Transport Board* (1978), 84 D.L.R. (3d) 504 (Alat. S.C.T.D.), (1979), 96 D.L.R. (3d) 278 (Alta. S.C.A.D.); *Re Agricultural Products Marketing Act* (1978), 84 D.L.R. (3d) 257 (S.C.C.).

13. Contrast the decisions in *Vardy v. Scott* (1976), 66 D.L.R. (3d) 431 (S.C.C.) and *Johnston v. A.-G. Can.*, [1977] 2 F.C. 301 (T.D.) See also the comment on the former case by Fera, (1977), 3 Queen's L.J. 183

14. *Vardy v. Scott* (1976) 66 D.L.R. (3d) 431 (S.C.C.). Since this decision has already been the subject of a comment, *supra* note 13, its facts will not be reviewed in detail here.

15. R.S.C. 1970, c. E-21

16. *Supra*, note 14 at 443

federal powers, the Court seemed to rely on the general concept of *persona designata* as a criterion for determining when such an individual exercises these powers in a capacity distinct from his day-to-day functions as a provincial appointee. It follows from this view that when one contemplates whether a provincial appointee is or is not nominated as a *persona designata* under a federal statute reference also must be had to the provincial Act in order to determine what are the normal or usual functions of that appointee.¹⁷ In this respect, the judgment of Dickson, J represents an important qualification in the judicial approach to the second exclusionary term of section 2(g).

The more significant exclusion set out in the Act (*i.e.* other than a body constituted or established by or under a law of a province) has not yet been the subject of proceedings in the Supreme Court. Nevertheless, a recent decision of the Ontario Divisional Court¹⁸ on this point seems to overrule established Federal Court jurisprudence¹⁹ and also puts into doubt the accepted methodology for evaluating when a nominally provincial body has been constituted as a federal tribunal exercising federal powers. This decision, *Re Abel and Penetang Mental Health Centre* is of particular importance because it strikes at the heart of federal judicial review jurisdiction in all matters involving inter-delegation to administrative agencies. If followed, it would seem to oblige the Federal Parliament to revise radically its approach to inter-delegation whenever it wishes to vest review of federal powers so delegated in the Federal Court.²⁰

The situation confronting the Court in *Re Abel* was not novel; nor, at first blush did it appear to be particularly difficult to resolve. A number of persons held at the Penetanguishine Mental Health Centre, Oak Ridge Division, pursuant to warrants of the Lieutenant-Governor of the Province of Ontario issued under ss.

17. For a discussion of recent Supreme Court jurisprudence on the *persona designata* question see Macdonald, *supra*, note 1

18. *Re Abel and Penetang Mental Health Centre et al.* (1979), 24 O.R. (2d) 279 (Div. Ct.)

19. *Lingley v. Hickman*, [1972] F.C. 171 (T.D.); *Re Lingley and N.B. Board of Review* (1975), 25 C.C.C. (2d) 81 (F.C.T.D.)

20. An indication of the need for such revision can be seen in the judgment in *Re Shoal Lake Band of Indians and the Queen* (1979), 101 D.L.R. (3d) 132 (Ont. H.C.) where, in a case of inter-delegation with respect to fisheries, the issue of the proper forum was not even raised, even though a strong case for Federal Court jurisdiction can be made out.

545 and 546 of the *Criminal Code*,²¹ sought various declaratory orders from the Ontario Divisional Court. These orders were to be directed primarily against a tribunal styled as the "Advisory Review Board".²² In substance it was argued that various decisions of the Board were void as being taken in violation of the principles of natural justice.²³ The application of relief came before Grange, Southey and O'Driscoll, JJ., the first two of whom delivered judgement in favour of the applicants and ordered the decision of the Advisory Review Board quashed. In a dissenting opinion, O'Driscoll, J. stated not only that he would have refused relief on the merits of the application, but also that the Divisional Court had no jurisdiction to entertain the application. According to Mr. Justice O'Driscoll, the Advisory Review Board was a "federal board, commission or other tribunal" whose determinations would be subject to judicial review only in the Federal Court.²⁴ This latter contention was expressly rejected by Mr. Justice Grange in what appears to be an addendum to his judgment. He noted:

The Board is an emanation of the Province having been set up under the *Mental Health Act*. It may be that the enactment of s. 547 of the *Criminal Code* has rendered unconstitutional or inoperative s. 31 of the *Mental Health Act* but that question was neither raised nor argued before us. In my view, however, the enactment of the *Criminal Code* section would not transform a provincial board into a federal board. It could only put it out of

21. R.S.C. 1970, c. C-34 as amended

22. *Supra*, note 18, at 282. The applicants also sought declaratory relief against the Penetang Mental Health Centre in an application not relevant to the present discussion.

23. See *id.* The applicants sought:

- (a) An Order in the nature of a declaration declaring that the Advisory Review Board (hereinafter referred to as the Board), while conducting a hearing pursuant to Sections 31 and 29 of the *Mental Health Act* R.S.O. 1970, c. 269, is subject to the provisions of the *Statutory Powers Procedure Act*, 1971 and the *Judicial Review Procedure Act*, 1971; and subject to the provisions of Sections 545 and 547 of the *Criminal Code* (Canada).
- (b) An Order in the nature of *certiorari* quashing the decision of the Board denying the applicants or their legal or medical appointees disclosure of any information that had been or was intended to be made available to the Advisory Review Board for the purpose of being taken into consideration by the Board in reaching its decision . . .
- (c) an Order in the nature of a declaration declaring that the decision of the Board denying the Applicants or their medical or legal appointees such disclosure . . . constituted a violation of the principles of natural justice.

24. *Id.*, at 286-287

existence.²⁵

For Mr. Justice Grange, therefore, the question of whether a nominally provincial Board is or is not appointed by or under a law of a province when it exercises federal powers apparently may be answered by determining if the provincial board predates the federal statute under which powers are delegated. This decision also appears to represent a significant shift in the judicial approach to the exclusionary provisions of section 2(g).

Unfortunately in neither *Vardy v. Scott* nor *Re Abel* do the judgments contain a detailed analysis of the inclusive and exclusionary clauses of section 2(g).²⁶ Yet because the Federal Court has previously held certain provincial appointees and an Advisory Review Board of another province to be federal boards, commissions or other tribunals these decisions offer an excellent opportunity to canvass thoroughly the effect of the section 2(g) definition on various instances of federal inter-delegation. Specifically, they invite commentary on the criteria (including constitutional principles) to be used in determining when a federal statute which apparently delegates power to a provincial tribunal, actually creates a separate federal body to exercise this federal jurisdiction.²⁷ Such an investigation necessarily has two aspects: (i) what is the meaning of the inclusive clause "any body . . . having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada"? and (ii) what is the meaning of the exclusionary clause "other than any such body constituted or established by or under a law of a province"? For it is only by analysing separately each of these terms of the section 2(g) definition that a correct approach to federal jurisdiction may be elaborated, and the relationship between federal constitutional jurisdiction under section 91 and Federal Court judicial review jurisdiction under section 2(g) may be clarified.

II. *Bodies exercising jurisdiction or powers conferred by or under an Act of the Parliament of Canada*

Within the general realm of the topic known as administrative law

25. *Id.*, at 296

26. In *Vardy v. Scott*, Dickson, J. discusses the point in three paragraphs; in *Re Abel* O'Driscoll, J. and Grange, J. each devote only one paragraph to this issue.

27. For the converse situation, a provincial statute which delegates powers to a federal board, see *Président de la Commission d'appel des Pensions v. Matte*, [1974] C.A. 252.

three distinct sources of decisional power usually have been identified: statute, royal prerogative and contract.²⁸ Hence, if one were to consider the Federal Court as indeed the appropriate jurisdiction for reviewing the exercise of *all* federal administrative law powers, one would expect its jurisdiction to be stated so as to encompass the decisions of any person or body exercising jurisdiction conferred by one of these sources. In other words, under such a view, the section 2(g) definition of "federal board, commission or other tribunal" (upon which judicial review jurisdiction under both sections 18 and 28 depends) should envision any body or decision-maker exercising section 91 powers or jurisdiction conferred (i) by or under an Act of Parliament, (ii) by or under the federal Royal Prerogative, and (iii) by or under any other enactment, prerogative or source (*e.g.* contract)²⁹ within a federally regulated domain.³⁰ But the language of section 2(g) of the *Federal Court Act* is not so comprehensive; "federal board, commission or other tribunal" is rather narrowly defined as

any body or any person having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada. . .³¹

Consequently, even at its widest (*i.e.* without taking into account the several exclusionary phrases of section 2(g) of the Act) Federal Court judicial review jurisdiction would appear not to extend to all administrative law powers in the federal domain, but rather, would seem restricted to persons or bodies exercising powers derived from a Parliamentary enactment.³²

28. See Molot, "Annual Survey of Administrative Law" (1975), 7 Ott. L.R. 514 at 515-517. This list is not exhaustive. See *infra*, text accompanying notes 40-46

29. Provided of course that such powers were of a public or quasi-public nature. See *Re O.P.P. Assoc. Inc. et al. and The Queen in Right of the Province of Ontario* (1974), 3 O.R. (2d) 698 (Div. Ct.)

30. In view of the justifications advanced at the time the *Federal Court Act* was passed, one would think that comprehensive federal judicial review jurisdiction was indeed intended to be vested in the Court. See, for example, Chalmers, "The Federal Court Act as an Attempt to solve some Problems of Administrative Law in the Federal Area" (1972), 18 McGill L.J. 206. Nevertheless, the subsequent attitude of Courts (see *Re Clark et al* (1977), 17 O.R. (2d) 593 (H.C.); *Herman v. A.-G. Canada* (1978), 23 N.R. 235 (S.C.C.)) and commentators (see *C.B.A. Special Inquiry Into Jurisdiction of Federal Court* (undated)) reflects an opposite perspective. Here, of course, one is concerned only with what jurisdiction actually was conferred by the *Federal Court Act*.

31. R.S.C. 1970, (2nd Supp.), c. 10, s. 2

32. This is not to claim that Federal Court jurisdiction may not be more extensive in other areas or under other sections of the Act. See *infra*, 39

Since the *Federal Court Act* came into force in 1971 a relatively consistent jurisprudence has adhered to the precise terms of section 2(g) and has refused to permit judicial control of federal prerogative powers under either sections 18 or 28.³³ In practice, it will be almost invariably the Governor-in-Council who exercises federal prerogative powers in such a way as to give rise to an application for judicial review,³⁴ although it is not inconceivable that certain other persons or bodies may be exercising delegated prerogative powers.³⁵ However, simply because the Governor-in-Council is the appropriate party respondent in judicial review proceedings does not of itself mean that prerogative powers are in issue: such jurisdiction may be conferred upon the Governor-in-Council by or under an Act of Parliament. In this latter case, there is every reason for concluding that the Governor-in-Council is a "federal board, commission or other tribunal" and hence, in principle, susceptible to Federal Court review.³⁶ For example, in *Inuit Tapirisat et al. v. Governor-in-Council*,³⁷ the Governor-in-Council acting under s. 64 of the *National Transportation Act*,³⁸ constituted a "federal board, commission or other tribunal". Moreover, on many occasions declaratory orders have been granted with respect to regulations made by the Governor-in-Council.³⁹ Nevertheless, if the Governor-in-Council indeed acts as the Crown (*i.e.* exercises Royal Prerogative jurisdiction) his acts will not be subject to judicial review under section 18 or section 28.⁴⁰ Furthermore, insofar as any

33. See for example, *M.N.R. v. Creative Shoes* (1972), 29 D.L.R. (3d) 89 (F.C.A.); *S.E.A.P. v. A.E.C.B.* (1977), 74 D.L.R. (3d) 541 (F.C.A.)

34. Under sections 12 and 15 of the *B.N.A. Act* it is however possible for the Governor-General alone, or the Queen herself to exercise such powers.

35. Such a situation could arise in situations such as *Ex parte Lain*, [1967] 2 Q.B. 864 or *Re Raney et al and The Queen in Right of Ontario* (1974), 4 O.R. (2d) 249 (C.A.) or in any case involving a true Royal Commission (*i.e.* a Commission not acting by virtue of the *Inquiries Act*, R.S.C. 1970, c. I-13). Finally such delegation could be possible under the provisions of section 14 of the *B.N.A. Act*.

36. This does not mean that review of decisions of the Governor-in-Council may be sought under section 28. See section 28(6) which expressly precludes review of "a decision or order of the Governor-in-Council . . .". Insofar as other prerogative decision-makers are concerned the requirement that a duty to act judicially be imposed "by law" would seem to exclude section 28 review.

37. (1978), 24 N.R. 361 (F.C.A.) *Cf. Desjardins v. Bouchard* (1976), 71 D.L.R. (3d) 491 (F.C.T.D.)

38. 1970 R.S.C., c. N-17

39. *The Queen v. Robertson*, [1972] F.C. 796 (C.A.); *Ulin v. The Queen*, [1973] F.C. 319 (T.D.)

40. Some early cases seem to countenance the possibility of declaratory proceedings being sought against the Crown. See, for example, *Smith v. The*

other person or body, however appointed, constituted or established, purports to exercise jurisdiction conferred by or under the federal Royal Prerogative, no application to review the exercise of such power would lie in the Federal Court under sections 18 or 28.⁴¹

But decision-making powers of a public or quasi-public nature at the federal level do not arise only under an Act of Parliament or under federal Royal Prerogative. There are a number of persons or tribunals whose jurisdiction may be considered to be derived at least in part from contract. For example, one may cite the case of arbitrators or arbitration boards acting pursuant to a collective agreement signed under the *Canada Labour Code*.⁴² While review of even truly consensual arbitrators at the provincial level has been held to fall within the terms of the Ontario *Judicial Review Procedure Act*,⁴³ since the judgment of the Supreme Court of Canada in *Association of Radio and T.V. Employees v. C.B.C.*⁴⁴ it has been accepted that at the federal level, these quasi-consensual bodies do not fall within the terms of section 2(g). The Supreme Court held, per Laskin, C.J.C., that

the bare direction for a provision for final settlement of all differences as to the meaning or violation of the terms of a collective agreement . . . [cannot bring]. . . any instrument for such settlement, be it a board of arbitration as in this case or some other agency, within the category of the public tribunals which are envisaged by the definition in s. 2(g).⁴⁵

Thus, even though various powers to resolve disputes were conferred under an Act of Parliament, the fact that the parties

Queen, [1972] F.C. 561 (T.D.); *Landreville v. The Queen*, [1973] F.C. 1223 (T.D.). However, it is probably more correct to see these as instances of an action against the Crown under section 17 of the *Federal Court Act* rather than as applications for declaratory relief under section 18. On the scope of relief against the Governor-in-Council and the Queen see *Re Clark and A.-G. Canada* (1977), 17 O.R. (2d) 593 (H.C.), and Macdonald "Comment" (1978), 10 Ott. L.R. 456.

41. A curious example of a situation where this conclusion would be significant arises in respect of institutions established under Royal Charter. The Royal Institution for the Advancement of Learning (McGill University) is one such body. Constituted under a pre-Confederation Royal Charter, the visitatorial jurisdiction in the University is vested in the Governor General. Since neither the administrative officers of the University, nor the Governor General exercises powers under a law of Canada, review of the decisions of each (to the extent such decisions are judicially reviewable) would remain vested in the Superior Court of Quebec.

42. R.S.C. 1970, c. L-1

43. S.O. 1971, c. 48. See *supra* note 28

44. [1975] 1 S.C.R. 118

45. *Id.* at 121

themselves selected the mode of settlement made the exercise of such powers so remote from the statute itself that jurisdiction could not really said to be founded in an Act of Parliament.⁴⁶ Hence, review would not lie in the Federal Court.

A second type of situation where Federal power does not arise either under an Act of Parliament or under federal prerogative can be traced to the constitutional structure of Canadian government. There are today still some institutions exercising federal powers granted by an Imperial Statute, most notably the *B.N.A. Act*. Among persons or bodies vested with such powers one may cite the Queen's Privy Councillors for Canada. Consequently any decisions made by the Privy Council under the *B.N.A. Act* (e.g. in advising the Governor-General) would not be subject to review in the Federal Court.⁴⁷ Again, education appeals to the Governor-in-Council under section 93(3) of the *B.N.A. Act* are an example of a federal power arising other than by statute or prerogative. Finally, in the case that it might arise, appointees of the Governor-in-Council under section 131 of the *B.N.A. Act*, who exercise powers to carry out the provisions of the Act would also be exempt from federal review.

A third example of federal power conferred by a mechanism which might not attract federal review under section 2(g) involves persons or bodies exercising powers flowing from a treaty entered into by the Federal government. Although invariably treaties concluded by the Government of Canada are incorporated and ratified by Parliamentary legislation it is arguable that certain decisions taken by tribunals or bodies pursuant to powers set out in such treaties are too remote from federal legislation to constitute decision by or under an Act of the Parliament of Canada. Such circumstances are, in practice, apt to be extremely rare.⁴⁸

In view of the above observations one might conclude that only

46. Since the *C.B.C.* case the *Canada Labour Code* has been amended to vest review jurisdiction expressly in Provincial Courts. For a recent example of such power see *Rankin v. National Harbours Board* (1979), 99 D.L.R. (3d) 631 (B.C.S.C.)

47. Furthermore, proceedings in *quo warranto* against a Privy Councillor as such could not be taken in the Federal Court. For an example of such a case see *The King v. Speyer*, [1916] 2 K.B. 858

48. In such a case it would be necessary to envision a tribunal established by treaty whose jurisdiction arises by consent of affected parties (e.g. on international arbitration agreement). It is difficult to speculate in this area, although the decision in *Laker Airways Ltd. v. Dept. of Trade*, [1977] 2 W.L.R. 234 (C.A.) suggests that various aspects Treaty-making powers may in the future come increasingly under scrutiny by way of judicial review.

those federal decision-makers whose powers are directly delegated by a federal statute may be judicially reviewed in the Federal Court. Even given this restriction, however, a literal reading of the phrase "by or under an Act of Parliament" would establish a broad jurisdiction, including in this category any body exercising delegated statutory powers, whatever be their nature: not only agencies, boards and commissions as those terms are popularly understood, but "all persons deriving decision-making authority from any Act of the Federal Parliament or subordinate legislation made under such an Act".⁴⁹ Hence, minor immigration officials,⁵⁰ District Supervisors under the *Indian Act*,⁵¹ penitentiary doctors,⁵² harbour policemen,⁵³ the Liquor Control Board of the Northwest Territories,⁵⁴ and officers of federal Crown corporations⁵⁵ presumably would be "federal boards, commissions or other tribunals", since all exercise powers ultimately traceable to a federal enactment. However, none have been held to fall under the definition of section 2(g); in each case, the court concluded that the official in question was not exercising jurisdiction under a federal statute.⁵⁶ Moreover, in the ten year history of the Act no application to review the decision of an officer of a federal corporation

49. Mullan, *Administrative Law* (2nd ed. 1979), s. 256

50. *Re Russo and M.M.I.* (1977), 70 D.L.R. (3d) 118 (F.C.T.D.)

51. *Bedard v. Isaac et al.*, [1972] 2 O.R. 391 (H.C.)

52. *McNamara v. Caros*, [1978] 1 F.C. 451 (T.D.)

53. *Rogers v. National Harbours Board*, [1979] 1 F.C. 90 (T.D.)

54. *Re Fortier Arctic Ltd.* (1971), 21 D.L.R. (3d) 619 (N.W.T.S.C.)

55. *Canada Metal Co. Ltd. v. C.B.C. (no. 2)* (1975), 11 O.R. (2d) 167 (C.A.)

56. In *Re Russo* the court stated at page 121: "persons authorized only to implement a decision made by a tribunal are not included in the definition . . . [of section 2]." In *Bedard*, the court stated at page 395: "I am not persuaded that the term 'federal board, commission or other tribunal' is sufficiently broad to encompass an individual such as a District Supervisor under the *Indian Act*." In *McNamara* the court stated at page 452: "the respondent Mendes, institutional physician at Matsqui Institution, a penitentiary as described in the *Penitentiary Act*, is not, when acting in his professional capacity in the treatment of inmates, a 'federal board, commission or other tribunal' as defined." In *Rogers* the court stated at page 91: "the decision here under attack was not made by a 'federal board, commission or other tribunal' within the meaning of section 2 of the *Federal Court Act*. That decision was pronounced by a police officer acting under the provisions of the collective agreement." In *Re Fortier Arctic* the Court held that the Liquor Control Board of the Northwest Territories was not a federal board because section 28 of the federal *Interpretation Act* which provides that "province" means . . . and includes . . . the Northwest Territories." Finally in *Canada Metal* the court stated at pages 170-171: "the C.B.C. . . . [is] . . . a corporate entity carrying on the business of broadcasting in this country with none of the attributes of a federal board, commission or tribunal."

apparently has been brought, even though his authority to act is derived from a federal statute, the *Canadian Business Corporations Act*.⁵⁷ Finally, there is no reported case where an attempt has been made to seek judicial review of a private citizen exercising powers under a federal statute (e.g. arrest powers under section 449 of the *Criminal Code*).⁵⁸ In each of the above instances one can find an example of powers being exercised which, according to the literal terms of section 2(g), should be subject to judicial review in the Federal Court. Yet each either has not or likely would not be held to fall under section 2(g). One may conclude that, notwithstanding the apparently broad definition of "federal board, commission or other tribunal" (at least insofar as persons deriving powers from an Act of Parliament are concerned), Courts will limit its scope to persons or bodies who would be viewed as administrative decision-makers under an orthodox view of the expression.⁵⁹

57. R.S.C. 1970, c. C-32. Other federal statutes which authorize corporate decision making include the *Bank Act*, R.S.C. 1970, c. B-1; or the *British and Canadian Insurance Companies Act*, R.S.C. 1970, c. I-15. In *A.-G. Canada v. Canard*, [1976] 1 S.C.R. 170 Chief Justice Laskin suggests that implicit in section 2(g) is the requirement that decision-makers be exercising public functions. Since the above was written the Alberta Court of Appeal addressed this issue in *Sparling v. Duby*, (1980) 6 W.W.R. 97, finding no jurisdiction in the Federal Court.

58. In such cases a more appropriate remedy would be an action for false imprisonment and on this basis courts are likely to refuse relief even though Federal Court jurisdiction could be established.

59. The following quotation, from the judgment in *Wilcox v. C.B.C.* (1979), 101 D.L.R. (3d) 484 (F.C.T.D.) is representative of the judicial approach in this area. At 487 the Court states:

While I see no reason to doubt that the powers referred to in the definition of "federal board, commission or other tribunal" in s. 2 are not confined to powers that are required by law to be exercised on a judicial or quasi-judicial basis, it appears to me that the expression "jurisdiction or powers" refers to jurisdiction or powers of a public character in respect of the exercise of which procedures by prerogative writs or by injunction or declaratory relief would formerly have been appropriate ways of invoking the supervisory authority of the Superior Courts. I do not think it includes the private powers exercisable by an ordinary corporation created under a federal statute which are merely incidents of its legal personality or of the business it is authorized to operate. Absurd and very inconvenient results would flow from an interpretation that it does include such powers and it does not appear to me that that was intended or that it is necessary to so interpret the expression in the context in which it is used.

It appears to me, as well, that if the powers of the defendant under the *Broadcasting Act* in respect of the defendant's broadcasting activities are not powers of the kind embraced by the definition, there is even less reason to conclude that the power of the defendant to engage employees falls within the meaning of the definition.

The discussion so far has revealed two limitations upon federal jurisdiction: first, the definition in section 2(g) offers an incomplete inventory of federal administrative decision-makers, and secondly, courts have restricted the scope of the expression “conferred by or under an Act of Parliament” to various officials exercising *public* powers granted rather directly by a federal statute. But the ambit of this definition is also limited by a third condition, the interpretation placed on the expression “laws of Canada” by the Supreme Court of Canada. Although section 2(g) is drafted so as to encompass all persons “having, exercising or *purporting to exercise* powers” it is now open to question whether Parliament has the authority to establish jurisdiction in the Federal Court to hear applications taken against individuals *purporting* to exercise powers conferred by an Act of Parliament. If Parliament may vest in a section 101 court only jurisdiction in respect of matters where there is “applicable and existing federal law, whether under statute or regulation or common law”⁶⁰ then the Federal Court cannot be given jurisdiction whenever a federal tribunal’s action formally exceeds its statutory authority or whenever a body or persons usurp federal powers, or whenever a federal tribunal is constituted under a constitutionally *ultra vires* statute. In other words, it is a reasonable deduction from the *Quebec North Shore Paper* case that unless a decision-maker’s powers actually result from a law of Canada (which is manifestly not the case whenever he acts *ultra vires*), Federal Court jurisdiction upon judicial review should be excluded. Such a result would indeed sterilize judicial review in the Federal Court and consequently one would not expect the Supreme Court to read its decision in *Quebec North Shore Paper* literally. Rather, one might suggest that the Court will find to exist a “law of Canada” sufficient to support a judicial review application in the Federal Court until such time as it declares such law not to exist in a given case.⁶¹

I am accordingly of the opinion that the Court does not have jurisdiction under s. 18 to entertain the plaintiff’s claim and, as the Court has no general common law or equity jurisdiction but has only such jurisdiction to administer federal law as has been conferred on it by statute, there is, as well, no jurisdiction to entertain an ordinary proceeding between subject and subject for the declaratory relief which the plaintiff seeks.

60. *Quebec North Shore Paper Co. et al v. C.P. Ltd.* (1976), 71 D.L.R. (3d) 111 at 120

61. Although the decision antedates *Quebec North Shore*, this seems to be the rationale sustaining Federal Court jurisdiction in *Re Steve Dart Co. and D.J. Duer & Co.* (1974), 46 D.L.R. (3d) 745, (F.C.T.D.) commented on by Fera, (1977), 23

It follows from the above analysis that the scope of federal judicial review jurisdiction is far from coextensive with federal constitutional powers. Rather, at the outset, it is circumscribed by a mixture of definitional lacunae (the omission of non-statutory sources of power), restrictive judicial interpretation (the exclusion of various statutory decision-makers whose powers seem remote from the constituent legislation or not sufficiently public in character), and over-riding constitutional issues (the scope of jurisdiction which may be granted to a section 101 court). But, despite these express and implied limitations on the scope of section 2(g) there is little doubt that both the Magistrate in *Vardy v. Scott* and the Advisory Review Board in *Re Abel* were exercising "powers or jurisdiction conferred by or under an Act of the Parliament of Canada". In *Vardy* these powers were granted by section 31 of the *Extradition Act*, while in *Re Abel* these were set out in sections 547(5) through (7) of the *Criminal Code*. Therefore, in either of these cases, if judicial review jurisdiction is to be found in provincial superior courts (as it was), such jurisdiction must result from the fact that one of the exceptions set out in section 2(g) of the *Federal Court Act* is found to apply.

III. *Other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province. . .*

The definition of section 2(g) makes it apparent that even if a person or body is found to be exercising federal powers, review under the *Federal Court Act* may be excluded if the appointment of an individual or the establishment of the body can be traced to a law of a province. Consequently, in each case where a person or body exercises federal powers, one must also ask by what title he exercises these powers. In order to divine the precise situations in which a power-holder will be held to fall within a section 2(g) exception, it is necessary to distinguish various mechanisms by which the delegates of federal power may be appointed.

McGill L.J. 677. One might also attempt to justify federal jurisdiction by distinguishing acts from omissions: an *ultra vires* act constitutes an omission to do what is mandated by statute. Hence, a reviewing court would find jurisdiction by claiming that "administration of the laws of Canada" includes making determinations that a negative statutory duty was not performed. Again, this disingenuous attempt to establish Federal Court jurisdiction should be not be adopted.

Presumably, the same three sources of provincial appointment may exist as sources of federal power: provincial statute, provincial prerogative, and other (including contract). With respect to individuals appointed by virtue of provincial royal prerogative to whom federal statutory powers are granted, the locus of judicial review is not difficult to trace. Such persons or bodies (*i.e.* true Royal Commissions appointed by the Lieutenant-Governor of a province),⁶² if vested with federal statutory powers, would be subject to review in the Federal Court whenever exercising these federal powers. Insofar as persons or bodies falling within the third category of appointment are concerned, a similar conclusion must be reached. Thus, any federal statutory powers delegated to a Lieutenant-Governor would be reviewable in the Federal Court, as this office is neither constituted nor established under a "law of a province", but rather under the *B.N.A. Act*.⁶³ Again, in situations where a federal statute delegates powers to a consensual tribunal (*e.g.* an arbitrator) review would also lie in the Federal Court.⁶⁴ Hence, adjudicators under *The Public Service Staff Relations Act*⁶⁵ (exercising powers under an Act of Parliament because arbitration is obligatory: nominated by the parties themselves) would be subject to federal review. Finally, review of any body exercising federal powers, whose source of appointment is non-governmental or for which it is difficult to determine precisely who is the constituting authority, would be vested in the Federal Court.⁶⁶

The remaining category of individual or body is that involving situations where federal statutory power is delegated to a person or persons who are already appointed or constituted to perform various statutory functions by a provincial law. As noted, the characterization process in such cases must proceed first with an analysis of the federal legislation. On the one hand, if the federal Act purports to

62. Possibly also included in the category of prerogative appointments would be provincial Official Guardians. See *Re Knoch* (1979), 25 O.R. (2d) 312 (H.C.)

63. Thus, the power of a Lieutenant-Governor to appoint an advisory review board under section 547 of the *Criminal Code* would be reviewable only in the Federal Court. See *Lingley v. Hickman*, [1972] F.C. 171 (T.D.)

64. Although the decision in *Jacmain v. A.-G. Canada* (1977), 81 D.L.R. (3d) 1 (S.C.C.) involved an appeal, if review were taken upon a non-appealable point (*n.b.* section 29, *Federal Court Act*) review would be sought in the Federal Court.

65. R.S.C. 1970, c. P-35

66. A paradigm example of such a body would be the "therapeutic abortion committee" envisaged by section 251 of the *Criminal Code*. Although this committee exercises federal statutory powers, it is difficult to establish precisely how, or by virtue of what power it is established or constituted.

create a new office to exercise federal powers (*e.g.* a Firearms Registrar) even though the office may be filled by an individual holding a provincial appointment in a similar domain (*e.g.* a police constable) persons holding that office will be deemed to be federally appointed.⁶⁷ On the other hand, if the federal statute merely delegates powers to a named provincial appointee (*e.g.* a deputy Crown Attorney) further analysis seems to be required.⁶⁸ In order to determine by whom such an individual is appointed it seems to be necessary to have recourse to the concept of *persona designata*.⁶⁹ if the delegate is performing functions having nothing to do with his regular provincial duties he will be considered to be a federal appointee *persona designata*; if his federal powers are only tangential to the scheme of the federal statute and are analogous to his day-to-day provincial duties he will be considered as appointed under a law of a province.⁷⁰

A similar analysis should avail in the case of bodies already constituted or established under a law of a province. If the federal legislation purports to create a distinct federal board to exercise federal powers, even though a similarly constituted provincial body may be in existence, the board so established will be subject to review only in the Federal Court. If the federal Act simply delegates powers to an existing provincially-appointed body further analysis must be undertaken into whether the concept of *persona designata* may apply. However, given the current judicial approach to this concept it is unlikely that a provincially-appointed board to whom federal powers are directly delegated would ever be held to be acting *persona designata* as a federal board.⁷¹

It follows therefore, that apart from instances where the *persona designata* issue arises, the key questions for determining federal jurisdiction are "when will a person appointed under a law of a

67. *Walker v. Gagnon*, [1976] 2 F.C. 155 (T.D.); *Martinoff v. Gossen*, [1979] 1 F.C. (T.D.)

68. See *Johnston v. A.-G. Canada*, [1977] 2 F.C. 301 (T.D.). But compare *Re Shoal Lake Band of Indians and The Queen* (1979), 101 D.L.R. (3d) 132 (Ont. H.C.) where the potential jurisdictional question was not even addressed.

69. See *Vardy v. Scott* (1976), 66 D.L.R. (3d) 431 (S.C.C.)

70. This test for determining when an official acts *persona designata* was elaborated by the Supreme Court in *Herman v. A.-G. Canada*, [1979] 1 S.C.R. 729. For a critique of this decision see Macdonald, *supra*, note 1

71. See the Transport Board cases, *supra*, note 12. In order for the board to be found to be acting as a *persona designata* under the current test one would have to imagine a situation such as the provincial Transport Board exercising powers under the federal *Agricultural Products Marketing Act*.

province be held not to be so appointed when exercising federal powers?" and "when will a collection of persons or a body established under a law of a province be held not to be so constituted when exercising federal powers?" Insofar as individuals are concerned, this question is relatively easy to answer; one need only inquire if a power of appointment is set out in the federal Act. For example, section 81(1) of the *Criminal Code* states that a local Registrar of firearms means "a person appointed in writing by the Commissioner or by the Attorney-General of a province",⁷² a clear appointment under a federal statute. The more difficult hypothesis involves bodies having an existence as provincial tribunals to whom federal powers are granted. Since this issue has arisen in the past with respect to Motor Transport Boards under the *Motor Vehicle Transport Act*⁷³ and with Advisory Review Boards under the *Criminal Code*⁷⁴ discussion may usefully follow a comparison of these two federal enactments. Under the *Motor Vehicle Transport Act* the delegation of federal power is expressed in sections 2, 3(2) and 4.

Section 2 defines "provincial transport board" as:

a board, commission or other body or person having under the law of a province, authority to control or regulate the operation of a local undertaking.

Section 3(2) provides:

The provincial transport board in each province may in its discretion issue a license . . .

Section 4 states:

. . . the tariffs and bills . . . may in the discretion of the provincial transport board be determined and regulated by the provincial transport board . . .

A careful reading of these sections demonstrates that the federal act in no way constitutes or establishes a separate Transport Board to regulate extra-provincial matters. Rather the statute refers to the provincial board by its generic title, sets out no rules governing the manner of its creation or the manner of exercise of the powers delegated, and delegates powers directly to that Board.

On the other hand, section 547 of the *Criminal Code* reveals an entirely different approach to the delegation of federal powers. This

72. R.S.C. 1970, c. C-34, s. 82

73. R.S.C. 1970, c. M-14

74. R.S.C. 1970, c. C-34

section provides:

547(1). The lieutenant-governor of a province may appoint a board to review the case of every person in custody in a place in that province by virtue of an order made pursuant to section 545 or subsection 546(1) or (2).

Sections 547(2) through (4) and 547(7) establish limitations on the qualifications of members, enact rules as to quorum, provide for the designation of a chairman and grant several procedural powers to the chairman. These sections make it absolutely clear that a separate board is being created for the express purpose of exercising the powers delegated by subsections (5) and (6).⁷⁵ First, unlike the situation envisioned by the *Motor Vehicle Transport Act*, here the *Criminal Code* does not even mention an existing provincial body; moreover, it stipulates how the Board is to be created and it provides for certain procedural powers of the board when it performs its task. In other words, while it is logical to conclude that Provincial Transport Boards are formally established under a law of a province, the above provisions of section 547 of the *Criminal Code* indicate that Advisory Review Boards exercising powers delegated by section 547 are constituted not under a law of a province but under the *Criminal Code*.⁷⁶

Yet in *Re Abel* Mr. Justice Grange was of the opposite opinion for reasons relating specifically to the statutory framework of interdelegation operative in the province of Ontario. Nevertheless, his remarks may be extrapolated to most instances of federal interdelegation. After noting that an analogous board was created by the Ontario *Mental Health Act*⁷⁷, and that prior to the enactment of section 527A of the *Criminal Code* this provincial Board exercised similar functions to those set out by the current section 547,⁷⁸ he concluded:

the enactment of the *Criminal Code* section could not transform a

75. These provisions were originally added to the *Code* as section 527A by S.C. 1968-69, c. 93, s. 69 at which time they were amended by S.C. 1974-75-76 c. 93, s. 69 at which time they were renumbered as section 547, and subsections 2 and 5(b) were amended and section 5(f) and 7 added thereto.

76. It should be noted that the Lieutenant-Governor is empowered to appoint members. Yet this power is itself a federal power and the lieutenant-governor is himself reviewable in the Federal Court. *Supra*, note 60

77. R.S.O. 1970, c. 269

78. These provisions in the *Mental Health Act* were added by S.O. 1967, c. 51, s. 31 while section 527A of the *Criminal Code* was enacted by S.C. 1968-69, c. 93, s. 48.

provincial board into a federal board. It could only put it out of existence.⁷⁹

In other words, Grange, J. believed that if federal and provincial legislation were in conflict the only possible result would be the total abolition of the board created by provincial law. Since the tasks performed by the previously constituted provincial board continued to be undertaken under section 547 Grange, J. concluded that the provincial board itself was continued and was subject to review in the Divisional Court.⁸⁰ Moreover, he felt that the previous Advisory Review Board decision, *Lingley v. Hickman*⁸¹ was inapplicable in Ontario, as no provincial Board existed in New Brunswick at the time the *Criminal Code* was amended.

These remarks of course raise several important issues in constitutional law, including paramountcy.⁸² However, both O'Driscoll, J.⁸³ and Grange, J.⁸⁴ agreed that since no question of the constitutionality of the Ontario legislation or of the A.R.B. was raised, that question should not be addressed. While it may be that ultimately the resolution of all the issues in dispute in *Re Abel* will require the Court to pass on the constitutional validity of both the provincial and federal legislation, and to determine the precise domain within which each is operative, even without such an investigation the Court should be able to arrive at a juridical characterisation of the Advisory Review Board contemplated by section 547 of the *Criminal Code*. To the extent that he did not undertake such an exercise of characterisation, Grange, J. failed to frame adequately the jurisdictional question raised in *Re Abel*. The *Criminal Code* may indeed put the provincial board completely out of existence; but it may also simply constitute a parallel federal board for the purposes of exercising section 547 powers, whose membership happens to be identical to the provincial board exercising powers under the *Mental Health Act*. In either case

79. *Supra*, note 18, at 296

80. At page 289 of his judgment he states:

The ARB was created by Order in Council [O.C. 1486/77] pursuant to the *Mental Health Act*, R.S.O. 1970, c. 289, . . . The *Criminal Code* also has provisions for the establishment of a board of review (see *Criminal Code*, s. 547 [am. 1974-75-76, c. 93, s. 71]. For substantially the same purpose . . . Ontario has proceeded under the *Mental Health Act*.

81. [1972] F.C. 171. (T.D.)

82. See Hogg, *Constitutional Law of Canada* (1977), at 101-113

83. *Supra*, note 18 at 285

84. *Id.*, at 289

judicial review in the Federal Court of section 547 powers would be indicated.

That two distinct Boards have been created can be seen by comparing the language of section 31 of the *Mental Health Act* with that of section 547 of the *Criminal Code*. The *Criminal Code* merely requires the Lieutenant Governor to appoint an Advisory Review Board; this has been done *ipso facto* by the appointment of members to the Board contemplated by section 31 of the *Mental Health Act*. Provided that the specific requirements of section 547 respecting membership, quorum and procedures are followed,⁸⁵ there is no reason not to conclude that indeed it is the "federal board" which is acting, notwithstanding the beliefs of the Chairman or parties to a hearing. As long as the requirements of section 547 are followed, this panel is a federal board when it reviews any detention resulting from an order under section 545 or 546(1) or (2) of the *Criminal Code*. On the other hand, if the Board so acting is improperly constituted according to the Code, or does not first act within six months various remedies may be sought in the Federal Court: a declaration against the Lieutenant Governor declaring that he should appoint a Board in the latter case; or a mandatory injunction against the Board in the former case, requiring it to act. In all cases, review jurisdiction would be exclusively vested in the Federal Court, whenever powers delegated by section 547 are being exercised.

It follows from the above discussion, therefore, that the respective dates of creation of federal and provincial boards is not relevant to the issue of whether a "federal board" commission or other tribunal" has been created. One may conclude, insofar as the

85. There are several differences in the requirements of the *Criminal Code* and the *Mental Health Act*. (i) The former enactment requires a board of 3 to 5 members of which 2 shall be qualified psychiatrists and 1 a qualified barrister; the latter requires a board comprised of a judge or retired judge of the Supreme Court, a psychiatrist and at least three other members. (ii) The *Code* requires a quorum of three including at least one psychiatrist and one lawyer; the *Act* requires a quorum of five, including a psychiatrist and the judge. (iii) The *Code* permits any member to serve as Chairman; the *Act* requires the judge to so serve. (iv) The *Code* requires a first hearing within six months of detention; the *Act* permits a hearing as late as 2 years less one day from the date of detention. (v) The *Code* stipulates the Chairman's powers by reference to the Federal *Inquiries Act*, R.S.C. 1970, c. I-13; the *Act* incorporates the procedures of section 29 of the *Mental Health Act*. Nevertheless, there is no direct inconsistency in these provisions and there is no reason why exactly the same individuals performing exactly the same tasks cannot serve on both boards at once.

provincial exception of the section 2(g) definition is concerned, that Federal Court judicial review jurisdiction will be ousted only when the recipient of a federal statutory power is appointed by or under a law of a province, and not by or under the provincial prerogative or some other provincially oriented source. Moreover, even in cases where federal powers are delegated to a named board or official constituted by or under a provincial statute, recourse must be had to the concept of *persona designata* in order to determine if, in fact, these federal powers are being delegated to the provincial appointee *qua* provincial appointee. Finally, in cases of inter-delegation to boards or commissions, it is necessary to compare carefully the provisions of the federal or provincial statutes with respect to membership, procedures and quorum. Differences between the two statutes are evidence that indeed a separate federal board is being created.

IV. Conclusion

It is almost impossible to pick up a volume of any Canadian series of law reports and not find at least one judgment in which the jurisdiction of the Federal Court is (or should be) in issue. The precise scope of the judicial review jurisdiction of the Court is of particular difficulty. As a result of the *Quebec North Shore Paper* case potential constitutional problems abound. But more importantly, the language of section 2(g) of the *Federal Court Act* is simply inappropriate as a definition of the types of powers and categories of decision-makers who should be open to supervision by the Court. Both the principal clause which states the foundation of this jurisdiction and the exception clauses which exclude federal review in certain cases are elliptical and ambiguous. The expression "any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada . . ." is elliptical, as it does not include a number of decision-makers who exercise federally authorized administrative law powers. The exception clause "other than . . . any such person or persons appointed under section 96 of the *British North America Act, 1867*" is ambiguous, as it does not provide guidance in determining the scope of the doctrine of *persona designata* as applied to the judiciary. Finally, the exception clause "other than any such body constituted or established by or under a law of a province or any such person or persons appointed

under or in accordance with a law of a province'' is both elliptical and ambiguous.

This last clause is elliptical in that it does not extend the exception to provincial officials not appointed by an Act of a legislature: Lieutenant-Governors, persons appointed under provincial Royal Prerogative, and several other provincial decision-makers may thus be subject to Federal Court review in many cases. The clause is also ambiguous because it neither sets out criteria for determining the scope of the *persona designata* concept with respect to provincially appointed officials, nor does it elaborate, in cases of federal inter-delegation to a board or commission, factors to be considered in evaluating when a body has been constituted or established under a law of a province. Cases such as *Vardy v. Scott*⁸⁶ and *Re Abel and Penetang Mental Health Centre*⁸⁷ are examples of the confusion which this last exception clause has created.

In view of the inevitable problems which arise whenever a system of dual jurisdictions is created some have recommended the abolition of the Federal Court judicial review power.⁸⁸ Yet there is nothing inherently intractable about defining the circumstances in which recourse should be sought before the Federal Court. Minor amendments to both the inclusive and exclusive clauses of section 2(g) will overcome most of the problems here raised. In the interim one cannot be overly critical of provincial Superior Courts which refuse to decline jurisdiction on the basis that review should have been sought in the Federal Court. Nevertheless, especially in cases involving federal inter-delegation, counsel must be prepared to carefully examine the provisions of the federal statute which grants such power in order to determine if indeed a separate federal tribunal is envisioned.

86. (1976), 66 D.L.R. (3d) 431 (S.C.C.)

87. (1979), 24 O.R. (2d) 279 (Div. Ct.)

88. Compare Mullan, *The Federal Court Act* (1977), at 74, and the comments of Professor Evans referred to therein.