

THE DECLARATORY JUDGMENT: REVIEWING ADMINISTRATIVE ACTION

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In an application for *certiorari*, the plaintiff may not ask for other relief, examine for discovery, request a decision on the merits, proceed in some provinces after six months, request the quashing of a decision of a domestic tribunal, proceed unless the error of law appears on the face of the record, or proceed if the administrative agency is said to be exercising an administrative function.

As an apparent inconsistency, the declaratory judgment has evolved unrestrained by such impediments, yet, in Canada, it has been subservient to the traditional but antiquated proceedings for *certiorari*.

It is the purpose of this article to examine the declaration as it has been used, and to suggest how it could be used in Canadian administrative law. The subject may be divided analytically into three categories: the scope of its application, the jurisdiction of the courts and the discretionary nature of the remedy. The present work is limited in its scope to administrative law and concentrates on the jurisdiction of the superior courts to use the declaration in a supervisory and original capacity, mentioning the discretionary aspect only as it affects the other two categories.

The declaratory judgment is a legal proceeding whereby the court merely proclaims or declares the existence of a legal relationship.¹ The order which results from the judgment may not be enforced against any party, and proceedings for contempt are not available against a party who refuses to recognize the propriety of the judgment.

Professor de Smith points out that in English administrative law ". . . the action for a declaration has become one of the most

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¹ Zamir, *The Declaratory Judgment* (1962), p. 1.

popular forms of proceedings in the High Court";² the Canadian practice has been quite the opposite.

By examining the leading Canadian cases which deal with the declaration in administrative law and by investigating the concept of jurisdiction,³ it is hoped some semblance of a basic pattern of development will be suggested.

The jurisdiction of superior courts⁴ is threefold: original, supervisory and appellate. The original jurisdiction rests on the principle that no cause of action shall be excluded from the powers of the superior courts, except those expressly stated to be so.⁵ The appellate jurisdiction must be conferred by legislation.⁶ The general supervisory jurisdiction rests on the long established practice of supervision by superior courts of the proceedings of inferior tribunals.⁷ It is proposed to examine each of these concepts as they affect the court's ability to issue a declaration in the area of administrative law.

I. Supervisory Jurisdiction.

In a case⁸ involving proceedings for *certiorari*, Denning L.J. stated:⁹

... the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law.

² Judicial Review of Administrative Action (1961), p. 372.

³ The word "jurisdiction" is used in this article in three different settings: jurisdiction of the superior courts to review administrative action, jurisdiction of the Rule Committee to create the declaratory judgment, and more generally, jurisdiction of administrative agencies to decide certain questions.

⁴ For an exhaustive judgment on the determination of whether a court is a "superior" court in Canada see *Re MacDonald: The King v. Surrogate Court Judge*, [1930] 2 D.L.R. 177 (Man. C.A.), per Fullerton J.A., at p. 181 *et seq.*; in England see *The Mayor and Aldermen of London v. Cox et al.*, [1867] L.R. 2 H.L. 239.

⁵ *Beaton v. Sjolander* (1903), 9 B.C.R. 439 (B.C.S.C.), per Martin J., at p. 441; *Dominion Cannery Limited, v. Horace Costanza and Others*, [1923] S.C.R. 46, per Anglin J., at p. 61.

⁶ *Board v. Board*, [1919] A.C. 956 (P.C.) on appeal from the Supreme Court of Alberta; *Crédit Foncier Franco-Canadien v. Board of Review under the F.C.A. Act, 1934*, [1940] 1 D.L.R. 182 (Sask. K.B.); *Helman v. Brown* (1965), 55 W.W.R. 187 (B.C. S.C. Chambers).

⁷ Griffith and Street, *Principles of Administrative Law* (3rd ed., 1963), p. 219.

⁸ *Rex v. Northumberland Compensation Appeal Tribunal, ex parte Shaw*, [1952] 1 Q.B. 338.

⁹ *Ibid.*, at p. 348. See also Lord Parker of Waddington, *Recent Developments in the Supervisory Powers of the Courts over Inferior Tribunals* (1959), a lecture delivered at the Hebrew University of Jerusalem, published by the Magnes Press, The Hebrew University.

Historically, review was effected by two writs: the writ of error and the writ of *certiorari*.¹⁰ Error had become a means of rectifying judgments, originating from the medieval concept of the liability of judges for faulty judgments.¹¹ *Certiorari*, as a means of reviewing inferior administrative decisions, was not readily accepted at first by the executive organ of government. In 1599 Lord Coke attempted to check the power granted to the Sewer Commissioners by using *certiorari* to limit their discretion to a grant of authority "... to discern . . . between shadows and substance, between equity and colourable glosses and pretenses and not to do according to their wills and private affections. . .".¹² The attempt to introduce *certiorari* as a means of judicial review was thwarted by Bacon, who, as Attorney General, was able to persuade the King's Council to pass an order forbidding judicial interference with the proceedings and decisions of the Commissioners.¹³

Shortly afterwards, the King's Council itself took over the power to control inferior bodies and with the abolition of the Prerogative Courts in 1643 and given the defects in the writ of error, the way lay open for the gradual development of *certiorari* as the chief means of reviewing the decisions of inferior agencies. The power to award *certiorari* was first outlined by Holt C. J. in *Grenvelt v. Burwell*¹⁴ where he said that although "... the statute¹⁵ does not give authority to this Court to grant a *certiorari* . . . it is by the common law that this Court will examine if other courts exceed their jurisdiction . . .".

It can be seen that jurisdiction to review and quash decisions of inferior agencies was not a characteristic of a writ, but a characteristic of the jurisdiction of the superior courts under the common law. Given the flexibility of the common law and equity, it would not seem too bold to suggest that even though review was traditionally effected by the use of prerogative writs (because they were the only means available), the courts are free to use any means, providing only that the means are within their jurisdiction and

¹⁰ The following brief review of the history of supervisory jurisdiction is taken from Rubinstein, *On the Origins of Judicial Review* (1964), 2 U.B.C. Law Rev. 1; Jaffe and Henderson, *Judicial Review and the Rule of Law: Historical Origins* (1956), 72 L.Q. Rev. 345 and de Smith, *op. cit.*, footnote 2, chapter 8.

¹¹ Rubinstein, *loc. cit.*, *ibid.*, at p. 5.

¹² *Rooke's Case* (1599), 5 Co. Rep. 996, 77 Eng. Rep. 209 (C.P.), at p. 210; Jaffe and Henderson, *loc. cit.*, footnote 10, at pp. 352-353.

¹³ Jaffe and Henderson, *loc. cit.*, *ibid.*, at pp. 352-353.

¹⁴ (1700), 1 Ld. Raym. 454, 91 Eng. Rep. 1202 (K.B.), at p. 1212; Rubinstein, *loc. cit.*, footnote 10, points out that the other report of the case (12 Mod. 386, 88 Eng. Rep. 1398) does not contain these words.

¹⁵ The Crown Debts Act, 1541, 33 Hen. 8, c. 39.

are suited for the task presented. As will be shown, such a conclusion, however, was initially too bold for some Canadian courts.

Before turning to the use of the declaration in a supervisory capacity, one should note that, in exercising their supervisory jurisdiction, the courts have been willing to review inferior acts or decisions whether promulgated by inferior courts, administrative tribunals, local authorities, statutory bodies, domestic tribunals or individual officers.¹⁶ Thus, a decision by the Registrar of Motor Vehicles to revoke a license¹⁷ is reviewable on the same considerations as a decision to revoke a license by the Air Transport Board,¹⁸ providing that in both instances the plaintiff is able to establish the necessary prerequisites.¹⁹

The case upon which the development of the declaration in reviewing administrative acts has been built is *Dyson v. Attorney General*.²⁰ In *Dyson*, the plaintiff sued the Attorney General requesting a declaration that a notice and form sent out by the inland Revenue Commissioners was *ultra vires* the Finance Act. The Court of Appeal granted the declaration, the effect of which was to quash an unauthorized administrative act. When speaking of the use of such a technique to test the actions of officials purporting to act under legislative authority, Fletcher Moulton L. J. said: ". . . I can think of no more suitable or adequate procedure for challenging the legality of such proceedings."²¹

From the administrative law viewpoint, the *Dyson* decision establishes two related significant points in the development of the declaratory action. First, the plaintiff did not ask the court to pass on the merits of the administrative decision, but simply to declare the decision unauthorized and void, and secondly, it is clear that the plaintiff did not have a cause of action in the conventional sense that would have entitled him to any other form of judicial relief.

Following the *Dyson* decision, a majority of the Court of Appeal

¹⁶ de Smith, *op. cit.*, footnote 2, p. 274.

¹⁷ *Klymchuk v. Cowan* (1964), 45 D.L.R. (2d) 587 (Man. Q.B.).

¹⁸ *Samuels and Charter Airways Ltd. v. Attorney-General For Canada and Air Transport Board et al.* (1956), 1 D.L.R. (2d) 110 (Alta. S.C.).

¹⁹ For example, if *certiorari* is sought the plaintiff must show that the agency had a duty to act judicially, but this applies equally to an individual officer and an administrative board.

²⁰ [1912] 1 Ch. 158. Compare the early Canadian case of *Alexander et al. v. The Corporation of the Township of Howard* (1887), 14 O.L.R. 22 (Ont. H.C. of J.) where the plaintiffs succeeded in bringing an action for a declaration that a by-law and assessments made thereunder were illegal and void.

²¹ *Ibid.*, at p. 168.

in *Cooper v. Wilson*²² held that an order of the Watch Committee dismissing the plaintiff police officer was void, and granted a declaration quashing the order. Greer L. J., citing *Andrews v. Mitchell*,²³ stated: "... a claim for a declaration that a statutory body acted without jurisdiction can be dealt with by an action for a declaration that the decision in question was null void."²⁴ The *Cooper* holding was endorsed and followed by the Court of Appeal in *Barnard v. National Dock Labour Board*²⁵ and by the House of Lords in *Vine v. National Dock Labour Board*²⁶ and *Ridge v. Baldwin*.²⁷ In view of these holdings it would seem safe to assert in England that it is now "... clear law that the Queen's courts can grant declarations by which they pronounce on the validity or invalidity of the proceedings of statutory tribunals".²⁸

In Canada the judicial development of the declaration as a remedy to review administrative action proceeded along much the same lines as the English decisions until 1934. In that year, the Government of Canada passed the Farmers' Creditors Arrangement Act,²⁹ which was designed to alleviate the depressed state of agriculture in the provinces of Manitoba, Saskatchewan and Alberta. The Act provided that a "farmer" could file a request with an Official Receiver to have his debts and obligations reviewed; the Official Receiver assisted the farmer-debtor in compiling a statement of his affairs and in framing his proposal to creditors. A meeting was then held with creditors and if agreement could be reached, the Official Receiver applied to the District or County Court for an order approving the scheme. If agreement could not be reached, one party would file a request that the Board of Review formulate an acceptable proposal.³⁰

As could be expected, the Act resulted in a great deal of litigation. Many plaintiffs were enticed by the decision of the English

²² [1937] 2 K.B. 309 (Greer and Scott L. JJ.; MacNaghten L.J. dissenting).

²³ [1905] A.C. 78.

²⁴ *Supra*, footnote 22, at p. 324. It is not clear whether the court declared the decision void on grounds of lack of jurisdiction or for a violation of natural justice. The court also awarded the plaintiff certain back payments; see *infra* for a discussion of original jurisdiction.

²⁵ [1953] 2 Q.B. 18.

²⁶ [1957] A.C. 488.

²⁷ [1964] A.C. 40.

²⁸ Per Denning L.J. in *Healey v. Minister of Health*, [1955] 1 Q.B. 221, at p. 237.

²⁹ S.C., 1934, c. 53; presently R.S.C., 1952, c. 111.

³⁰ For a description of the functioning of the Official Receiver and the Board of Review see R. L. Winton, *The Saskatchewan Board of Review an essay in Canadian Boards at Work* (Ed. by J. Willis, 1941), p. 148 *et seq.* The Act was substantially amended by S.C., 1943-44, c. 26 including the abolishment of the Board of Review and substituting a county or district court.

Court of Appeal in *Cooper v. Wilson*³¹ to bring an action for a declaratory judgment to review the findings of the Board of Review³². From the viewpoint of the systematic development of the declaration, the result of these actions was disastrous. By 1944, it was impossible to state with any certainty that the declaration could or could not be used to review the decisions of inferior tribunals.

In 1937, the Chief Justice of Alberta, in *Kettenbach Farms Limited et al. v. Henke et al.*,³³ an action to review the findings of the Board of Review by way of a declaration, stated:³⁴

A Superior Court exercising the powers of the former Court of King's Bench as this Court does have a supervisory authority over inferior Courts and over tribunals . . . for the purpose of seeing that they do not go beyond their jurisdiction

The learned judge then allowed the review to proceed by way of a declaration.

Three years later the British Columbia Court of Appeal³⁵ was asked by way of an action for a declaration to declare that the defendant, a corporation, was not a "farmer" within the meaning of the Farmers' Creditors Arrangement Act, 1934, and consequently that the Board of Review was without jurisdiction to hear the claim of the defendant. Mr. Justice O'Halloran refused to allow the supervisory jurisdiction of the court to be exercised by the declaration, saying:³⁶

If the Supreme Court has not exclusive or concurrent jurisdiction it cannot entertain a declaratory action by borrowing the jurisdiction

³¹ *Supra*, footnote 22.

³² In the years between 1934 and 1944 over seventy cases appear in the law reports; the more significant cases involving a declaration include: *Laugharn (Sterling Estate) v. Brownell and Turner*, [1942] 2 W.W.R. 428 (Alta. S.C. App. Div.) (dictum); *In Re McEwen*, [1941] S.C.R. 542; *National Trust Co. v. Christian Community of Universal Brotherhood and Board of Review (No. 2)*, [1940] 3 W.W.R. 650 (B.C.C.A.), app'd and rev'd on other grounds [1941] S.C.R. 601; *McKerracher v. Mfrs. Life Insurance Co. and Board of Review*, [1941] 1 W.W.R. 509 (Alta. S.C.); *In Re Kucy and McCallum*, [1944] 1 W.W.R. 361 (Alta. S.C. App. Div.); *Kettenbach Farms Ltd. v. Henke*, [1937] 3 W.W.R. 703 (Alta. S.C. App. Div.); *In Re F.C.A. Act, 1934 et al.*, [1938] 2 W.W.R. 412 (Alta. S.C. App. Div.) (dictum); *Crédit Foncier Franco-Canadien v. Board of Review under the F.C.A. Act, 1934*, *supra*, footnote 6.

³³ *Ibid.*, under the F.C.A. Act the debtor had to be a "farmer" and "unable to meet his liabilities as they became due"; the plaintiff alleged that the debtor, Henke, did not come within these provisions as he was able to meet his liabilities as they came due.

³⁴ *Ibid.*, at p. 704; followed by *McKerracher v. Mfrs. Life Insurance Co. et al.*, *supra*, footnote 32.

³⁵ *National Trust Co. Ltd. v. Christian Community of Universal Brotherhood and Board of Review (No. 2)*, *ibid.*

³⁶ *Ibid.*, at p. 672 (W.W.R.).

which it has in prohibition and *certiorari*, for its jurisdiction in prohibition and *certiorari* is restricted to a review of jurisdictional objections to proceedings of inferior tribunals

The Saskatchewan Court of King's Bench also refused to adopt the reasoning of the Chief Justice of Alberta; in 1939 Mr. Justice MacDonald stated in *Crédit Foncier Franco-Canadien v. Board of Review under the F.C.A. Act, 1934*.³⁷ an action for a declaration that the Board lacked jurisdiction:³⁸

True this Court has a supervisory authority over inferior courts and over tribunals not strictly Courts but performing judicial functions, but how is that jurisdiction exercised? In my opinion, it is exercised [only] through the writs of prohibition mandamus and *certiorari*.

As an added blow to the declaration the court went on to hold that the declaratory judgment action required a "cause of action" and that reviewing the jurisdiction of an inferior tribunal did not constitute a cause of action.

The Supreme Court of Canada has never been presented with the problem of granting a supervisory role to the declaratory judgment and so the courts in other provinces have been free to choose between the two choices presented in the *Kettenbach* and *Crédit Foncier* decisions.

Unhappily, the Ontario Court of Appeal³⁹ in 1952 choosing to follow the *Crédit Foncier* decision, disallowed a declaratory action alleging absence of jurisdiction against the Ontario Labour Relations Board. The plaintiff alleged that the Board had acted without jurisdiction in holding that the collective bargaining agreement between the company and union could not be terminated by the parties before its expiry date.

Drawing upon the authority of the common law cases dealing with the legal status of unions, Mr. Justice Roach stated in his first reason for dismissing the action that the Labour Relations Board was not a suable entity. Alternately, he held that the court had no jurisdiction to grant a declaration in such circumstances.

That portion of the judgment dealing with the declaration as a supervisory remedy could be classified as dictum, but it is repeatedly cited as the leading authority relegating the declaration to original jurisdiction only.⁴⁰ Speaking for the court Mr. Justice Roach

³⁷ *Supra*, footnote 6.

³⁸ *Ibid.*, at p. 185.

³⁹ *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board*, [1952], 3 D.L.R. 162 (Ont. C.A.).

⁴⁰ Mr. Justice Roach initially states that the Labour Board could not be the object of a declaration for it was not a suable entity (*ibid.*, at pp. 164-166) and then goes on to add that even if it could be sued, the court was without jurisdiction to award a declaration.

stated:⁴¹

This action is based on the erroneous theory that there is a dispute in the nature of a *lis* between the plaintiff and the Board . . . the plaintiff . . . alleges that in [the] adjudication the Board either acted without any jurisdiction or exceeded its jurisdiction. Even if that be so, that does not create a new *lis* between the plaintiff and the Board. The plaintiff may have a complaint against the Board, but it has no claim against it.

After analysing the theory and history of *certiorari*, Mr. Justice Roach concludes:⁴²

In this conception of *certiorari* it is plain that the relief thereby made available is of a type distinct and apart from the relief obtainable in an ordinary action.

An examination of the cases I have discussed reveals four principal reasons for denying the declaratory judgment a role in supervising the decisions of inferior agencies: there is no *lis* or cause of action, the relief available by *certiorari* is different from that available by a declaration, the courts' supervisory jurisdiction is ousted if a tribunal is granted exclusive jurisdiction and, finally, administrative tribunals are not suable entities. It is now proposed to scrutinize each of these reasons by examining the concept of a superior court's jurisdiction and the history of the declaratory judgment.

(a) *Necessity for a cause of action*

The chief difficulty in analysing the cause of action argument is the determination of the meaning of the concept. Most purported definitions of the concept are more properly characterized as descriptions.⁴³ The following elements, however, would seem to be inherent in the common law conception of a cause of action: the plaintiff must have a judicially recognized right; such right must be, or threatened to be, infringed by the defendant's acts or omissions; and the court must be able to grant executory relief to the plaintiff.

Both MacDonald J. A. in the *Crédit Foncier*⁴⁴ case and Roach

⁴¹ *Ibid.*, at pp. 169-170.

⁴² *Ibid.*, at p. 172.

⁴³ For example see: *Re Taylor v. Reid* (1906), 13 O.L.R. 205 (Ont. D.C.), where a cause of action was defined to mean every fact that is material to be proved to entitle the plaintiff to succeed—every fact which the defendant would have a right to traverse; *Shtitz v. C.N.R.*, [1927] 1 D.L.R. 951 (Sask. C.A.) where it was defined to mean that particular act of the defendant which gives a plaintiff his cause of complaint.

⁴⁴ *Supra*, footnote 6; Mr. Justice MacDonald stated: "I . . . have

J.A. in the *Hollinger Bus Lines*⁴⁵ case state that a *lis* or cause of action is required to bring a declaratory action, and that no cause of action exists when an administrative agency proceeds without jurisdiction to determine a question affecting the rights of the plaintiff.

If their Lordships were referring to executory relief available to an aggrieved plaintiff, their statements must clearly be taken to be incorrect, for the availability of consequential relief is not necessary in an action for a declaration.

The controversy concerning the requirement of being able to claim consequential relief when suing for a declaration remained in reported cases in England and Canada for over fifty years.

While Lord Brougham began advocating the adoption of a declaratory proceeding in 1828,⁴⁶ the first form of declaration was authorized in the Chancery Act of 1850.⁴⁷ The forerunner of the present rule appeared in the Chancery Procedure Act of 1852;⁴⁸ section 50 of the Act provided that:

No suit . . . shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief.

The procedure did not, however, receive a warm welcome as evidenced not only by the negative wording of section 50, but also by the reception accorded in the courts. The authority granted by negative implication was narrowed by the traditional aversion of the courts from pronouncing on future rights,⁴⁹ and by the con-

come to the conclusion that the statement of claim herein discloses no cause of action" (at p. 189).

⁴⁵ *Supra*, footnote 39; Mr. Justice Roach stated: ". . . This action is based on the erroneous theory that there is a dispute in the nature of a *lis* between the plaintiff and the Board" (at p. 169).

⁴⁶ In the House of Commons in 1828, Lord Brougham stated: "In England it is not possible to have the opinion of any court until the parties are actually engaged in a law suit . . . The Scotch Law . . . permits a declaratory action to be instituted . . . and enables the [plaintiff] to make all whose claims he dreads parties so as to obtain a decision on the question immediately." (1828), 18 Parl. Deb. (N.S.) 179.

Lord Brougham's passion for the adoption of the declaratory judgment was particularly evident in the House of Commons where he introduced no less than five bills urging the passage of a declaratory procedure: 1843, 1844, 1846, 1854 and 1857; See Borchard, *Declaratory Judgments* (2nd ed., 1941), pp. 125-128.

⁴⁷ 13 & 14 Vict., c. 35; sections 1 and 14 authorized the Court of Chancery by way of special stated cases to give opinions as to the Acts of Parliament, wills, deeds, or other written instruments including evidence of title to any real or personal property.

⁴⁸ 15 & 16 Vict., c. 86.

⁴⁹ *Lady Langdale v. Briggs* (1856), 8 DeG. M. & G. 391, 44 Eng. Rep. 441 (Ch.).

struction that the courts could make a declaration only as an incident to coercive relief.⁵⁰

The reforms instituted by the Judicature Act of 1873 allowed for the adoption of new rules of court. In the Supreme Court Rules of 1883,⁵¹ Order 25, rule 5, provided:

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

Order 25, rule 5, of the English orders was adopted *verbatim* in nine of the ten Canadian provinces⁵² and the Schedule of the Rules for the Supreme Court of Canada provides for declaratory judgments.⁵³ Until recently, the Province of Quebec had no general provision for declarations.⁵⁴ A significant difference (the importance

⁵⁰ *Rooke v. Lord Kensington* (1856), 2 K. & J. 753, 69 Eng. Rep. 986 (Ch.).

⁵¹ [1883] Statutory Rules and Orders, 54.

⁵² *Newfoundland*: The Rules of the Supreme Court (appended to c. 83 of the Consolidated Statutes, third series, 1916) O. 24, r. 5 as authorized by The Judicature Act, R.S. Nfld., 1952, c. 114, s. 277 (2): "For regulating the pleading, practice and procedure in the Court. . . ."

Nova Scotia: Rules of The Supreme Court, O. 25, r. 5 as authorized by The Judicature Act, 1950, S.N.S., 1950, c. 65, s. 45 (2): "For regulating the pleading, practice and procedure . . . and the rules of law which are to prevail in relation to remedies in causes and proceedings therein."

Prince Edward Island: Rules of Court, O. 25, r. 5 as authorized by The Judicature Act, R.S.P.E.I., 1951, c. 79, s. 27(1) (b): "For regulating the pleading, practice and procedure. . . ."

New Brunswick: Rules of Court, O. 25, r. 5 as authorized by The Judicature Act, R.S.N.B., 1952, c. 120, s. 73(c): "For regulating the pleading, practice and procedure. . . ."

Ontario: The Judicature Act., R.S.O., 1960, c. 190, s. 15 (b).

Manitoba: Queen's Bench Act, R.S.M., 1954, c. 52, s. 62(8).

Saskatchewan: The Queen's Bench Act, S.S., 1960, c. 35, s. 44(17).

Alberta: The Judicature Act, R.S.A., 1955, c. 164, s. 32(p).

British Columbia: Supreme Court Rules, O. 25, r. 5 (M.R. 285) as authorized by the Supreme Court Act, R.S.B.C., 1960, c. 374, s. 79: "For regulating the pleading, practice and procedure . . . including all matters connected with writs, forms of action, parties to actions, evidence and mode and place of trial. . . ." It can be seen that four of the Canadian provinces (Ont., Man., Sask. and Alta.) have adopted the declaratory judgment by legislation. The differences between the eastern or maritime provinces and western provinces would seem to be accountable by reference to the dates of entry into Confederation.

⁵³ Rules of the Supreme Court, O. 25, r. 5 as authorized by Supreme Court Act, R.S.C., 1952, c. 259, s. 103.

⁵⁴ *Laurier Saumur et les Témoin De Jéhovah et Le Procureur Général de la Province de Québec*, [1964] S.C.R. 252, at p. 257, per Taschereau C.J.C.; see also *La Corporation du Village de la Malbaie v. Warren et autre* (1924), 26 K.B. 70 and the article by G. E. LeDain, *The Supervisory Jurisdiction in Quebec* (1957), 35 Can. Bar Rev. 788, at p. 805 *et seq.* One would have expected to find the declaratory judgment in Quebec either because it has been recognized for several hundred years in France, the civil law of which was continued in the Province of Quebec by the Treaty of Paris in 1763 or because of the influence of the common law existent in

of which will be shown shortly) in the Canadian authority for the use of the declaration is that some provinces adopted Order 25, rule 5 by legislation and not by rules promulgated by the judges of the superior courts.

The chief reason in England behind the change in the wording of Order 25, rule 5 from that which appeared in section 50 of the Chancery Act was the need to overcome the judicial reluctance to grant a declaration where no other relief was claimed or could be claimed. Section 50 used the words ". . . without granting consequential relief" while rule 5 used the words ". . . whether any consequential relief is or could be claimed or not".

Judicial attitudes change slowly, however, and initially both the English⁵⁵ and Canadian⁵⁶ courts continued to insist upon the availability of other relief, conceding only that the plaintiff did not have to request other relief.

In England this reluctance was supported by the argument that to concede direction in Order 25, rule 5 to award a declaration where no relief could be claimed, would be to pronounce Order 25, rule 5 invalid as being beyond the powers of the Rule Committee. Section 17 (2) of the Judicature Act of 1875 authorized the Committee to make rules for ". . . regulating the pleading, practice and procedure in the High Court of Justice and the Court of Appeal . . .",⁵⁷ and a rule which purported to remove the requisite of consequential relief could not be said to come within the ambit of "pleading, practice or procedure" for its effect was to enlarge the jurisdiction of the court.

As late as 1911 in *Viola School District Trustees v. Canada Saskatchewan Land Co.*⁵⁸ where the plaintiffs requested a declaration, *inter alia*, that they were the owners of certain lands within the meaning of an Ordinance, Newlands J. dismissed the action

the other jurisdictions of Canada: see P. Martin, *The Declaratory Judgment* (1931), 9 Can. Bar Rev. 540, at p. 545. This defect was remedied by the new Code of Civil Procedure, 1965, 13-14 Eliz. II, c. 80, articles 35 and 453 to 456.

⁵⁵ *Offin v. Rochford Rural District Council*, [1906] 1 Ch. 342.

⁵⁶ *Bunnell v. Gordon* (1891), 20 O.R. 281 (Ch. Div.); *Viola School District Trustees' v. Canada Saskatchewan Land Co.* (1910-11), 16 W.L.R. 175 (Newlands J.); *Mutrie v. Alexander* (1911), 23 O.L.R. 396 (Middleton J.); *McCutcheon v. Wardrop*, [1919] 1 W.W.R. 925 (Man. K.B.).

⁵⁷ 38 & 39 Vict., c. 77; the present authority for Rules in England is found in section 99 (1) (a) of the Supreme Court of Judicature (Consolidated) Act, 1925 (15 & 16 Geo. 5, c. 49) which reads in part "For regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the Court of Appeal and the High Court. . . ."

⁵⁸ *Supra*, footnote 56.

on the grounds that “. . . no consequential relief is asked for, nor could any be granted on the above statement of facts”.⁵⁹

In some of the Canadian provinces, the old English Order 25, rule 5 was adopted by legislation, and, therefore, the *ultra vires* argument was overcome by statutory embodiment. As Chief Justice Haultain of Saskatchewan said in *Swift Current v. Leslie et al.*:⁶⁰

Our [rule] will be found in the Judicature Ordinance The rules at [the time of the Ordinance] were not made as they are now by the judges under the authority of the Judicature Act, but were statutory enactments forming part of the Ordinance. If necessary, therefore, we can assume that the new jurisdiction was created by the Legislature⁶¹

The courts in those provinces which could not look to legislation for authority to grant a declaration were forced to adopt the holding in the leading English case, *Guaranty Trust Co. of New York v. Hannay and Co.*⁶² In that case the Court of Appeal held that Order 25, rule 5 had not created any new jurisdiction, for jurisdiction to give declaratory judgments whether consequential relief was available or not, and whether there was a traditional cause of action or not, had always rested with Chancery, even though it had never been exercised.⁶³ Pickford L.J. went on to say:⁶⁴

⁵⁹ *Ibid.*, at p. 177.

⁶⁰ (1916), 9 W.W.R. 1024 (S. C. of Sask. *en banc*).

⁶¹ *Ibid.*, at p. 1033. In *Hoffman v. McCloy* (1916-17), 38 O.L.R. 446 (Ont. S.C. App. Div.), Mr. Justice Masten stated: “Under the practice which preceded this rule, no declaration would be granted unless the plaintiff was entitled to claim relief consequent upon the declaration; but the statute [The Judicature Act, R.S.O., 1914, c. 56, s. 16(b)] did away with this limitation.” Compare also *Fielding v. Sibbald*, [1953] 1 D.L.R. 232 (B.C.C.A.), at p. 234 and *Wilson v. Abbott* (1914), 6 W.W.R. 1097 (Sask. S.C., Trial), at p. 1099.

⁶² [1915] 2 K.B. 536 (C.A.).

⁶³ *Ibid.*, per Pickford and Bankes L. JJ. Advocates of the proposition that equity has always possessed power to award a declaratory judgment include: Triplett, *The Inherent Jurisdiction of Equity to Administer Declaratory Relief* (1964), 45 Miss L.J. 241; Freeman on Judgments (5th ed., 1925), vol. 2, p. 2781; Hanbury, *Modern Equity* (8th ed., 1962), pp. 611-616. Consider also the remarks of Zamir, *op. cit.*, footnote 1, pp. 187-191, and de Smith, *op. cit.*, footnote 2, p. 369.

The English Court of Exchequer, whose general equitable jurisdiction passed to the Court of Chancery in 1841 had awarded declaratory relief against the Crown as represented by the Attorney General as early as 1598: *Sir Thomas Cecil's Case* (1598), 7 Co. Rep. 186, 77 Eng. Rep. 440 (Exch.). de Smith, p. 369 points out however, that the jurisdiction of the Court of Exchequer to award declaratory relief against the Crown was incidental to its capacity as a court of revenue and therefore did not pass to Chancery. Bankes L. J. in *Guaranty Trust Co. v. Hannay*, *ibid.*, at p. 568, states: “I cannot doubt that had the Court of Chancery of those days thought it expedient to make declaratory judgments, they would have claimed and exercised the right to do so.”

⁶⁴ *Ibid.*, at pp. 563-564.

But if its [Order 25, rule 5] only effect is to provide that the court may deal with a matter with which it can already deal in a different manner under different circumstances and when brought before it by a different person, it is . . . only dealing with practice and procedure and is *intra vires*.

In view of the doubt surrounding the theory that Chancery had been able to grant declarations,⁶⁵ the holding must be taken to illustrate the growing judicial desire to advance the development of the declaration.

Comparing the solution arrived at in the *Swift Current* case with that in the *Guaranty Trust* decision, we find that on exactly the same wording, one court, the Saskatchewan court, implies that the rule did create new jurisdiction, albeit by legislation, while the other court, the English Court of Appeal, denies the rule created any new jurisdiction. The resulting inconsistency exists not only between the English and Canadian courts, but between those Canadian jurisdictions which have adopted the *Guaranty Trust* reasoning because their rule is not based on legislation, and those which, like Saskatchewan, have a statutory basis for the rule.

The inconsistency is not only of academic interest to Canadians since the *ultra vires* defense would conceivably be available in the courts of the provinces of Prince Edward Island, Newfoundland, New Brunswick and British Columbia, all of which retain the old English rule promulgated by the superior court judges under authority to make rules relating to "pleading, practice and procedure".⁶⁶

It is suggested that one of the difficulties in attempting to resolve the problem is the continued persistence by courts and authors to find *authorization* for a declaration in Order 25, rule 5; only the most elastic definition of "pleading, practice and procedure" would encompass the creations of remedy and an enlargement of jurisdiction.

One answer to this interesting question is found in analysing the nature of a judicial judgment. The basic functions of any court are to *declare* rights and duties and to award relief for injury to a legally protected interest. The authority for a court to perform these functions cannot be found in any statute or decree: they are the very reason for the existence of the court.

Order 25, rule 5 does not purport to grant authority to make

⁶⁵ See comments in footnote 63, *supra*.

⁶⁶ See the comments, *supra*, footnote 52, Nova Scotia does not fall within the same category as Newfoundland, New Brunswick, Prince Edward Island, and British Columbia for the enabling section specifically allows for rules on remedies.

declarations; rather it states that no objection shall be sustained on the ground that merely a declaration is requested, and that it shall not be necessary for the plaintiff to claim other relief or to be able to claim other relief. One wonders, if the above analysis of a judicial judgment is correct, why it was even necessary to pass Order 25, rule 5 for its effect is simply to remove one of the traditional elements of a judicial judgment; the element of relief. The removal of one element does not create the other; the Rule Committee merely provided the *procedure* (in effect, by removing a procedural obstacle) to gain a declaration.

In summary, the jurisdiction of a court to issue a declaration as a remedy is not found in Order 25, rule 5 but in the historical function of the court.

The significance for administrative law of the development away from requiring the plaintiff to be able to claim consequential relief is explained in terms of a cause of action. The traditional concept of a cause of action included the right to some form of executory relief. If the plaintiff did not have to be entitled to consequential relief, he did not have to fit his claim within the established bounds of a cause of action. As Mr. Justice Locke of the Supreme Court of Canada stated in *Klopfer Wholesale Hardware and Automobile Company Limited v. Roy*:⁶⁷

To make a declaration of right is expressly authorized by subsection (b) of s. 15 of the Judicature Act [of Ontario], whether any consequential relief is or could be claimed or not. The section of the Ontario Act reproduced verbatim r. 5 of Order XXV of the Rules of the Supreme Court of 1883, under which it has been held that the making of such a declaration is not confined to cases where the plaintiff has a cause of action against the defendant.⁶⁸

⁶⁷ [1952] 2 S.C.R. 465.

⁶⁸ *Ibid.*, at p. 475. Mr. Justice Locke cites, *inter alia*, *Guaranty Trust Co. of N.Y. v. Hannay & Co.*, *supra*, footnote 62, where Pickford L. J. said: "I think . . . that the effect of the rule [rule 5 of Order 25] is to give a general power to make a declaration whether there be a cause of action or not . . ." (at p. 562). Compare *Hume and Rumble Ltd. et al. v. Local 213 et al.* (1954), 12 W.W.R. (N.S.) 321 (B.C.S.C., Wilson, J.). By the wording of O. 25, r. 5, it would seem clear that the plaintiff may ask for consequential relief; thus he may combine, *inter alia*, with his request for a declaration a claim for:

Damages: Vine v. National Dock Labour Board, *supra*, footnote 26, *Barber v. Manchester Regional Hospital Board*, [1958] 1 W.L.R. 181 (Q.B.) (dictum); in Canada see *Klymchuk v. Cowan*, *supra*, footnote 17, where Mr. Justice Smith was prepared to award damages if malice could have been found in actions of the public official (at pp. 589-590);

Injunction: Attorney-General of New Brunswick v. Town of Newcastle (1947), 19 M.P.R. 365 (N.B.S.C. Ch. Div.); *Rogers City of Fredericton* (1931), 3 M.P.R. 161 (N.B.S.C. Ch. Div.);

Mandamus: Appleyard v. Lambeth Vestry (1897), 66 L.J.Q.B. 27; *Pringle v. City of Stratford* (1909), 20 O.L.R. 246 (Ont. C.A.);

Returning to the statements of MacDonald and Roach J.J.A., it is possible to interpret their holdings concerning the need to show a cause of action, as referring to the judicially recognized right factor in the common law conception of a cause of action. In the words of Mr. Justice Roach, "The plaintiff may have a complaint against the Board, but it has no claim against it".⁶⁹

To insist upon the need for a traditionally recognized right to review the decisions of inferior agencies is to misinterpret the nature of a superior court's supervisory jurisdiction. The nature of the plaintiff's claim in a quashing action (as in *certiorari* proceedings) is fundamentally different from the nature of an ordinary action. In the former the court is asked to review and quash the findings of an inferior body, in the latter the court is requested to adjudicate on the merits of certain questions. The bases for reviewing inferior decisions are certain legally delineated concepts such as lack of jurisdiction and error of law on the face of the record.

The two concepts—consequential relief and a judicially recognized right—are, of course closely linked; as judicially recognized rights have always been dependent in part on whether or not the court has traditionally awarded relief, the removal of the need to be entitled to relief has the effect of enlarging the number of judicially recognized rights, and one does not have to argue the theory of supervisory jurisdiction. Such was the reasoning of Warrington J. in *Burges v. Attorney General*⁷⁰ where the plaintiff sought a declaration quashing a notice of the Commissioners of Inland Revenue.⁷¹

It is contended that there is no cause of action against the Crown or its officers, that they have broken no contract and have done the plaintiff no legal wrong, nor do they threaten to do so. But Order XXV, r. 5, is intended to deal with the very case—that is, one in which no relief can be claimed either by way of damages for the past or an injunction for the future

This argument would seem to say that Order 25, rule 5, did not do away with the necessity for a cause of action, but rather modified it by removing the need for consequential relief and enlarging the area of judicially recognized rights.⁷²

Specific performance: Phillips v. Butler, [1945] Ch. 358;
Accounting and sale of land: Violette v. Violette (1948), 22 M.P.R. 231 (N.B.S.C. App. Div.).

⁶⁹ *Supra*, footnote 39, at p. 170.

⁷⁰ [1911] 2 Ch. 139.

⁷¹ *Ibid.*, at p. 155.

⁷² It should be noted that some difficulty has been encountered by the courts in getting around the words in Order 25, r. 5. empowering the courts to ". . . make binding declarations of right . . .": for example,

Whichever of the arguments is preferred, the conclusion would seem to be that in reviewing administrative action by means of the declaration, the plaintiff need not assert a cause of action in its traditional, common law meaning.

(b) *The relief available*

Mr. Justice MacDonald in the *Crédit Foncier* case stated “. . . on *certiorari* proceedings a court considers only the question of jurisdiction and does not consider the merits”;⁷³ Mr. Justice Roach in the *Hollinger Bus Lines* case stated: “In . . . *certiorari* . . . the relief thereby made available is of a type distinct and apart from the relief obtainable in an ordinary action.”⁷⁴

It is submitted that these statements either confuse or refuse to recognize the distinction between the supervisory and the original jurisdiction of the superior courts. When the court is asked to invoke its supervisory jurisdiction the relief made available by a declaration is exactly the same as that supplied by *certiorari*: the decision or act of the administrative agency is *declared* null and void, or, as is commonly said, is quashed. *Certiorari* is merely a *declaration* of nullity. If it is contended that the declaration questions the merits of the inferior decision or act, the answer is simply that the court has no jurisdiction to question the merits when the declaration is sought only in its supervisory capacity. When, on the other hand, the plaintiff invokes the original jurisdiction of the court along with the supervisory jurisdiction, the question of whether the court may decide the merits of the case depends upon considerations of “exclusiveness” of jurisdiction in the agency.⁷⁵

(c) *Ousting supervisory jurisdiction*

Mr. Justice O'Halloran in *National Trust v. Christian Community*⁷⁶ and Mr. Justice MacDonald in *Crédit Foncier*⁷⁷ both imply

see *MacLeod et al. v. White* (1955), 37 M.P.R. 341 (N.B.S.C. Ch. Div.) per McNair C. J., at p. 360 *et seq.* and *S.M.T. (Eastern) Limited et al. v. The City of Saint John* (1946-47), 19 M.P.R. 103 (N.B.S.C. App. Div.). In the *Guaranty Trust* case, *supra*, footnote 62, Bankes L. J. pointed out that the rule also allowed the making of a “declaratory judgment or order” which did not necessarily have to be a declaration of right (at p. 571). Zamir, *op. cit.*, footnote 1, concludes “the rule . . . provides not only for declarations of ‘right’ in the narrow Hohfeldian sense, but for declaration of all sorts of legal relations, *inter alia*, declarations of immunity and non-liability” (p. 15). In view of this difficulty it is submitted that at least in the area of reviewing administrative action (*i.e.* supervisory jurisdiction), the theory expressed earlier on the non-necessity for requiring a cause of action is to be preferred.

⁷³ *Supra*, footnote 6, at p. 188.

⁷⁴ *Supra*, footnote 39, at p. 172.

⁷⁵ *Supra*, footnote 32, at p. 672.

⁷⁷ *Supra*, footnote 6, at pp. 183-184.

⁷⁶ See *infra*.

that the superior courts' jurisdiction to supervise the findings of an administrative agency is ousted if the agency has been granted "exclusive" jurisdiction over the issue in question.⁷⁸ As will be explained more fully under the heading of original jurisdiction,⁷⁹ the concept of "exclusiveness" of jurisdiction in the agency goes *only* to ousting the superior courts' *original jurisdiction*. A statute granting an administrative agency exclusive authority to consolidate a farmer's debts does not oust the superior courts' jurisdiction to review that decision on grounds of lack of jurisdiction. The usual means of attempting to oust supervisory jurisdiction is by the so-called "privative clauses".

(d) *Suable entity*

Mr. Justice Roach states in *Hollinger Bus Lines*⁸⁰ in his first reason for dismissing the plaintiff's case, that "There is nothing in the Act remotely suggesting that it was intended by the Legislature that the Board should have the capacity to sue or to be sued".⁸¹ As a result therefore ". . . the defendant is not a suable entity. . .".⁸² The necessity for the administrative agency to be a suable entity if the court is to exercise its supervisory jurisdiction is unknown to the law. In proceedings for *certiorari*, which, as we saw earlier, is just one means available to the court in exercising supervisory jurisdiction, the court is not concerned with the question of juridical personality. Such a consideration is relevant only when the plaintiff is suing the defendant by asking the court to exercise its original jurisdiction.

It must always be remembered that the declaratory judgment is a discretionary remedy and courts may refuse to grant a declaration merely on grounds that supervision of administrative acts has traditionally been accomplished by the prerogative writs. If the judgments of Roach and MacDonald JJ. are explained on these grounds, one can only dispute their soundness as constructively developing the law.

Such an explanation serves as an example of what Professor Robson infers when he says there is missing in the courts today ". . . the freshness of view, the capacity to invent new rules, doctrines and standards, and readiness to abandon outworn legal tools which fail to serve modern needs . . ." which are required

⁷⁸ Mr. Justice O'Halloran in *National Trust*, *supra*, footnote 32, speaks in these terms: "If the Supreme Court has not exclusive or concurrent jurisdiction . . . it cannot review the findings of the agency by a declaratory action."

⁷⁹ See *infra*.

⁸¹ *Ibid.*, at p. 166.

⁸⁰ *Supra*, footnote 39.

⁸² *Ibid.*

to make judicial review of executive action a reality, and judicial scrutiny of administrative justice effective.⁸³ This is not to advocate the complete disregard of the old procedures and remedies, but legal tradition and precedent make it easier to develop existing but unused rules than to change existing but used rules.⁸⁴

The four points discussed earlier were expressly or impliedly dealt with in two recent cases in Alberta and Manitoba.

The separation and independence of supervisory and original (or concurrent) jurisdiction were recognized and given full force four years after the *Hollinger Bus Lines* decision on similar facts by the Alberta Supreme Court, Appellate Division, in *Samuels and Charter Airways Ltd. v. A.-G. for Canada and the Air Transport Board et al.*⁸⁵ In *Samuels*, the plaintiffs sought to attack the validity of the orders of the Air Transport Board and to have them declared "null, void and of no effect" charging improper motivation and bias against the Board and that it had acted on a report in cancelling plaintiff's licence which had not been disclosed to the plaintiffs. The Board moved to strike out that part of the statement of claim on the grounds that *inter alia* it was not a suable entity, and that its jurisdiction could only be questioned by the use of *certiorari*. The Board pointed out further that an appeal was provided from the Board's Orders⁸⁶ to the Minister and a further right of appeal to the Supreme Court of Canada, thus the jurisdiction of the Alberta Supreme Court was ousted. The majority of the court (Clinton J., Ford and Johnson, J.J.A.; O'Connor C.J.A. dissenting) dismissed the motion to set aside part of the statement of claim on the grounds set forth.

⁸³ Justice and Administrative Law (3rd ed., 1951), pp. 544-545. In the words of de Smith, *op. cit.*, footnote 2, p. 404: "To treat the action for a declaration as an unwelcomed intruder which must be kept in place by pettifogging restrictions would be inimical to the healthy development of administrative law." Compare the words of Roach J. A. in *Hollinger Bus Lines*, *supra*, footnote 39, with the words of McRuer C.J.H.C. in *Gruen Watch Company of Canada Limited et al. v. The Attorney-General of Canada*, [1950] O.R. 429 (Ont. H.C.), at p. 450: "This peculiar right of recourse to the Courts (the declaratory judgment) is a valuable safeguard for the subject against any arbitrary attempt to exercise administrative power not authorized by statute, and judges ought not to be reluctant to exercise the discretion vested in them where a declaration of the court will afford some protection to the subject against the invasion of his rights by unlawful administrative action." The case was appealed and reversed in part: *Bulova Watch Co. v. Attorney-General of Canada*, [1951] O.R. 360.

⁸⁴ For the opposite view, see H. W. R. Wade, *The Future of Certiorari*, [1958] Camb. L. J. 218, and his more recent remarks in (1964), 80 L. Q. Rev. 329, a case comment on *Punton et al. v. Ministry of Pensions and National Insurance* (No. 2), [1963] 2 All E.R. 693.

⁸⁵ (1956), 1 D.L.R. (2d) 110.

⁸⁶ R.S.C., 1952, c. 2, s. 15(11) (appeal to Minister) and s. 19(1) (appeal to Supreme Court of Canada).

Speaking for the majority, Mr. Justice Johnson stated that ". . . on principle there appears to be no valid distinction between cases where . . . the jurisdiction of a tribunal is questioned on *certiorari* and where it is done by a declaratory judgment".⁸⁷ As a result, the Board could not be heard to defend on grounds of no cause of action or lack of legal personality, for, as in proceedings for *certiorari*, both submissions were irrelevant.

Concerning the argument that the existence of the statutory appeal ousted the court's jurisdiction, Mr. Justice Johnson stated:⁸⁸

The point at issue in these proceedings is the *jurisdiction* of the Board. . . . The Court is here not asked to review the order and substitute its own in place of the Board's.

The Alberta court looked to the distinction between its supervisory jurisdiction and original jurisdiction to overcome the defense that an appeal to the Supreme Court of Canada ousted its jurisdiction; the court implies that the existence of an appeal procedure would oust its original jurisdiction to inquire into the merits of the question, but such a consideration was irrelevant to the exercising of supervisory jurisdiction. Unless one is prepared to entertain "distinctions without a difference", the *Hollinger* and *Samuels* decisions appear to be clearly in opposition; be that as it may, the former is still cited as the leading and only case on the issues involved.⁸⁹

The most recent decision in Canada to deal with this problem is the thorough one of Mr. Justice Smith of the Manitoba Queen's Bench in *Klymchuk v. Cowan*.⁹⁰ The plaintiff sued the defendant Registrar of Motor Vehicles for improperly cancelling the plaintiff's permit as a used car dealer. It was alleged that the defendant failed to observe the fundamental principles of natural justice in cancelling the permit without notice and without affording the plaintiff

⁸⁷ *Supra*, footnote 85, at p. 114; Mr. Justice Johnson cites *Barnard v. National Dock Labour Board*, *supra*, footnote 25, as authority for this proposition.

⁸⁸ *Ibid.*, at p. 115 (emphasis added); the court also draws attention to the fact that the time limit had expired for obtaining *certiorari* as in the *Barnard* case, *ibid.*, and *Cooper* case (*supra*, footnote 22). This point did not, however, induce Mr. Justice MacDonald in *Crédit Foncier* (*supra*, footnote 6) to allow the action to proceed by way of a declaration as the courts did in *Barnard* and *Cooper*.

⁸⁹ For example, see A. Findlay, *The Declaratory Judgment*, Special Lectures of the Law Society of Upper Canada (1961), p. 183 and G. A. McAllister, *Administrative Law* (1963), 6 Can. Bar J. 439, at p. 464. Surprisingly, the Alberta Supreme Court in *Samuels* never mentions the *Hollinger Bus Lines* decision, *supra*, footnote 39.

⁹⁰ *Supra*, footnote 17.

an opportunity to be heard, thus depriving him of his livelihood.

The plaintiff, apparently unwilling to run the risk of having his action dismissed under the *Hollinger Bus Lines* doctrine, asked not only for a declaration that the defendant's order was "void, illegal and of no effect", but also for *certiorari* "quashing the said order". He was obviously unwilling to proceed by *certiorari* alone for he also requested damages.

The court denied the claim for *certiorari* stating that it could not be joined with other forms of relief, and that the wrong procedure had been employed.

In considering the application for a declaration, the court distinguished the *Hollinger Bus Lines* decision as an example of refusing a declaration on grounds of discretion, not jurisdiction.⁹¹ After an exhaustive review of the leading English cases, Mr. Justice Smith concludes:⁹²

There is no doubt in my mind that the court has jurisdiction to make a declaration such as that asked for in the case at bar. This jurisdiction is discretionary and should be exercised with caution. A declaration of invalidity should not normally be made in cases where *certiorari* is available and will afford a complete remedy. In my view *certiorari* is an available remedy in the circumstances of this case, but it would not afford an adequate remedy since the plaintiff is seeking damages in addition to attacking the validity of the defendant's action in cancelling his permit.

The court then proceeded to declare the order of cancellation void and stated:⁹³

As the period for which the plaintiff's permit was granted has expired, there will be no order to restore his permit and dealer's plates.

The court seems to imply that had the permit's period of validity not expired at the time of the action, it would have been willing to inquire into the merits of the Registrar's decision and possibly award a declaration restoring the licence. In doing so the court would have proceeded beyond its supervisory function and invoked its original jurisdiction. As we shall see, the court could only

⁹¹ *Ibid.*, at p. 591. Mr. Justice Smith says: "This decision [*Hollinger*] illustrates the reluctance often expressed by judges to permit an action for a declaration to stand in cases for which proceedings for an order of *certiorari* are available."

⁹² *Ibid.*, at p. 593; the court also adds that it will allow the declaration to avoid multiplicity of actions and to enable all issues to be tried in one proceeding. Consider *Re Oil, Chemical & Atomic Workers International Union, Local 9-14 and Polymer Corporation Ltd.*, [1966] 1 O.R. 774 (Ont. H.C.J.) wherein the question whether the Ontario provisions provide for a declaration to be commenced by an Originating Notice and to be appended to a motion for *certiorari* are discussed by the court.

⁹³ *Ibid.*, at p. 600.

proceed in such a manner if the decision of the Registrar was not "exclusive" in the sense that his determination on the merits was not final,⁹⁴ and that the plaintiff was not granted a statutory appeal to another tribunal or court for a review on the merits.

The results of the *Samuels* and *Klymchuk* decisions may be summarized as follows:

1. Subject to the limitation of the court's discretion, the declaratory judgment may be issued to review the decisions and acts of administrative tribunals and officers.⁹⁵
2. When used as a supervisory remedy it is not necessary for the plaintiff to establish that the defendant is a suable entity or that, as plaintiff, he has a cause of action in the common law tradition.
3. When used in a supervisory role, the relief obtained by use of the declaratory judgment is identical to that obtained by use of *certiorari*.
4. The court may declare an act or decision void in its supervisory role, and then, subject to the condition of "exclusiveness", invoke its original jurisdiction to hear and determine the very issue which was before the administrative tribunal or official.⁹⁶
5. When the declaration is used to review the acts or decisions of inferior bodies and *certiorari* is also available, the determination of whether the court will award the declaration depends on the court's discretion, not its jurisdiction, and the court will consider such factors as convenience and whether or not the plaintiff is seeking other relief.⁹⁷
6. The declaratory judgment may be awarded together with some other form of relief when used either in its supervisory role or as questioning the merits of the decision or acts of the inferior agency.⁹⁸
7. The declaration may be used in its supervisory role to

⁹⁴ See *infra*.

⁹⁵ It should be noted that just as the declaration is a discretionary remedy, so is *certiorari*: see de Smith, *op cit.*, footnote 2, pp. 257 and 314-315.

⁹⁶ At this point, this statement is certainly tenuous; see *infra* for a more complete discussion of this proposition.

⁹⁷ The Alberta Supreme Court in the *Samuels* case, *supra*, footnote 85, did not single out the availability of *certiorari* as giving rise to any special considerations, but rather tended to view the two remedies as alternates.

⁹⁸ Per Mr. Justice Smith in *Klymchuk*, *supra*, footnote 17, at p. 589. Compare the English cases of *Vine v. National Dock Labour Board*, *supra*, footnote 26; *Barker v. Manchester Regional Hospital Board*, [1958] 1 W.L.R. 181 (Q.B.); *Cooper v. Wilson*, *supra*, footnote 22, and *Ridge v. Baldwin*, *supra*, footnote 27.

review judicial acts as well as non-judicial acts.⁹⁹

8. In its supervisory role, the declaration will issue at least for violation or natural justice, bias, bad faith and, more generally, for lack of jurisdiction.¹⁰⁰
9. The existence of an appeal procedure from an administrative agency's decision does not oust the supervisory jurisdiction of the superior courts.
10. In order for *certiorari* to pre-empt the action for a declaration, it is necessary to prove not only that it is available but also that it is an "adequate" remedy.¹⁰¹

II. Original Jurisdiction.

The concept of original jurisdiction as used here describes the power of a superior court to take cognizance of a legally protected interest in the first instance and then to pass judgment upon the law and the facts.

The prime intention behind the pressure to adopt a declaratory procedure in the latter half of the nineteenth century in England was to allow the courts to administer the declaration in exercising its original jurisdiction: for example, to decide questions concerning status, wills, title to property, and contractual rights. As I have said, however, the remedy was adopted in the area of administrative law and used in a supervisory capacity. Unhappily in Canada, the line between original and supervisory jurisdiction became blurred and the resulting confusion did much to retard the growth of the remedy. Having examined the problem from the viewpoint of supervisory jurisdiction, I propose now to investigate the original jurisdiction of the superior courts to issue a declaration as it is affected by the existence of an administrative agency also having jurisdiction over the subject matter; where, in other words, there is concurrent jurisdiction.

In discussing the superior courts' original jurisdiction, we start with the proposition that:¹⁰²

⁹⁹ *Klymchuk v. Cowan*, *supra*, footnote 17, at p. 599.

¹⁰⁰ For an extensive review of the grounds for an award of the declaration in reviewing administrative action see Zamir, *op. cit.*, footnote 1, pp. 178-182.

¹⁰¹ See the words of Mr. Justice Smith in the *Klymchuk* case, *supra*, footnote 17, quoted above.

¹⁰² *Beaton v. Sjolander*, *supra*, footnote 5, at p. 441 quoting from the argument in *Peacock v. Bell* (1666), 1 Wms. Saund. 73, 85 Eng. Rep. 84 (K.B.); see also *Ritz v. Froese* (1898), 12 Man. Rep. 346 (Man. Q.B.) and *Dominion Cannery Limited v. Horace Costanza and Others*, *supra*, footnote 5. Concerning the problem of common law rights and statutory rights see Zamir, *op. cit.*, footnote 1, pp. 91-95.

. . . nothing shall be intended to be out of the jurisdiction of a superior court but that which specifically appears to be so; . . .

If *prima facie* all causes are within the jurisdiction of superior courts, what are the ways or the events which oust original jurisdiction or cause a court in its discretion to decline to exercise that jurisdiction?

A preliminary word is necessary to distinguish the so-called "privative" clauses which purport to exclude the supervisory jurisdiction of the superior courts. Such clauses in the enacting legislation exclude or attempt to exclude jurisdiction to review and quash decisions of an administrative agency;¹⁰³ they do not work so as to exclude the courts' original jurisdiction, although, as will be shown shortly, it is difficult to imagine the plaintiff's access to a superior court to seek relief by original jurisdiction if supervisory jurisdiction has been excluded.

(a) *Ousting original jurisdiction*

Where the legislature has granted an administrative agency an exclusive jurisdiction, remedy or procedure the courts have generally considered their original jurisdiction over the subject matter as ousted.¹⁰⁴

In *The Dominion Cannery Limited v. Horace Costanza et al.*,¹⁰⁵ the Supreme Court of Canada held that where a board has been established to determine matters under a section of a statute, and that determination is labelled "exclusive" by the enacting legislation, then the jurisdiction of the superior courts to hear and to determine the matter is ousted. In this case, the Ontario Workmen's Compensation Act¹⁰⁶ by section 60 gave the Compensation Board ". . . exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part . . .". Mr. Justice Anglin stated:¹⁰⁷

. . . I have not forgotten that the jurisdiction of superior courts is not taken away unless by express language in, or by necessary in-

¹⁰³ Laskin, *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses* (1952), 30 Can. Bar. Rev. 986 and correspondence resulting therefrom (1953), 31 Can Bar Rev. 114.

¹⁰⁴ The courts have been quick to hold as invalid any subordinate legislation which attempts to limit or exclude access to the superior courts in the absence of express authority in the enabling legislation: *Re Bachand v. Dupuis*, [1946] 2 D.L.R. 641 (B.C.S.C.) where the court held as invalid an order of an administrative officer requiring administrative approval for the execution of court judgments. See also *Chester v. Bateson*, [1920] 1 K.B. 829.

¹⁰⁵ *Supra*, footnote 102; the classic English case on exclusive jurisdiction is *Barraclough v. Brown*, [1897] A.C. 615 (H.L.).

¹⁰⁶ R.S.O., 1914, c. 25; presently R.S.O., 1960, c. 437, s. 72.

¹⁰⁷ *Supra*, footnote 102, at p. 61.

ference from a statute.¹⁰⁸ I find here a positive and clear enactment that the jurisdiction of the board shall be "exclusive"—and nothing to warrant a refusal to give that word its full effect.

Apart from the use of the word "exclusive", legislative enactments may exclude original jurisdiction in the courts by declaring the decision of the tribunal "final"¹⁰⁹ or "conclusive".¹¹⁰ These so-called finality clauses, while strictly construed (or in fact ignored¹¹¹) in the area of supervisory jurisdiction, are usually granted full effect in ousting the original jurisdiction.

Professor de Smith points out that rights of access to superior courts may be prohibited not only by granting exclusive jurisdiction to a tribunal, but also where the remedy created for a breach of a statutory duty is regarded as exclusive.¹¹² As an example, the duty of a local education authority to make sufficient schools available is cited as being enforceable only by the Minister in exercise of the default powers vested in him by the Education Act.¹¹³

Similar to the exclusive remedy concept, is the recently established category of exclusive procedure. It has been held that where a statute provides that a certain question "shall" be adjudicated by a specific tribunal, the jurisdiction of the superior courts to declare upon that question is ousted.¹¹⁴ When, however, the statute says only that the question "may" be adjudicated by a

¹⁰⁸ Citing *Balfour v. Malcohn* (1842), 8 Cl. and F. 485, 8 Eng. Rep. 190 (H.L.) and *Oram v. Brearey*, [1877] 2 Ex. Div. 346.

¹⁰⁹ For example: "... the [Labour] Board shall decide [certain] question(s), and its decision shall be final and conclusive.": Labour Relations Act, R.S.B.C., 1960, c. 205, s. 65 as amended by Labour Relations Act Amendment Act, 1961, B.C., 1961, c. 31, s. 37.

¹¹⁰ A more extensive form of the privative provisions in modern legislation appears in The Workmen's Compensation Act, R.S.O., 1960, c. 437, s. 72 (1) of which reads: "The Board has exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon is final and conclusive and is not open to question or review in any court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by *certiorari* or otherwise into any court." The ostensible intention of this clause is to remove both original and supervisory jurisdiction.

¹¹¹ Laskin, *loc. cit.*, footnote 103.

¹¹² de Smith, *op. cit.*, footnote 2, p. 390. Compare the brief judgment of Mr. Justice Brown in *Re Metalliferous Mines Regulation Act* (1963), 42 W.W.R. (N.S.) 157 (B.C.S.C.) where the declaration sought (not under O. 25, r. 5) might have involved penal consequences and the statute provided a remedy.

¹¹³ *Ibid.*; compare the words of Tenterdon C.J. in *Doe v. Bridges* (1831), 1 B. & Ad. 847, 109 Eng. Rep. 1001 (C.P.), at pp. 1005-1006.

¹¹⁴ *Wilkinson v. Barking Corporation*, [1948] 1 K.B. 721; see Zamir, *op. cit.*, footnote 1, p. 89.

specific tribunal, the courts have been willing to retain their original jurisdiction and entertain an action for a declaration.¹¹⁵

The doctrine of exclusiveness prevents a plaintiff from initiating an action in the courts regardless of whether the administrative agency has reached a decision or has not considered the issue at all.

(b) *Declining original jurisdiction*

The superior courts may refuse to adjudicate a question even though their original jurisdiction has not been ousted. The grounds for such refusal *after* a decision has been reached by an agency exercising concurrent jurisdiction are the doctrines of *res judicatae* and election; *before* a decision has been made the refusal rests on numerous grounds of policy.

It is by no measure clear when the decision of an administrative agency on the merits of a question is *res judicatae*, and an extensive treatment of the subject is well beyond the bounds of the present paper.¹¹⁶

Strictly speaking, when a court grants the status of *res judicatae* to a decision it does so not because of a lack of jurisdiction in the court, but rather as a result of the exercising of discretion, the theory being that either the cause of action has merged in the judgment or the doctrine of collateral estoppel prevents further litigation. The requisites for pleading *res judicatae* appear to be threefold: identity of parties,¹¹⁷ identity of issues and claims,¹¹⁸ and a final determination by a competent tribunal exercising a judicial function.¹¹⁹ It is clear that if the supervisory jurisdiction of the court has not been excluded by privative clauses, the doctrine of *res judicatae* has no application when the plaintiff merely requests the court to review and quash the decision of an agency.¹²⁰

¹¹⁵ *Cooper v. Wilson*, *supra*, footnote 22; *Pyx Granite Co. v. Ministry of Housing and Local Government*, [1960] A.C. 260 and the judgment of the Court of Appeal, [1958] 1 Q.B. 554.

¹¹⁶ For the only extensive treatment of this subject, see Davis, *Administrative Law* (1959), ch. 18.

¹¹⁷ *Smith v. Northern Canadian Trust Company et al.* (No. 2), [1947] 2 W.W.R. 429 (Man. K.B.), *aff'd*, [1947] 2 W.W.R. 672 (C.A.).

¹¹⁸ *Moore v. De Wolf*, [1945] 1 D.L.R. 792 (B.C.C.A.).

¹¹⁹ *Dunn v. Eaton*, [1953] 3 D.L.R. 478 (N.S.S.C.). For authority that the administrative agency must be exercising a judicial function see *Re Arbitration Act* (1963), 42 W.W.R. (N.S.) 511, Lord J. (B.C.S.C.) and cases cited therein.

¹²⁰ *Toronto Railway Company v. Corporation of the City of Toronto*, [1904] A.C. 809 (P.C.) on appeal from the Ontario Court of Appeal. In this case the Act stated that the decision of the Ontario court was to be final and the defendants pleaded *res judicatae*. Lord Davey said: "... where the [decision] was *ab initio* a nullity, [the court] had no jurisdiction to confirm it or give it validity [and its decision therefor] . . . cannot be pleaded as an estoppel" [*i.e.* as *res judicatae*].

Supervisory jurisdiction aside, most courts agree that where both the superior courts and an inferior tribunal have original jurisdiction over a matter, and the inferior tribunal has pronounced upon the matter, then the inferior tribunals are:¹²¹

. . . deemed to have been invested with power to err within the limits of their jurisdiction; and provided that they keep within those limits, their decisions may be *res judicatae*.

Such a conclusion would seem justified where a party who has had his day in court is prevented from pursuing the same claims or same defenses, notwithstanding errors of fact or law or how unjust the practical consequences may seem to appear by the policy of the courts in ending litigation.¹²²

The one significant exception to this rule is the case of *Bennett and White (Calgary) Ltd. v. Municipal District of Sugar City No. 5*¹²³ decided by the Privy Council on appeal from the Supreme Court of Canada in 1951. The Committee decided that a plaintiff who has exhausted¹²⁴ the administrative appeal procedure and is dissatisfied with the decision, has a right to submit the question to the ordinary courts. The plaintiff in *Bennett* sought a declaration that its property was not subject to assessment under the Alberta Assessment Act,¹²⁵ the Court of Revision and on appeal, the Assessment Commission both found for the defendant municipality. The plaintiff then initiated an action in the Supreme Court of Alberta, Trial Division.

The case provoked little comment at the time of the decision, but in later years authors have attempted to elucidate the holding by a variety of explanations.¹²⁶ It is submitted that the subject matter of the decision should be given special attention if the decision is to receive any weight in Canadian jurisprudence. Lord Reid never makes general statements that administrative decisions are always open to redetermination by superior courts, but rather restricts his remarks and judicial authorities to the issue of the

¹²¹ de Smith, *op. cit.*, footnote 2, p. 63. Apart from the common law doctrine, the statute itself may declare a board's determination as *res judicatae*; e.g., see Public Utilities Act, R.S.A., 1942, c. 28, s. 64, amended and changed by R.S.A., 1955, c. 267.

¹²² Davis, *op. cit.*, footnote 116, pp. 326-327.

¹²³ [1951] A.C. 786.

¹²⁴ The Privy Council went on to say by *dicta* that the plaintiff did not have to exhaust his administrative remedies before seeking judicial relief.

¹²⁵ R.S.A., 1942, c. 157; presently R.S.A., 1955, c. 17.

¹²⁶ For example, see Zamir, *op. cit.*, footnote 1, p. 244; one needs little encouragement to agree with Professor de Smith's conclusion—that "The decision . . . is a surprising one", *op. cit.*, footnote 2, p. 224, footnote 12.

citizen's liability to taxation. Consider the following remarks:¹²⁷

. . . a taxpayer called on to pay a tax . . . has a right to submit to the ordinary courts the question whether he is taxable . . . unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the statute which authorizes assessment allows an appeal or a series of appeals against assessment to other tribunals is not sufficient to deprive the taxpayer of that right.

It remains to be seen what interpretation the Supreme Court of Canada, now the final court of appeal, will give to the *Bennett* holding.¹²⁸

The *res judicatae* problem has been approached by saying that when two tribunals exercising concurrent jurisdiction are open to a plaintiff, the plaintiff must make an election, and having elected he is barred from either discontinuing his action and resorting to the other tribunal or having obtained a decision, from resorting to the other tribunal for a rehearing of the same issue. In *Shipway v. Logan*¹²⁹ Mr. Justice Martin remarked:¹³⁰

. . . a dual jurisdiction is conferred upon two separate tribunals the [County Court and the Court of Appeal] to do a particular act, . . . to either of these tribunals a litigant may resort. The moment he selects one of these concurrent tribunals, then the other tribunal is excluded

¹²⁷ *Supra*, footnote 123, at pp. 808-809. Subsequent Canadian cases considering the *Bennett* holding have been restricted to tax questions. For example, see: *Regina (Minister of Municipal Affairs) v. Standard Gravel and Surfacing Company Limited* (1953), 9 W.W.R. (N.S.) 601 (S.C. Alta.); *Taber (Town) v. Canadian Sugar Factories Ltd.* (1960), 33 W.W.R. (N.S.) 658 (S.C. Alta.).

¹²⁸ It should be mentioned that in determining whether or not a matter decided by another court is *res judicatae*, Lord Reid looks to the question of whether exclusive jurisdiction was granted to the administrative agency to decide the matter in issue. His Lordship concluded that as the words were ambiguous, and as clear words were required to oust the superior courts' original jurisdiction, the decision of the agency could not be considered *res judicatae*. It is submitted that the question of *res judicatae* is separate and independent of the question concerning exclusive jurisdiction. If it is found that exclusive jurisdiction is granted to an agency, the matter is at an end; if, however, exclusive jurisdiction is not granted, there still remains the question of *res judicatae* for it only arises when two bodies have concurrent jurisdiction over a matter and one has made a decision. One is a question of discretion and policy (*res judicatae*), the other of jurisdiction (exclusive jurisdiction).

¹²⁹ (1916), 22 B.C.R. 410 (B.C.C.A.).

¹³⁰ *Ibid.*, at p. 413. Compare the words of Chief Justice Farris of the Supreme Court of British Columbia in *Re Security Storage Ltd. and Dominion Furniture Chain Stores Ltd.*, [1943] 2 D.L.R. 47, at p. 50: "It would appear that if this Court [Supreme Court] has concurrent jurisdiction with the County Court to hear an application . . . then the [plaintiff] must elect as to which court he shall choose in making the application. Having once made this election and proceeded to the Court of his choice he has no right to change his election and select another Court."

and the matter can solely be adjudicated upon the forum to which he has decided to resort; . . .

Just as there are compelling reasons for preventing redetermination by the courts of an administrative decision, so too, there are strong grounds for preventing judicial action before an authorized administrative agency reaches a decision.

In recent years the doctrine of election has lost ground to the general policy of judicial abstention from making a decision where another tribunal has been specifically established to adjudicate on a problem, even though concurrent jurisdiction may exist. The justifications usually advanced in support of the policy include the grounds of necessary intendment, exhaustion of statutory remedies, requirements of expertise, convenience and avoidance of conflicting decisions. As Mr. Justice Anglin in the Supreme Court of Canada said:¹³¹

Out of respect to the legislature and to carry into effect the spirit, if not the letter, of its policy, as expressed in the [statute] . . . , the Courts, although they may not have been denuded of jurisdiction to entertain such an action . . . , should, I think decline to exercise that jurisdiction . . . , and should relegate the parties to the board which the legislature has constituted to deal with such cases and has clothed with powers . . . to do full and complete justice in the premises.

The English courts appear to be limiting this discretion or policy by awarding a declaration where the administrative procedure is not as convenient as an action for a declaration.

In *Pyx Granite Co. v. Ministry of Housing and Local Government*¹³² the plaintiff quarry company sought a declaration that

While an administrative tribunal cannot constitutionally be considered a court (*Board of Public Utility Commissioners v. Model Dairies*, [1937] 1 D.L.R. 95 (Alta. C.A.) and *Reference Re the Adoption Act*, [1938] S.C.R. 398) this factor should not be considered determinative of whether the plaintiff is estopped after electing the forum of his choice.

¹³¹ *Lethbridge v. Canadian Western Natural Gas, L.H. & P. Co.*, [1924] S.C.R. 652, at p. 659. It should be noted that while the statute conferred exclusive authority on the Board generally, his Lordship did not feel that this necessarily ousted the court's jurisdiction because the action for a declaration was a common law action in contract, and, as the same judge had pointed out only a few months earlier in the *Dominion Cannery* case, *supra*, footnote 102, it requires express language to oust the superior court's jurisdiction. The words in the statute in the *Lethbridge* case were "The Board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other Act. . . .". Compare the words of Viscount Simonds in *Smith v. East Elloe Rural District Council*, [1956] A.C. 736, at p. 750: "Any one bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."

¹³² *Supra*, footnote 115.

planning permission was not required to carry out a certain development on their land. Section 17 (1) of the Town and Country Planning Act, 1947,¹³³ was pleaded by the defendants as providing the proper procedure for determining the issue. The section allowed, by the use of permissive language, any person to apply to the local planning authority for the determination. Clearly the superior court retained its original jurisdiction, but instead of dismissing the action on grounds of an available administrative procedure, the House of Lords unanimously allowed the plaintiff to come straight to the court, by-passing the administrative planning board.

It has been pointed out that not only did the *Pyx* case involve a difficult point of law but also the statutory procedure was awkward, and, therefore, the House of Lords' holding may be justified on the grounds of convenience.¹³⁴ In Canada, it would be a reasonable conclusion, as Professor Zamir states:¹³⁵

. . . that where a satisfactory procedure is prescribed by legislation, the courts will generally refuse to exercise their declaratory power in disregard of that procedure Yet, it is to be hoped that the courts will not in such cases hold their jurisdiction to be excluded; . . .

To conclude these remarks on original jurisdiction, it appears that a court having concurrent jurisdiction over the merits of a question will refrain from allowing an action except possibly when the issue involves taxation or when the court system is more convenient.

III. *Combining Original and Supervisory Jurisdiction.*

If once it is accepted that the declaration can be used in both a supervisory and original capacity, a most intriguing result occurs when one combines them in the same action. Where the superior court retains its original jurisdiction over a question, it is submitted that if a decision of an agency is quashed by the court in its supervisory role, that court may then proceed to examine the merits of the question by invoking its original jurisdiction. At first blush, this resembles an appeal. a procedure unknown to the common

¹³³ Section 17 (1) reads in part: ". . . any person who . . . wishes to have it determined whether the carrying out of [certain] operations . . . would constitute or involve development of the land within the meaning of this Act. . . may apply to the local planning authority to determine that question."

¹³⁴ de Smith, *op. cit.*, footnote 2, p. 402; also mentioned in Note, (1959), 22 Mod. L. Rev. 664. Compare the case of *Cooper v. Wilson*, *supra*, footnote 22, where the plaintiff had not availed himself of the administrative appellate procedure.

¹³⁵ Zamir, *op. cit.*, footnote 1, p. 92.

law;¹³⁶ in fact, even wider than an appeal for the court may try the issue *de novo*. The reaction of the courts to the kind of submission I am making has varied from denying the declaration both a supervisory¹³⁷ and an original¹³⁸ function, to granting either function separately¹³⁹ or together¹⁴⁰ in one action. The multitude of conflicting decisions requires an examination into the true effect of combining the two functions.

The effect of a superior court's decision to quash an unauthorized administrative act or decision is to hold that no decision has been made upon the issue in question. The decision made is null and void and in law ceases to exist as a decision affecting the rights and duties of the parties.

At this point in time, the situation, with one exception, is indistinguishable from that described earlier where the plaintiff has a choice of which of two tribunals in which to litigate, both having jurisdiction over the subject-matter. We saw then that, as a matter of policy and discretion, the courts have generally required the plaintiff to proceed to the agency specifically established by the legislature to decide the issue except when the declaratory procedure would be more *convenient*, and possibly when the subject-matter involved a question of taxation.

The one exception to the indistinguishable character of these two situations is the fact that the plaintiff is already in the court: a matter of considerable convenience to both the parties and the court. In such circumstances, it is submitted, the court should be willing, in the absence of other considerations, to decide the merits of the question on the grounds of convenience when the plaintiff so requests. The court would be free in the exercise of its discretion to decline jurisdiction if other considerations outweighed the convenience factor: for example, if the question required adjudication by experts.

If this analysis is accepted, it is clear that the procedure described is not an appeal. The rationale I suggest has never been explicitly adopted by any Anglo-Canadian court, but there are

¹³⁶ *Chagnon v. Normand* (1888), 16 S.C.R. 661, per Ritchie C.J.C. The proposition of combining supervisory and original jurisdiction is discussed by Zamir, *supra*, footnote 1, pp. 69-119, and 179-171.

¹³⁷ *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board*, *supra*, footnote 39; *Crédit Foncier Franco-Canadien v. Board of Review*, under the F.C.A. Act, 1934, *supra*, footnote 6.

¹³⁸ *Samuels and Charter Airways Ltd. v. A.-G. for Canada and the Air Transport Board et al.*, *supra*, footnote 18; *Healey v. Minister of Health*, *supra*, footnote 28; *Lagunju v. Olubadan in Council*, [1952] A.C. 387 (P.C.).

¹³⁹ *Bennett and White (Calgary) Ltd. v. Municipal District of Sugar City No. 5*, *supra*, footnote 123.

¹⁴⁰ *Cooper v. Wilson*, *supra*, footnote 22.

examples where the court, having quashed an administrative decision or act, has then proceeded to determine the issue originally adjudicated by the agency.

The English case most often cited for this proposition is *Cooper v. Wilson*¹⁴¹ where the plaintiff sought a declaration, not only that his dismissal from the police force by the Watch Committee was invalid, but also that he was entitled to certain payments withheld from his wages. The Court of Appeal granted the declarations requested, but analysed only the question whether a declaration could issue in a case suited for *certiorari*.¹⁴²

The House of Lords in the recent case of *Ridge v. Baldwin*¹⁴³ was asked by the plaintiff on facts similar to those in the *Cooper* case, to declare the termination of the plaintiff's employment as Chief Constable by the Watch Committee as void, and that the plaintiff was entitled to back wages or alternately to a pension for life. A majority of their Lordships (Lords Reid, Morris, Hodson and Devlin; Lord Evershed dissenting) quashed the order of the Watch Committee, and remitted the case¹⁴⁴ to the Queen's Bench for a more complete hearing on the merits question. By remitting the case, the House would seem to imply that it would have been willing to decide the merits question providing there had been a more complete argument on the question in the lower courts.¹⁴⁵

No Canadian court has been faced with deciding whether or not it should proceed to examine the merits of a question after quashing a decision of an administrative agency. Presumably, Mr. Justice Smith in *Klymchuk v. Cowan*¹⁴⁶ would have been willing to examine the question of restoring the plaintiff's permit as a used car dealer if the point had not in the interim become moot.¹⁴⁷

¹⁴¹ *Ibid.*

¹⁴² Considering the traditional role played by the English courts in reviewing administrative action, the absence of analysis by the Court of Appeal of its holding allowing supervisory and original jurisdiction to be combined is most surprising. For a narrow interpretation of the *Cooper* ratio see de Smith, *op. cit.*, footnote 2, pp. 407-408.

¹⁴³ *Supra*, footnote 27, commented on by Goodhart (1964), 80 L.Q. Rev. 105.

¹⁴⁴ *Ibid.*, per Lord Reid, at p. 81.

¹⁴⁵ *Cf.*, *Taylor v. National Assistance Board*, [1958] A.C. 532 (H.L.) and *Spring v. National Amalgamated Stevedores and Dockers Society*, [1956] 1 W.L.R. 585 (Chancery of the County Palatine of Lancaster).

¹⁴⁶ *Supra*, footnote 17.

¹⁴⁷ *Ibid.*, at p. 600 where the learned judge says: "As the period for which the plaintiff's permit was granted has expired, there will be no order to restore his permit and dealer's plates." It is arguable that such action is not really questioning the merits of the issue, but at least one can say an order restoring the licences would go further than the court could go on proceedings for *certiorari*.

With the more liberal approach exhibited in the *Klymchuk*¹⁴⁸ and *Samuels*¹⁴⁹ decisions allowing the declaration to be used in a supervisory role, we can soon expect a case requesting a court to combine supervisory and original jurisdiction.

IV. *Advantages of the Declaration in Administrative Law.*

The advantages of the declaration in administrative law are best explained by comparing it with the old prerogative writs of *certiorari*, *mandamus*, *quo warranto* and prohibition. As we have principally examined the use of the declaration in quashing administrative acts or decisions, the advantages which follow below are chiefly concerned with comparing *certiorari* and the action for a declaratory judgment.¹⁵⁰

The most significant general advantage of the declaration in administrative law is the discretionary nature of the remedy. While most often labelled a limiting factor, it is suggested that because of, rather than in spite of discretion the courts have been free to develop its wide potential in reviewing and checking administrative abuses. The words of Denning L.J. in *Barnard v. National Dock Labour Board et al.*¹⁵¹ point out, first, the discretionary nature of the remedy, and, then, how it can be used to promote justice as between the parties to a dispute:¹⁵²

I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself; . . . If the Tribunal does not observe the law, what is to be done? The remedy by *certiorari* is hedged round by limitations and may not be available. Why then should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean the tribunal could disregard the law, which is a thing no one can do in this country.

The growth of the declaration through the discretionary process is an example of the development of the common law and in particular its flexibility to meet contingencies in our society.¹⁵³

¹⁴⁸ *Ibid.*

¹⁴⁹ *Supra*, footnote 18.

¹⁵⁰ For a more detailed comparison of the declaration and the prerogative orders see: Barrie, *The Advantages of The Declaratory Judgment in Administrative Law* (1955), 18 Mod. L. Rev. 138; Zamir, *The Declaratory Judgment v. The Prerogative Orders*, [1958] Public Law 34 (reprinted in Professor Zamir's book, *op. cit.*, footnote 1, pp. 166-172); Schwartz, *Forms of Review Action in English Administrative Law* (1956), 56 Col. L. Rev. 203, at pp. 215-226; H. Wade, *The Future of Certiorari*, [1958] Camb. L.J. 218.

For a general commentary on the advantages of the declaration see: de Smith, *op. cit.*, footnote 2, pp. 405-413; Findlay, *Declaratory Judgment*, *Special Lectures of the Law Society of Upper Canada* (1961), p. 183; Lord Parker, *op. cit.*, footnote 9; Jennings, *Declaratory Judgments Against Public Authorities in England* (1932), 41 Yale L.J. 407; and Borchard, *op. cit.*, footnote 46, Chapter XIV.

¹⁵¹ *Supra*, footnote 25.

¹⁵² *Ibid.*, at p. 41.

¹⁵³ We saw earlier how judicial review of inferior decisions was originat-

The second general advantage of the declaration, again often labelled a limiting factor, is the absence of coercive force behind the judgment. The absence of sanctions against public authorities decreases the chance of hostility in the proceedings, and recognizes that public officials in a democratic society act more often as a result of a perceived public duty than private gain.

We saw earlier that other relief¹⁵⁴ is available in an action for a declaration whereas in *certiorari* proceedings, the aggrieved plaintiff must commence another action to obtain, for example, damages suffered as a result of unauthorized administrative action. It would appear from the holdings in the *Barnard*, *Cooper* and *Vine* cases that the court need only be exercising its supervisory jurisdiction to grant damages to the plaintiff, and invocation of the courts' original jurisdiction is not required.

In the wonderland of *certiorari*, one of the most taxing and potentially disastrous activities which must be undertaken to obtain judicial review is the classification of the function exercised—legislative, administrative (or executive), judicial or ministerial—by a particular tribunal. This problem is not encountered in the action for a declaration. In the words of Lord Denning:¹⁵⁵

It is one of the defects of *certiorari* that it so often involves an inquiry into the distinction between judicial and administrative acts which no one has been able satisfactorily to define. No such difficulty arises with the remedy by declaration, which is wide enough to meet this deficiency . . . It applies to administrative acts as well as judicial acts whenever their validity is challenged because of a denial of justice, or for other good reasons.¹⁵⁶

There is growing authority for the proposition that while *certiorari* is limited to errors of law on the face of the record, the declaration will lie to review errors of law whether or not they appear on the face of the record. The first authoritative pronouncement again came from Denning L.J. in *Lee v. Showmen's Guild of Great Britain*¹⁵⁷ when he said,¹⁵⁸

. . . the remedy by declaration and injunction . . . can be as effective as, if not more effective than, *certiorari*. It is, indeed, more effective, because it is not subject to the limitation that the error [of law] must appear on the face of the record.

ed by the use of a discretionary remedy: *certiorari*, *supra*, footnote 95—a similar pattern is slowly emerging with the declaration.

¹⁵⁴ *Supra*, footnote 68.

¹⁵⁵ *Pyx Granite Co. v. Ministry of Housing and Local Government*, *supra*, footnote 115.

¹⁵⁶ *Ibid.*, at p. 571 (Q.B.).

¹⁵⁷ [1952] 2 Q.B. 329.

¹⁵⁸ *Ibid.*, at p. 346.

This contention, while *obiter*, has been repeated in four later English cases,¹⁵⁹ but as yet no Canadian court has squarely considered the question.¹⁶⁰

The *Lee* case illustrates another advantage the declaration enjoys over *certiorari*; in that case in which a declaration was sought against a domestic tribunal, Denning L.J. said:¹⁶¹

In the case of statutory tribunals, the injured party has a remedy by *certiorari*, and also a remedy by declaration and injunction. The remedy by *certiorari* does not lie to domestic tribunals, but the remedy by declaration and injunction does lie, and it can be as effective as, if not more effective than, *certiorari*.

There is no right to discovery in *certiorari* proceedings, but there is in the action for a declaration; such an advantage was crucial to the plaintiffs in the *Barnard* case where they could not obtain redress for the simple reason that they did not know the facts. Denning L.J.¹⁶² said: "In *certiorari* there is no discovery, whereas in an action for a declaration it can be had."

Professor Zamir points out that the declaration may be used not only to quash administrative decisions, but also to remove doubts as to the meaning of a decision, a determination which could not be made by way of *certiorari*.¹⁶³ The extension of this proposition to allow administrative boards to apply themselves to a superior court for a clarification of some point might possibly be a welcome procedure to some agencies.

The Crown Rules in some Canadian provinces still limit the time to obtain *certiorari* to six months from the date of the order

¹⁵⁹ *Barnard v. National Dock Labour Board*, *supra*, footnote 25, per Denning L.J., at p. 41; *Taylor v. National Assistance Board*, *supra*, footnote 43, per Lord Merriman, rev'd on other grounds, but with no disapproval of holding on error of law, [1958] A.C. 532; *Pyx Granite Co. v. Ministry of Housing and Local Government*, *supra*, footnote 115, Denning L.J., at p. 570 (Q.B.); *contra* Parker L.J. in *Healey v. Minister of Health*, *supra*, footnote 28, at p. 232. For more extensive comments see Zamir, *op. cit.*, *supra*, footnote 1, pp. 160-166 and de Smith, *op. cit.*, footnote 2, pp. 409-411.

¹⁶⁰ Mr. Justice Smith in *Klymchuk v. Cowan*, *supra*, footnote 17, at p. 592 briefly states that the "... Court had jurisdiction to make a declaration where the complaint was based upon an alleged error in law", citing *Punton et al. v. Ministry of Pensions and National Insurance* (No. 2), [1963] 2 All E.R. 693.

¹⁶¹ *Supra*, footnote 157, at p. 346. In *White v. Kuzych*, [1951] A.C. 585, on appeal from the British Columbia Court of Appeal, the Privy Council held that the plaintiff who seeks to have a decision of a domestic tribunal quashed must first exhaust his prescribed remedies. We noticed the same principle was modified in the case of statutory tribunals in the case of greater convenience (*Pyx Granite Co.*, *supra*, footnotes 133-136) and possibly taxation questions (*Bennett and White*, *supra*, footnotes 141-146).

¹⁶² *Supra*, footnote 25, at p. 43.

¹⁶³ *Op. cit.*, footnote 1, pp. 169-170.

or judgment sought to be reviewed; this limitation does not apply to the declaration.¹⁶⁴

Finally, as we have already seen, the declaration may be used by the superior courts in both a supervisory and original capacity, allowing them not only to quash a decision, but also to inquire into the merits of the issue providing the administrative agency's jurisdiction is not exclusive.

The legislative and judicial institutions have a responsibility rooted in democracy, to provide the individual with the simplest possible procedures and remedies for the ascertainment of his rights and duties when they are subject to the power of an administrative agency. The traditional means of submitting administrative acts to independent review—the prerogative writs—have become legal leviathans. While the ability of the common law to meet new situations may have been greatly reduced with the encompassing nature of modern legislation, there are still areas where it is incumbent upon judges to utilize the techniques of common law and equity to effect a balance between public and private interests: such an area is administrative law, such a technique is the declaratory judgment.

¹⁶⁴ For example, see the Alberta Rules of Court, rule 867 (1): "The motion shall not be entertained unless the return day thereof be within six months after the conviction, order, warrant or inquisition and unless the applicant, if not the Attorney General, is shown to have deposited with the clerk of the court to whom the certificate is required to be returned as security for costs of the application the sum of \$25 or such other sum as a judge may direct."