The *Federal Courts Act* and Federal Jurisdiction

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I. Introduction

Chief Justices and the organizing committee, very many thanks for the invitation to participate in this important occasion, the celebration of the 40th anniversary of the coming into force of the original *Federal Court Act, 1970*, and the creation of what are today the Federal Court and the Federal Court of Appeal. In recent years, I have had the opportunity on a number of occasions to be part of the Federal Court and Federal Court of Appeal annual education seminars. Over that time, I have come to value greatly the Courts' commitment to the development of coherent and appropriately grounded principles of judicial review of administrative action. My own thinking about judicial review has also been much enriched by my various interactions with the judges of both courts. I am therefore delighted to be part of these celebrations and speaking to you today, as I did twenty years ago along with one of the other presenters today, my co-panelist, Raynold Langlois.[1]

In this paper, my objective is to survey briefly the origins and evolution of the Federal Courts' jurisdiction, and, in particular, the burdens under which it was labouring in 1991 on the occasion of the 20th anniversary of the then Federal Court. I will then detail the extent to which the 1990 amendments to the *Federal Court Act, 1970* dealt with some of the major criticisms of the Court to that point, before moving to a consideration of broader questions pertaining to the Courts' judicial review powers in particular. What were the objectives in conferring on the Federal Court extensive, though not totally exclusive judicial review jurisdiction over federal statutory and, after 1991, prerogative decision makers? Was there an expectation that the Federal Court (now Federal Courts) would develop a separate brand of judicial review law? If so, why, and has that come about? If not, what are the justifications for a federal court, rather than the provincial superior courts exercising the bulk of judicial review jurisdiction in the federal domain? Have those justifications found fulfilment in the Courts' judicial review jurisprudence?

II. The Federal Court in 1991

On the occasion of the Courts' 40th anniversary, it is fascinating to revisit the proceedings that marked the 20th anniversary in 1991: a symposium held by the Canadian Bar Association in Toronto in February of that year, *The Role of the Federal Court in the 1990s*, and the Court's own symposium held in Ottawa on June 26: *The Federal Court of Canada – An Evaluation*.

Not surprisingly, John Turner, one of the parents of the *Federal Court Act*, in his address at the Federal Court symposium praised the Court lavishly.[2] In doing so, he quoted[3] from, among others, the paper delivered by then Professor John Evans at the CBA symposium:

> At a time when so much of the glue that holds this improbable country together seems to be

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1 In the proceedings of the 1991 symposium, *The Federal Court of Canada – An Evaluation*, there is a paper by Justice Frank Iacobucci, "The Role of the Federal Court in the 1990s", at 261, who is part of today's programme. However, by the time of the symposium, Justice Iacobucci had gone from being the Chief Justice of the Federal Court to being a Justice of the Supreme Court of Canada and he did not speak at the symposium. Rather, his paper was the one that he had prepared for the earlier Canadian Bar Association symposium, *The Role of the Federal Court in the 1990s*, a symposium presented in Toronto and elsewhere.

2 The Right Honourable John N. Turner, "The Origin and Mission of the Federal Court of Canada", *id.*, at 1 and see 16-17 particularly.

3 *Id.*, at 15.

> eroding, the Federal Court of Canada remains a truly national, bilingual institution, dispensing justice from coast to coast. Its recent statutory renovations should help it to gain the legitimacy and acceptance that has so far eluded it. A decent building would not go amiss. Having survived that most dangerous life phase, adolescence, the Court is now better able to come to its own as a specialist public law court second in importance only to the Supreme Court of Canada.[4]

However, not everyone shared those sentiments. The Attorney General of British Columbia had been calling for the abolition of the Court. Various motions to that effect had been before the Canadian Bar Association. While the Canadian Bar Association rejected the British Columbia position, nonetheless, it had passed a number of resolutions in 1978 and reaffirmed them in 1982 calling for reduction in the Court's jurisdiction. Most notably, the CBA wanted all actions by or against the Federal Crown removed from the Federal Court and relocated in the provincial superior courts.[5] Brian Crane, who had been a member of two CBA Special Committees on the Federal Court, continued to advocate this position at the 1991 Federal Court symposium.[6] Much of the scepticism about the Court was indeed reflected in the title of the paper that my co-panelist this morning delivered at that symposium: “La Cour Fédérale: Une Morte en Sursis” (“The Federal Court: Dead [Wo]Man Walking”).[7]

What was behind this dissatisfaction with the Court? I believe that it was driven by five principal concerns.

The first and most fundamental was a belief on the part of some that Canada did not need a Federal Court; that jurisdiction over matters involving federal law and institutions was exercised appropriately by the section 96 courts. Among the advocates of this position, one that he maintains to this day, was one of Canada's pre-eminent constitutional law scholars and practitioners, Peter Hogg:

> ...Canada does not need a dual court system. The provincial courts have general jurisdiction over all causes of action; the judges of the higher courts are federally appointed; and consistency of decisions is guaranteed by the appeal to the Supreme Court of Canada. The existence of a parallel hierarchy of federal courts cannot fail to give rise to wasteful jurisdictional disputes and multiple proceedings.[8]

Much of the fuel for Hogg's argument came from the case law concerning the reach of the Federal Court's jurisdiction over civil disputes involving subject matters coming within federal legislative competence. Under the test developed by the Supreme Court of Canada, Federal Court competence depended not simply on the subject matter of the litigation involving a field of federal legislative competence. There were two other requirements. Not only did the dispute have to relate to a federal legislative class of subject, but also:

> b. There is actual operative applicable federal law, be it statute, regulation or common law, pertaining to the pith and substance of the litigation; and

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4 “The Role of the Federal Court in the 1990's.”

5 Various speakers at the 1991 symposium, including John Turner provide the details. However, the fullest account is to be found in the paper delivered by Raynold Langlois, my co-panelist: “La Cour Fédérale: Une Morte en Sursis”, *supra*, note 1, 237 at 241-48. See also Ian Bushnell, *The Federal Court of Canada: A History* (Toronto, University of Toronto Press, 1991) at 311-14.

6 Brian Crane, Q.C., “Jurisdiction of the Federal Court”, *supra*, note 1, 67, at 86.

7 *Supra*, note 5.

8 Peter W. Hogg, 1 *Constitutional Law of Canada* (Toronto: Thomson Carswell, serial), at pp. 7-27 and 7-34.

c. The administration of that federal law has been confided to [the Federal Court].[9]

At the 1991 symposium, Brian Crane detailed the problems that this test had created, and, in particular, the very uncertain status of what amounted to an operative federal law, not to mention the content of federal common law. In addition, the Supreme Court did not appear to countenance the possibility of pendent jurisdiction allowing the Federal Court to assume all aspects of a matter that in its principal characteristics came within the ambit of the three stage test.[10] Thus, the Court had no jurisdiction to entertain a counterclaim in a matter otherwise properly before it when the subject of the counterclaim did not meet the test.[11] All of these uncertainties and problems provided ample support for Hogg's contentions about wasteful jurisdictional disputes and multiple proceedings, a point that he too makes graphically in his Constitutional Law text and other academic writings.[12]

The third consideration arose much more directly from the terms of the original *Federal Court Act*[13] itself. In conferring judicial review jurisdiction on the Federal Court, the Act spoke in terms that generated much non-productive litigation. The threshold to the Court's jurisdiction in judicial review depended on classification of the impugned decision-maker as a “federal board, commission or other tribunal.” This term was defined in less than crystal clear fashion in section 2(g) of the Act.[14] However, even more litigation[15] was generated by the legislative division of original competence in judicial review matters between the Federal Court Trial and Appeal Divisions, the notorious original sections 18 and 28. If the challenged decision or order (and it had to be a decision or order and did not apply to pending proceedings) was “other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis”, it was subject to the original judicial review jurisdiction of the Appeal Division or Federal Court of Appeal. If ever a formula conferring jurisdiction was destined to generate litigation, particularly on the part of a Ministry of Justice determined to take every procedural and jurisdictional point, this was it.

Fourthly, there was a sense among the practising profession that, despite the fact that the Court had registries and sat in various cities across the country, it was not in tune with the realities of the various regions of the country and brought a centrist view to its handling of the disputes coming before it. This concern was reflected in two recommendations emerging from the Canadian Bar Association: that jurisdiction under the federal *Expropriation Act* be removed from the Federal Court and conferred on provincial courts, and, much more vaguely, that jurisdiction involving “purely local issues” also be

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9 As summarized recently by Harrington J. in *Onuschak v. Canadian Society of Immigration*, 2009 FC 1135, 357 F.T.R. 22, at para. 5, citing the leading authorities of *Canadian Pacific Ltd. v. Quebec North Shore Paper Co.*, [1977] 2 S.C.R. 1054; *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654; and *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752.

10 *Supra*, note 6, at 71-86. See also Brian Crane, “Constitutional Restraints on the Federal Court in Relation to Crown Litigation” (1992), 2 N.J.C.L. 1.

11 For a rejection of the American pendent jurisdiction doctrine, see *Roberts v. Canada*, [1989] 1 S.C.R. 222, though *cf R. v. Thomas Fuller Construction*, [1980] 1 S.C.R. 695.

12 *Supra*, note 8, at 7.2(b) – (d). See also, Peter W. Hogg, Comment (1977), 55 Can. Bar Rev. 550 and “Federalism and the Jurisdiction of Canadian Courts” (1981), 30 U.N.B.L.J. 9. For other commentary, see J.M. Evans, Comment (1981), 59 Can. Bar Rev. 124; and J.M. Evans and Brian Slattery, Comment (1989), 68 Can. Bar Rev. 817, as well as Bushnell's history, *supra*, note 5, at 232-57.

13 R.S.C. 1970, 2nd Supp., c. 10; S.C. 1970-71-72, c. 1.

14 For details of the case law up until 1997 see David J. Mullan, *Administrative Law* (Toronto: Carswell, 1997, 3rd ed.), at paras. 690-95.

15 Involving appeals to the Supreme Court of Canada is cases such as *Howarth v. National Parole Board*, [1976] 1 S.C.R. 453; *Minister of National Revenue v. Coopers & Lybrand*, [1979] 1 S.C.R. 495; *Martineau v. Matsqui Institution Inmate Disciplinary Committee*, [1980] 1 S.C.R. 602; and *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879.

removed from the Federal Court.[16]

Finally, in the first twenty years of the Court, there was a sense that too often appointments to the Court had been used for the purposes of rewarding retiring federal politicians.[17] While John Turner defended the appointment of former politicians in his paper at the 1991 symposium,[18] the Canadian Bar Association had been quite explicit about the need for qualified appointments, a need that it expressed quite deliberately in terms of "relevant professional experience."[19]

Coming out of the 1991 symposium, there was therefore a sense that, while perhaps the Court's continued existence was not in jeopardy, nonetheless, there was room for significant improvement in a number of important respects in terms of the constitutive legislation, personnel, and performance.

III. Meeting the Challenge

Indeed, "rescue" was close to hand at the very moment of the 1991 symposium in that Parliament had already passed amendments to the *Federal Court Act*.[20] These amendments were awaiting proclamation, a step that was scheduled to follow the redrafting of the *Federal Court Rules* to accommodate the statutory amendments[21]. (By virtue of further amendments in 2002, there was a renaming of the Act as the *Federal Courts Act* to reflect the structural change from one Court with two divisions to two single courts: The Federal Court and the Federal Court of Appeal.[22])

The 1990 amending legislation addressed a number of the concerns identified by the Court's critics and at the two symposia. In particular, the jurisdictional quagmire arising out of sections 18 and 28 was eliminated. Henceforth, original judicial review jurisdiction was, as a default position, the preserve of the Federal Court, now by way of a simplified application for judicial review.[23] However, the Federal Court of Appeal continued to retain significant original judicial review jurisdiction by way of a list of designated authorities.[24] While there might have been some quarrel with the wisdom of the actual list, at least this change was otherwise a distinct improvement over the previous situation. In the context of judicial review, section 2 was also amended to make it clear that the reach of "federal board, commission or other tribunal" extended to powers conferred "by or under an order made pursuant to a prerogative of the Crown."[25]

The amendments also responded to the recommendation of the Canadian Bar Association and Brian Crane (among others) that the Court's jurisdiction over claims against the Federal Crown be assigned to the provincial superior courts. Henceforth, that jurisdiction was to be shared between the Federal Court

16 See Langlois, *supra*, note 5, at 243-48.
17 See Bushnell, *supra*, note 5, at 268-69, headed "The Patronage Binge." See also, Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), at 323, though by 1991, he was "admir[ing] the more recent restraint that federal politicians exercised in appointments to the Court.": Peter Russell, "An Evaluation by a Political Scientist" in *The Federal Court of Canada – An Evaluation*, *supra*, note 1, 19, at 25.
18 *Supra*, note 2, at 16.
19 As quoted by Langlois, *supra*, note 5, at 17, citing the Special Committee Report, at 103-04.
20 Now R.S.C. 1985, c. F-7, as amended by S.C. 1990, c.8.
21 See Mary Dawson, Q.C., "Bill C-38: Some Reforms for the Federal Court of Canada" in *The Federal Court of Canada – An Evaluation*, *supra*, note 1, 251, at 253.
22 S.C. 2002, c. 8.
23 Section 18(1) and 18.1(1).
24 Section 28(1), (3).
25 Now section 2(1).

and the provincial superior courts to the extent that there was enabling provincial legislation.[26] While not eliminating entirely the dilemmas posed by the broader jurisprudence on jurisdiction in civil matters, at least in cases where the federal Crown was a defendant, the amendments offered litigants the choice of avoiding any problems arising out of the nature of "federal law" by commencing their litigation in the appropriate provincial superior court.

Of course, there were some concerns that it would have been difficult, if not impossible for the amendments to address such as the overriding question of the need for any kind of Federal Court and subsidiary matters such as the Court's profile outside of Ottawa and the calibre or nature of appointments. The cure, if one was indeed needed, for these "ills" would come about only as a result of the Court's performance of its mandate, and, in the case, of appointments, the actions of the federal executive branch.

However, even with respect to matters coming within the terms of the now *Federal Courts Act*, the amending legislation did not totally take care of business. Issues respecting jurisdiction over federal law in cases between subjects did not disappear, though, in the matter of the evolution of a pendent jurisdiction, it seemed clear that only a change of view on the part of the Supreme Court as to the constitutionally permissible range of section 101of the *Constitution Act* would allow for that in its fullest sense. While expanded to include exercises of power under a surviving prerogative, section 2 continued to have problematic aspects. Also, as was to become evident,[27] the ability to seek damages for wrongful administrative action (or to pursue other forms of collateral attack) in either the Federal Court or the provincial superior courts without first seeking judicial review in the Federal Court or Court of Appeal was a highly contentious issue, depending in part on how one read the judicial review provisions of the *Federal Courts Act*.

Nonetheless, it is my sense that since 1991, leaving aside the last matter, the extent of costly and largely unproductive litigation over the jurisdictional limits of the Federal Courts' jurisdiction, both between the two Courts and especially between the Federal Courts and the provincial superior courts, has diminished considerably. For the most part, the parameters of the Federal Courts' jurisdiction in disputes between subjects involving "federal law" has been satisfactorily delineated by the standard three-pronged test and the older jurisprudence applying that test.[28] While issues still periodically arise concerning whether a decision-maker is a "federal board, commission or other tribunal", those issues now seem to hinge on a rather more transcendent concern, common to the judicial review jurisdiction of the provincial superior courts: Whether a body is sufficiently public in nature and dependent on a statutory or prerogative grant of authority as to come within the reach of common law judicial review. This is well-exemplified by the judgments of Harrington J. in *Onuschak v. Canadian Society of Immigration*,[29] and earlier that of McTavish J. in *DRL Vacations Ltd. v. Halifax Port Authority*,[30] and may well become a more common feature of the Federal Courts' jurisdiction with the growth in the use of public-private partnerships. Also deriving in part from the definition of "federal board, commission

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26 Section 17(1), (2), and (5).

27 Starting with the judgment of Desjardins J.A . in *Tremblay v. Canada*, 2004 FCA 172, [2004] 4 F.C.R. 165, and definitively part of the Court of Appeal's jurisprudence following the judgment of Létourneau J.A. in *Grenier v. Canada*, 2005 FCA 348, [2006] 2 F.C.R. 287.

28 Though it must be conceded that since 1991, there have been a number of cases involving the reach of the Court's admiralty or maritime jurisdiction that have proceeded to the Supreme Court of Canada. See *e.g. Isen v. Simms*, 2006 SCC 41, [2006] 2 S.C.R. 349; *Holt Cargo Systems Inc. v. ABC Containerline NV (Trustees of)*, 2001 SCC 90, [2001] 3 S.C.R. 907; and *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

29 *Supra*, note 9.

30 2005 FC 860, [2006] 3 F.C.R. 516, at para. 48 particularly.

or other tribunal" but more dependent on general conceptions of the dividing line between public and private law is the whole question of the extent to which decisions taken as part of the commercial dealings of government are subject to judicial review, an area where the Federal Court of Appeal has taken the lead, especially in *Irving Shipbuilding Inc. v. Canada (Attorney General)*.[31]

Now, with the judgment of the Supreme Court of Canada in *Canada (Attorney General) v. TeleZone Inc.*,[32] and associated judgments,[33] about which we will hear much more later today,[34] the critical issue of whether an application for judicial review must precede any claim for damages based on unlawful administrative action has been put to rest. It is not an absolute requirement imposed by the terms of the *Federal Courts Act*; rather, the issue should be confronted as one involving remedial discretion. How satisfactorily it will be resolved in that new home remains to be seen. My only comment is that there may be some room for concern based on the existence of a similar notion of remedial discretion with respect to the seeking of *habeas corpus* to challenge allegedly unlawful detentions by federal boards, commissions and other tribunals.[35] That domain has proved problematic.[36]

Parliament's response to the obvious problems with the way in which the original *Federal Court Act* conferred judicial review jurisdiction on the Federal Court did not eliminate all of the concerns with the Court and, in particular, those based on whether such a court was even needed and the quality of its performance. In the balance of this paper, I want to address at least partially some of those issues.

IV. A Federal Law of Judicial Review?

A review of the legislative history of the original *Federal Court Act* suggests that one of its objectives may have been the creation of a special federal brand of judicial review, one seen as appropriate for statutory decision-making at the federal level rather than the common law principles of judicial review prevalent provincially at that time.[37]

What is the evidence in support of this contention? Most importantly, with respect to adjudicative tribunals reviewable in the Federal Court of Appeal as part of its original jurisdiction, the legislation set out in section 28 the grounds of judicial review and provided in effect that those grounds of judicial review were available notwithstanding the provision of any other Act, a statement that was apparently aimed at privative clauses in at least prior legislation.[38] Secondly, section 28's statement of the grounds

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31 2009 FCA 116, [2010] 2 F.C.R. 488.

32 2010 SCC 62, [2010] 3 S.C.R. 585.

33 See *McArthur v. Canada*, 2010 SCC 63, [2010] 3 S.C.R. 626; *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2010 SCC 64, [2010] 3 S.C.R. 639; *Nu-Pharm v. Canada*, 2010 SCC 65, [2010] 3 S.C.R. 648; *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66, [2010] 3 S.C.R. 657; and *Manuge v. Canada*, 2010 SCC 67, [2010] 3 S.C.R. 672..

34 In what I assume will be a face off between Sharpe J.A. of the Court of Appeal for Ontario and Létourneau J.A. of the Federal Court of Appeal.

35 The original section 18 and today section 18(1) by omission from the list of prerogative writs transferred from the provincial superior courts to the Federal Court preserved the *habeas corpus* jurisdiction of the provincial superior court save in relation to members of the Canadian Forces serving outside of Canada, this being the exclusive preserve of the Federal Court: section 18(2).

36 See the discussion in *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, but see more recently *John v. Canada (National Parole Board)*, 2011 BCCA 188 and *R. v. Graham*, 2011 ONCA 138.

37 See my article, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform?" (1973), 23 U.T.L.J. 14. See also Chapter 14 of Bushnell, *supra*, note 5 ("The Creation of the Federal Court").

38 This interpretation was adopted in *Canada (Attorney General) v. Public Service Staff Relations Board*, [1977] 2 F.C. 189 (C.A.), and applied to a privative clause post-dating the enactment of the *Federal Court Act* in *Pioneer Grain Co. v. Kraus*, [1981] 2 F.C. 815 (C.A.)

of review went beyond what was then the prevailing scope of common law review. Error of law review was to be available whether or not the error of law appeared on the face of the record. Review of factual matters was subject to a novel formulation that seemed to invite intervention beyond the restrictive terms of the then governing "no evidence" ground of review. Review was to be available whenever a covered tribunal

> ...based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Indeed, that provision would have been even more inviting of factual review were it not for the intervention of the Canadian Labour Congress. At the Committee stage in the House, that intervention led to the removal of "due" as a qualifier of "regard".[39]

In his address to the 1991 symposium, John Turner identified his objectives as Minister of Justice and Attorney General responsible for the carriage of the legislation in the House:

> We wanted to relieve the workload of the Supreme Court, and at the same time allow for a **wider** and more consistent review of the decisions of the administrative tribunals.[40]
>
> The review process was made **wider** than the old prerogative writs. I gave some examples in the House of Commons when I defended the Bill. When the principles of natural justice are not applied, where hearings are not granted, where each party does not have an opportunity to make his or her case, where the board has exceeded its jurisdiction or gone beyond the scope or ambit of the authority granted by the statute, where the board has refused to exercise its discretion, or where the board has exceeded its jurisdiction, where the board misinterpreted the law, in all of these cases, a decision of a tribunal or a commission or a board can be set aside by the Court [emphasis added].[41]

While one might question which of these various categories listed by Mr. Turner in fact represented grounds of review unknown to the common law's prerogative writs, the expansive objective is at least implicit in his sense that all errors of law were appropriately subject to judicial review. What, however, is also interesting is that Mr. Turner did not see much scope for review of federal decision-making that was not covered by section 28 of the Act. Outside of the world of judicial or *quasi*-judicial tribunals, to use the rubric of both the Act and the then common law, Mr. Turner saw little room for judicial inquiry. In the domain of administrative decision-making or policy decisions, the territory reserved to then Trial Division under section 18, there would be little or no room for judicial review:

> The review provided by this court, however, would relate to the judicial process, and not to administrative policy. ... But it seemed to us in Parliament that that there was a clear distinction between law and policy on the one hand and judicial processes on the other.[42]

This notion of a Trial Division that would have very little judicial review work was also shared by the then Deputy Minister, D.S. Maxwell. In his appearance before the House of Commons Second Reading

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39 Houses of Commons Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence, Tuesday, May 26, 1970, 28th Parliament, 2nd Session, No. 31, at 13*ff*.

40 *Supra*, note 2, at 6.

41 *Id.*, at 7.

42 *Id.*, at 6.

Committee, Mr. Maxwell, perhaps out of an abundance of constitutional caution,[43] spoke of section 18 being merely a device by which the prerogative writ jurisdiction over federal statutory authorities was removed from the provincial superior courts, with the substance of that jurisdiction then being transferred immediately by section 28 to the Court of Appeal and there conducted by way of a simplified application for judicial review.[44]

The reality is that nothing like an indigenous federal law of judicial review conditioned by the terms and objectives of the original *Federal Court Act* ever came to pass. The pull of the common law proved too strong. This is not meant to say that there are not domains where the Federeal Court and the Federal Court of Appeal have provided unique perspectives in applying the principles of judicial review of administrative action. However, for the most part, that has been in fields for which there are no provincial equivalents, with the Courts' immigration jurisdiction being the most obvious example. However, at the level of general principles, there has been a coalescence of the common law of judicial review of adminstrative action and judicial review as conducted by the Federal Court.

Let me provide what seem to me to be the most prominent examples:

1. Under the original section 28, only the Attorney General or "anyone directly affected" could apply for judicial review. That now applies to applications for review in both Courts.[45] While it might have been thought that the drafters of the Act intended, through the use of the term "directly affected", to condition access to judicial review on a rigorous standing requirement, the Courts have in fact held that the standing provision does not prevent the application of the principles of public interest standing to applications for judicial review commenced in the Courts.[46]

2. Notwithstanding the language of the original section 18(1)(c) and now section 18.1(4)(d), review for questions of fact in the Federal Courts has for the most part progressively followed the evolution of the common law "no evidence" rule,[47] to a "patently unreasonable" finding of fact standard,[48] and, latterly, to an "unreasonable" finding of fact.[49]

3. Even prior to the coming into effect of the 1990 amendments to the Act, the Supreme Court of Canada, in cases such as *National Corn Growers Assn. v. Canada (Import Tribunal)*[50] and *Bell Canada*

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43 Resulting from a sense that the prerogative writs jurisdiction of the provincial superior courts could not constitutionally be abolished but could legitimately be transferred.

44 House of Commons Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence, Thursday, May 7, 1970: 28th Parliament, 2nd Session, No. 26, at 25-26.

45 See section 18.1(1), and applicable to the Federal Court of Appeal by virtue of section 28(2).

46 Starting with *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229 (T.D.), and including later judgments such as *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211 (T.D.) and *Harris v. Canada (Minister of National Revenue)*, [2000] 4 F.C. 37 (C.A.).

47 Though note the judgment of Evans J.A. in *Stelco Inc. v. British Steel Canada Inc.*, [2000] 3 F.C. 282 (C.A.), at para. 14, reiterating the need to pay attention to the actual test for factual review in the Act. Earlier, Reed J., in *Singh v. Canada (Minister of Employment & Immigration)* (1993), 69 F.T.R. 141, at paras. 8-9, had made the same point and described the section as expanding the scope for review of questions of fact to embrace unreasonable findings of fact, the standard that in fact the common law now most frequently requires in the wake of *Dunsmuir*. See also the judgment of Cullen J. in *Hristova v. Canada (Minister of Employment & Immigration)* (1994), 75 F.T.R. 18, at para. 22, where he characterizes the Act as permitting review for both “no evidence” (as an error of law) and an unreasonable finding of fact, citing Reed J. in *Singh*.

48 See *e.g. Feradov v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 101, and see also *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at paras. 87-101

49 See *e.g. Precectaj v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 485, at paras. 29-34.

50 *Supra*, note 48.

v. Canada (Canadian Radio-Television and Telecommunications Commission),[51] was in effect applying standard of review analysis and the principles of deference to the review of federal tribunals whether occurring under section 28 or by way of appeal on questions of law and jurisdiction under the tribunal's constitutive statute. Correctness was not the standard that applied universally to the review of questions of law. Despite the language of section 28(1)(b) and the apparent irrelevance of privative clauses ("notwithstanding the provisions of any other Act"), tribunals were, by reference to the general principles of Canadian common law, entitled to deference on issues of law when operating in their home territory. Following the removal of "notwithstanding the provisions of any other Act" in the 1990 amendments, this application of the common law standard of review principles gathered momentum. Indeed, it is now firmly entrenched following *Canada (Citizenship & Immigration) v. Khosa*,[52] in which the Supreme Court addressed this issue specifically for the first time and rejected the contention that, on a fair reading of the now *Federal Courts Act*, there was no place for qualifying or overlaying the grounds of review with a standard of review analysis.

4. In other contexts as well, there is a sense that the wording of the review provisions of the *Federal Courts Act* and applicable privative clauses have ceased to matter and that the common law is all that does. Thus, in the very recent decision in *Canada (Attorney General) v. Public Service Alliance of Canada*,[53] the Federal Court of Appeal applied *Dunsmuir v. New Brunswick*[54] to reject the argument that the matter in issue was a jurisdictional question[55] but then proceeded to apply a reasonableness analysis to the tribunal's determination of the contested issue.[56] In straight common law terms, this was clearly appropriate. However, given that the privative clause excluded review for error of law and error of fact but retained it for jurisdictional error in terms of the grounds of review in section 18.1(4) of the *Federal Courts Act*,[57] there is a serious question as to whether the Court should have gone any further once it determined that the issue in contention was not one of true jurisdiction. Or, is the case to be read for the proposition that an unreasonable decision under the *Dunsmuir* test will count as jurisdictional for these purposes? That issue must await another day. However, what is revealing is that the text of the judgment does not refer to the wording of either section 18.1(4) or the privative clause, but rather simply identifies the presence of a privative clause as a deference or reasonableness review indicator.[58]

5. In 1991, the revised *Federal Courts Act* added two additional grounds of review to what is now section 18.1(4):

> (e) acted, or failed to act, by reason of fraud or perjured evidence; or
> (f) acted in any other way that was contrary to law.

To my knowledge, neither of these grounds has ever been successfully pleaded in an application for judicial review.

Lest I be misunderstood, I am not making these points to be critical of the Federal Court or Federal Court of Appeal (or the Supreme Court of Canada, for that matter). How precisely legislated judicial review regimes should interact with a constantly evolving common law of judicial review is a difficult and controversial question. Moreover, responsibility for much of what I have just discussed can be laid

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51 [1989] 1 S.C.R. 1722.
52 2009 SCC 12, [2009] 1 S.C.R. 339.
53 2011 FCA 257.
54 2008 SCC 9, [2008] 1 S.C.R. 190.
55 *Supra*, note 53, at paras. 27-34.
56 *Id.*, at paras. 36-37.
57 *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 51(1).
58 *Supra*, note 53, at para. 35.

at the door of the Supreme Court of Canada, and, in the instance of the last point, may simply reflect the rarity of what is provided for in section 18.1(4)(e) and the lack of imagination of the legal profession in the case of section 18.1(4)(f). In any event, my sole purpose in providing these examples is simply to make the case that, at the level of the basic principles of judicial review of adminstrative action, the provisions in the *Federal Courts Act* respecting judicial review and the grounds on which it can be obtained have not led to the development of an indigenous Federal Courts regime of judicial review. Review in both courts is rooted very firmly in the Canadian common law environment applicable in the provincial and territorial superior courts with the possible exception of British Columbia.[59] Mr. Turner's vision has not been realised.

V. If Not a Federal Law of Judicial Review, Why Have a Federal Court Exercising Judicial Review Jurisdiction in the Federal Arena?

Assuming that my analysis is correct and that there were some expectations that the Federal Court would develop a distnctive brand of federal judicial review principles, it is by no means beyond controversy that that is a desirable objective. What is it about federal statutory and prerogative decision-making that necessitates a regime of judicial review that deviates from common law principles that have proved themselves quite capable of evolution to meet the changing dimensions of the administrative state? Rather than answering that difficult question, let me, however, deal with the reality, and the whole question of the need for a federal court exercising a judicial review jurisdiction in federal matters that is rooted totally in the common law and does not deviate save perhaps in minor matters from the judicial review jurisdiction of the provincial superior courts, provincial superior courts that until 1971 exercised (albeit quite rarely) judicial review jurisdiction in federal matters?

There are, in fact, a number of advantages to such a regime and some of these considerations were at the forefront of the thinking of those responsible for the original *Federal Court Act*.[60] Prior to the advent of a federal court with judicial review jurisdiction, responsibility for the review of federal statutory authorities, as already noted, rested with the provincial and territorial superior courts. Following the 1969 judgment of the Supreme Court of Canada in *Three Rivers Boatman Ltd. v. Canada (Labour Relations Board)*,[61] affirming the jurisdiction of provincial superior courts over federal statutory authorities, the locus of any application for judicial review depended presumably on whichever province or territory had the closest connection with the decision under attack. This meant that superior court encounters with federal administative processes were spread across the country, and, in many instances, almost certainly sporadic or uncommon. As a consequence, it was unlikely that the provincial superior courts would all that often develop the familiarity with federal adminstrative processes that informed scutiny demands. That degree of familiarity was much more likely to be achieved by the conferral of virtually exclusive jurisdiction in such matters on a federal court.

This justification for a federal court is also underscored by a factor mentioned earlier, the distinctive characteristics of the federal adminstrative process. The elaborate regulatory regime respecting immigration has no provincial parallels. The same is true of the legislative regimes respecting patents, trademarks and copyrights and the various agenices created under that legislation. While some of the major federal economic regulatory agencies have provincial equivalents, particularly in the field of energy, others do not *(e.g.* Competition Tribunal, Patented Medicines Prices Review Board, the CRTC)

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59 As a consequence of legislative provisions respecting the conduct of judicial review for decision-makers subject to the *Administrative Tribunals Act*, S.B.C 2004, c. 45. See sections 58-59.

60 See *e.g.* the statement of then Minister of Justice John Turner moving second reading of Bill C-38 in the House: Hansard, March 25, 1970, 5470-71.

61 [1969] S.C.R. 607.

and the concentration and nature of such agencies in the federal domain provides a sharp contrast with the situation provincially.

Even conceding the random nature of applications for judicial review, the existence of a federal court provides a far greater assurance of frequent exposure to these unique or distinctive federal administrative processes than would have been the case had the provincial superior courts retained jurisdiction. Moreover, it is no response to point to the failure of the Federal Court to develop an indigenous law of judicial review. Effective and appropriate judicial review, including the now pervasive question of when deference or restraint is indicated, depends as much, if not more on an understanding of the nature of the adminstrative process under review as on an awareness of the principles of common law judicial review of adminisrative action. More frequent exposure provides a greater guarantee of the blending of process awareness and the principles of judicial review.

What is also obvious is that the Federal Courts have much more consistent and far greater exposure to the principles of judicial review and their application to discrete regimes than is the case with the provincial superior courts, where judges are for the most part generalists not specializing in particular aspects of the law. Indeed, that is to a certain extent true even in Ontario with its Divisional Court specializing in judicial review. Superior judges are rotated in and out of the Divisional Court with the resulting diminution in the advantages that accrue by reason of continuity of membership. In contrast, the Federal Court and the Federal Court of Appeal are essentially public law courts and their judges public law specialists.

Locating jurisdiction over judicial review of federal administrative action in the Federal Courts also provides a far greater likelihood of consistency in the application of the principles of judicial review to particular regimes than is likely in the instance of a regime where review is conducted by ten provincial and three territorial superior courts. This is especially the case with high volume jurisdictions such as immigration. Indeed, the importance of this in the immigration setting is even greater as a consequence of the lack of an automatic right of appeal on certain matters from the Federal Court to the Federal Court of Appeal.

Finally, in a way that was perhaps difficult to foresee in 1970, it is also obviously the case that the existence of a federal court with virtually exclusive jurisdiction over federal judicial review is more than justified in terms of volume. What that volume and the quality of appointments to the Federal Court and Federal Court of Appeal have led to is those courts taking a leadership role as the most important judicial review bodies in the country below the Supreme Court. Moreover, that leadership role has extended to important contributions to the evolution of the Canadian common law of judicial review of adminsitrative action, a contribution that may have been marginalized were there a sense that federal judicial review law was a separate species with the judges of the Federal Court and Federal Court of Appeal following a distinctive path.

At the risk of being criticized for bias in my selections, let me just provide a few examples of aspects of judicial review law in which the Federal Court and Federal Court of Appeal have played that leadership role: judicial review of prerogative decision-making and its limits[62]; judicial review of policy-making

62 In particular, the Federal Court played a highly significant role in the development of the law respecting review of exercises of prerogative powers arising out of the Omar Khadr affair. See *Khadr v. Canada (Prime Minister)*, 2009 FC 405, [2010] 1 F.C.R. 34, aff'd 2009 FCA 246, [2010] 1 F.C.R. 73, rev'd in part 2010 SCC 3, [2010] 1 S.C.R. 44, as well as the follow up: 2010 FC 715, [2010] 4 F.C.R. 36, rev'd 2010 FCA 199. See also *Smith v. Canada (Attorney General)*, 2009 FC 228, [2010] 1 F.C.R. 3; and *Abdelrazik v. Canada (Minister of Foreign Affairs*, 2009 FC 580; [2010] 1 F.C.R. 267.

and Cabinet decision-making[63]; the legal status of policies and guidelines[64]; the availability of judicial review of the exercise of contractual powers[65]; the extent to which review reaches the exercise of public power by private bodies[66]; the content of the duty to consult aboriginal peoples[67]; the principles attending the exercise of remedial discretion,[68] the requirements of the duty to give reasons and the relationship between reasons and reasonableness review[69]; and, more generally, the working out of the principles of review spelled out in *Dunsmuir*, *Khosa*, and now *Smith v. Alliance Pipeline Ltd.*,[70] with particular emphasis on the imperative of reasonableness review in virtually all situations in which a decision-maker is interpreting its empowering or constitutive statute.[71]

These are all cutting-edge issues in early 21st century Canadian judicial review law. Of course, it is neither the case nor desirable that all judges of the Federal Court and Federal Court of Appeal agree on all the details of judicial review law. Differences of opinion are both inevitable and desirable. Nonetheless, out of the cauldron of disagreement and healthy debate has emerged a body of case law that provides solutions to or guidance on a number of problems both new and emerging. In my estimation, this both affirms the importance of the Court and assures its future as a critical institution in the continued development of Canadian judicial review law.

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63 Also exemplified by the authorities cited in the previous footnote, as well as *Public Mobile Inc. v. Canada (Attorney General)*, 2011 FCA 194

64 *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385.

65 See *e.g. Irving Shipbuilding*, *supra*, note 31, and much earlier *Assaly (Thomas C.) Corp. v. Canada* (1990), 44 Admin. L.R. 89 (F.C.,T.D.); and *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694 (C.A.).

66 See *e.g. Onuschak*, *supra*, note 9: and *DRL Vacations Ltd.*, *supra*, note 30.

67 See *e.g. Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FCC 1354, 303 F.T.R. 106; *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2009 FC 484, 345 F.T.R. 119; and *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] F.C.R. 500.

68 See *e.g. Air Canada v. Lorenz*, [2000] 1 F.C. 494; and *C.B. Powell Ltd. v. Canada (Border Services Agency)*, 2010 FCA 61, [2011] 2 F.C.R. 332.

69 See *e.g. VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (C.A.) and *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158.

70 2011 SCC 7, [2011] 1 S.C.R. 160.

71 See *e.g. Canada (Attorney General) v. Public Service Alliance of Canada*, *supra*, note 53; *Public Mobile Inc. v. Canada (Attorney General)*, *supra*, note 63; and *Celgene Corp. v. Canada (Attorney General)*, 2009 FCA 378, [2011] 1 F.C.R. 78.