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Article abstract

Section 18 of the *Federal Court Act* provides that the Trial Division of the Federal Court has "exclusive original jurisdiction" to issue certain prerogative writs or grant declaratory relief "against any federal board, commission or other tribunal". In the early days of the Court, it was thought (in the words of W.R. Jackett, its first Chief Justice), that provincial superior courts were now without jurisdiction to exercise their traditional superintending and reforming powers over these federal boards, commissions or other tribunals. But this was soon challenged, and in a trilogy of cases, decided in 1982 and 1983, the Supreme Court of Canada clarified the meaning of "exclusive", as used in section 18 of the Act. This article traces the legislative history of the section, and it analyzes what was held in the three leading cases. The picture which emerges is that the Federal Court's jurisdiction is neither as exclusive as the word would suggest nor as its draftsmen had envisaged.

HOW EXCLUSIVE IS "EXCLUSIVE"? AN EXAMINATION OF SECTION 18 OF THE *FEDERAL COURT ACT*

by Donna Soble KAUFMAN*

Conformément à l'article 18 de la Loi sur la Cour fédérale, *la Division de première instance de la Cour fédérale a "compétence exclusive en première instance" pour émettre certaines ordonnances ou pour rendre un jugement déclaratoire "contre tout office, toute commission ou tout autre tribunal fédéral". Au tout début de l'existence de la Cour fédérale, on croyait (selon l'honorable W.R. Jackett, premier juge en chef de cette cour) que les cours supérieures provinciales avaient perdu toute compétence d'exercer leurs pouvoirs traditionnels de surveillance et de réforme sur ces offices, commissions ou tous autres tribunaux. Mais on ne tarda pas à contester ce point et, dans trois causes jugées en 1982 et 1983, la Cour suprême du Canada précisait la définition du mot "exclusive", tel qu'utilisé à la section 18 de la Loi. Le présent article retrace l'histoire législative de cette section et analyse la décision rendue dans ces trois causes marquantes. Il en ressort que la juridiction de la Cour fédérale n'est pas aussi exclusive que le mot le suggère ou que ses auteurs l'avaient envisagé.*

Section 18 of the Federal Court Act *provides that the Trial Division of the Federal Court has "exclusive original jurisdiction" to issue certain prerogative writs or grant declaratory relief "against any federal board, commission or other tribunal". In the early days of the Court, it was thought (in the words of W.R. Jackett, its first Chief Justice), that provincial superior courts were now without jurisdiction to exercise their traditional superintending and reforming powers over these federal boards, commissions or other tribunals. But this was soon challenged, and in a trilogy of*

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cases, decided in 1982 and 1983, the Supreme Court of Canada clarified the meaning of "exclusive", as used in section 18 of the Act. This article traces the legislative history of the section, and it analyzes what was held in the three leading cases. The picture which emerges is that the Federal Court's jurisdiction is neither as exclusive as the word would suggest nor as its draftsmen had envisaged.

SUMMARY

INTRODUCTION

> *The* Federal Court Act ... *attempts to clothe the new Federal Courts with an exclusive and pervasive jurisdiction, supervisory and appellate over federal tribunals ...*[1]

Section 101 of the *Constitution Act 1867* permits the Parliament of Canada, "from Time to Time", to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada".

It was in virtue of this section that, in 1875, the Parliament of Canada established the Supreme Court of Canada as a "General Court of Appeal for Canada" and the Exchequer Court of Canada as a court "for the better Administration of the Laws of Canada".[2] Both courts underwent changes from time to time,[3] but in 1970 the Government of Canada proceeded with a dramatic overhaul of the Exchequer Court, with the result that the court was "continued" under the name of the Federal Court of Canada.[4]

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1. N.A. CHALMERS, "The Federal Court as an Attempt to Solve Some Problems of Administrative Law in the Federal Area", (1972) 18 *McGill L.J.* 206, 213.

2. *Supreme and Exchequer Courts Act*, S.C. 1875, c. 11.

3. Most notably regarding the number of judges on the courts, but also in jurisdiction and procedure.

4. *Federal Court Act*, S.C. 1970-71-72, c. 1, s. 3; a partial text of this section may be found in n. 7, *infra*. Before the Act had been proclaimed, Gordon HENDERSON, Q.C., in a lecture to the Law Society of Upper Canada, spoke about the new tribunal. It was a speech rich in research and, among the areas examined, were the intent and scope of s. 18 of the Act: Federal Administrative Tribunals in Relation to the New Federal Court of Canada (1971), Law Society of Upper Canada Special Lectures, Administrative Practice and Procedure, 55. The problems of the drafting in parts of this Act are discussed by Norman M. FERA in an article entitled "Conservatism in the Supervision of Federal Tribunals: The Trial Division of the Federal Court Considered", (1976) 22 *McGill L.J.* 234. In Fera's view, the Act "is, at best, minimally defined, poorly qualified and often confusingly ambiguous in significant places". See also, by the same author, "Judicial Review Under Sections 18 and 28 of the Federal Court Act", (1975) 21 *McGill L.J.* 255, and a comment by J.M. EVANS, (1977) 23 *McGill L.J.* 132.

The new court, however, bears little resemblance to its predecessor. It is divided into two divisions — the Trial Division and the Federal Court of Appeal. The Trial Division is, essentially, the court of first instance. But certain applications for the review of decisions of federal boards and commissions are taken directly to the Court of Appeal, with the somewhat confusing result that, in spite of its name, the Federal Court of Appeal is also a court of first instance.[5]

The judges of the Federal Court are appointed by the Governor in Council under section 96 of the *Constitution Act*, and there is no doubt that the court itself is a superior court. As W.R. Jackett noted, it is "a court of law, equity and admiralty and it is a superior court of record having civil and criminal jurisdiction".[6] And the *Federal Court Act* so stipulates in section 3.[7]

I- THE JURISDICTION OF THE FEDERAL COURT

The jurisdiction of the Trial Division of the Federal Court is dealt with in sections 17 to 26 of the Act. There are four categories:

1. Where the court has "jurisdiction" to deal with a matter (s. 19, intergovernmental disputes);

2. Where the court has "original jurisdiction" (s. 24, income and estate tax appeals, s. 25, extra-provincial jurisdiction, and s. 26, general original jurisdiction);

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5. S. 28 of the *Federal Court Act* provides, in part, that, "[n]otwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal ...". Where the Court of Appeal has jurisdiction under this provision, "the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order".

6. W.R. JACKETT, *The Federal Court of Canada [ ] A Manual for Practice*, (1971), 15.

7. This section reads, in part, as follows: "The ... Exchequer Court of Canada is hereby continued under the name of the Federal Court of Canada as an additional court for the better administration of the laws of Canada and shall continue to be a superior court of record having civil and criminal jurisdiction."

3. Where the court is given "concurrent original jurisdiction" (s. 22, navigation and shipping, and s. 23, bills of exchange, promissory notes, aeronautics and inter-provincial works and undertakings); and
4. Where the Act gives the court "exclusive original jurisdiction" (ss. 17, 18, 20 and 21, which deal, respectively, with Crown litigation, extraordinary remedies, industrial property and citizenship appeals).

While use of the word "exclusive" in sections 17, 20 and 21 may at some future time pose problems, it is section 18 which has already given rise to litigation.

This section reads as follows:

18. The Trial Division has exclusive original jurisdiction (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	18. La Division de première instance a compétence exclusive en première instance a) pour émettre une injonction, un bref de *certiorari*, un bref de *mandamus*, un bref de prohibition ou un bref de *quo warranto*, ou pour rendre un jugement déclaratoire, contre tout office, toute commission ou tout autre tribunal fédéral; et b) pour entendre et juger toute demande de redressement de la nature de celui qu'envisage l'alinéa a), et notamment toute procédure engagée contre le procureur général du Canada aux fins d'obtenir le redressement contre un office, une commission ou à un autre tribunal fédéral.

Early commentators took the word "exclusive" at face value. W.R. Jackett (the first Chief Justice of the Court), in his Manual of Practice for the Federal Court, noted only that "[t]he Trial Division has exclusive jurisdiction of a very broad character in respect of federal boards, commissions and other tribunals".[8] He apparently did not foresee the potential difficulty with the notion of "exclusive" jurisdiction in section 18. The statute, he added, did "not seem to create a new kind of proceeding in relation to such matters";[9] any such proceeding, the Chief Justice thought, would in fact be "a proceeding that would have been available in some court even if the Act had not come into force".[10] By

8. W.R. JACKETT, *op. cit.*, note 6, 18.
9. *Ibid.*
10. *Ibid.*

implication, then, the reader may conclude that, in Chief Justice Jackett's view, provincial superior courts were now without jurisdiction to exercise their traditional "superintending and reforming" power[11] over the federal boards, commissions or other tribunals, as defined in section 18 of the Act.

Others shared this view. The Law Reform Commission of Canada, in a Working Paper on the Federal Court,[12] stated that:

> Until 1971, the supervisory function of the courts over federal administrative authorities was exercised in part by the Supreme Court and the Exchequer Court of Canada pursuant to a number of statutory provisions providing for appeals and in part by the provincial superior courts by means of the prerogative writs. The jurisdiction of the provincial courts gave rise to a number of difficulties. More than one provincial court could, in certain circumstances, exercise jurisdiction over the same subject matter and there was a risk of conflicting interpretations of the constituent statute of an administrative authority by different courts, giving rise to confusion about the authority's powers. Accordingly, when the *Federal Court Act* was enacted in 1971, supervisory jurisdiction over federal administrative authority by means of the prerogative writs and other extraordinary remedies (save *habeas corpus*) was, by section 18 of the Act, exclusively vested in the Trial Division of the Federal Court, and thereby taken away from the provincial courts.[13]

The Commission did, however, note the existence of "certain constitutional problems",[14] and by way of example the paper cited the potential difficulty "about the validity of any provision purporting to remove from the provincial courts the power of

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11. See, for instance, Art. 33 of the Quebec Code of Civil Procedure.

12. Working Paper 18, Administrative Law[:] Federal Court[:] *Judicial Review*, (1977).

13. *Id.*, 5. See also the Comment by J.E. CÔTÉ, (1972) 50 *Can. Bar Rev.* 519: "[B]y section 18 of the Act the Federal Court is given *exclusive* jurisdiction over such federal board, commission or other tribunal and the jurisdiction which the provincial superior courts had over such bodies previously is thereby abolished" (reference omitted). But see Norman FERA, "The Federal Court of Canada: A Critical Look at its Jurisdiction", (1973) 6 *Ottawa L.R.* 99, 106, where the author states his concern about the notion of exclusivity in s. 18: "But there is a good possibility that, because the common-law writs are so fundamental, a litigant will still be able to go to a provincial high court, if he chose that forum instead of the Federal Court, and have an irregular decision of the federal tribunal quashed." This, however, was not to be the challenge against s. 18, for how could one high court overrule the decision of another high court of equal rank?

14. *Id.*, 9.

examining constitutional questions by means of the prerogative writs".[15] This was an astute observation, and so, as we shall see, was the overall assessment made by the Commission:

> We doubt that the courts would interpret a broad general section (such as section 18 of the *Federal Court Act*) giving the Federal Court exclusive supervisory power over federal administrative authorities as intended to denude the provincial courts of their power of judicial review over constitutional questions, if indeed this exceeds federal constitutional capacity; rather, we think they would tend to interpret it as not being addressed to that issue.[16]

II. LEGISLATIVE HISTORY OF SECTION 18

An examination of the legislative history of section 18 of the *Federal Court Act* is enlightening. This Act was first brought before Parliament in the early part of 1970 — as Bill C-192 — and the Minister of Justice of the day, the Honourable John Turner, on second reading, explained the government's philosophy regarding the bill:

> In addition to the fundamental change in court structure that I have mentioned, the bill proposed what I consider to be an important administrative law change in relation to the superintendence of federal boards, commissions and tribunals. For many years federal boards, commissions and tribunals have been subject to the diverse jurisdictions and practices of the various superior provincial courts in this country. For this reason, federal boards, commissions and tribunals can be supervised to a much greater extent than can their provincial counterparts since provincial boards, commissions and tribunals of similar nature can be supervised only by their own provincial courts.
>
> This multiple supervision, with a lack of consistent jurisprudence and application, can work serious hardship not only on the boards and commissions but on those who appear before them. Indeed, hon. members can readily see the possibility of harassment and the possibility of the misuse of this multiple superintending jurisdiction. It is for this reason, plus one other that I shall mention shortly, that the conclusion was reached that this superintending jurisdiction should be vested in a single court that enjoyed the same nation wide jurisdiction as the federal boards, commissions and tribunals themselves. The bill is therefore designed to create a single and uniform basis of superintending jurisdiction in relation to federal boards and commissions and to place them on the same footing in this regard as provincial boards and commissions.

15. *Ibid.*

16. *Ibid.*

> I said there was another reason for this change in the administrative law applicable to federal boards, commissions and tribunals. It appears that the superintending jurisdiction now exercised by provincial superior courts over these federal tribunals arises out of what may be fairly described as pre-Confederation legislation that has not yet been repealed or modified by the Parliament of Canada. That being the case, it seems readily apparent that no significant improvements can be made in the existing superintending jurisdiction of the provincial courts over federal boards, commissions and tribunals by the provincial legislatures and that unless changes are made by Parliament, resort will have to be had to the ancient remedies of prohibition, certiorari, quo warranto, mandamus and the like. What I have said is based on the unanimous judgement delivered by Mr. Justice Fauteux, as he then was, in the Supreme Court of Canada — he is now the Chief Justice of this country — in the case of *Three Rivers Boatmen Ltd.* v. *Canada Labour Relations Board et al.*, on May 13, 1969.[17]

And he added:

> There is a growing feeling among those who practice law and those who observe the judgements of the courts that these ancient common law remedies are no longer adequate for present-day purposes. We as legislators must surely be certain that when we set up a statutory body to administer the fine legal principles in accordance with defined procedures, or in accordance with the rule of law and natural justice as interpreted by the courts, the jurisdiction we have created and conferred will be exercised properly and for the proper benefit of those for whom it was established. There is only one mechanism that can afford us that satisfaction, and that mechanism is the duly constituted and independent courts of this country.[18]

A careful reading of this speech would seem to indicate that the real intention of the Minister of Justice was to oust completely provincial superior courts from any possible review of federal bodies. The Government's desire clearly appears to have been to attempt to prevent the provincial courts from "meddling" in the affairs of federal bodies and agencies. It was a reflection of the tug-of-war at the time between the central government and the provinces. As long as the provincial superior courts had *any*

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17. John TURNER, *Hansard*, March 25, 1970, 5470. The case to which the Minister referred is reported at [1969] S.C.R. 607. The Appellant's correct name is Three Rivers Boatman Ltd. For a full discussion of the problems raised by the Minister, see, for instance, D.J. MULLAN, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform?", (1973) 23 *U. of T. L.J.* 14, 22.

18. John TURNER, *op. cit.*, 5471.

jurisdiction over federal boards and agencies, those bodies would escape uniform control.[19]

However, not everyone was as convinced as the Minister that section 18 was necessary, and Mark MacGuigan, M.P. (then a back-bencher, later a Minister of Justice and now a judge of the Federal Court of Appeal), voiced some concern:

> It can be argued that clause 18 is not necessary at all, and that clause 28 could even have eliminated all recourse to the old prerogative writs in matters pertaining to review of decisions of administrative boards. I think it is fairly safe to predict that clause 18 will not be used very much in the light of advantages of the appeal procedure stemming from clause 28. In fact, it is hard to imagine circumstances which might lead to review under clause 18 and not under clause 28. Therefore, it seems safe to predict that clause 28 will supersede clause 18 from the point of view of practice.[20]

Others also voiced misgivings,[21] but the government held firm on the drafting of the Act.

Time eventually ran out on Bill C-192, but it was reintroduced (as Bill C-172) in the following session, and by agreement of the House the new bill did not take the normal course. Thus, on October 28, 1970, the Minister of Justice was able to take into consideration what had been said in Committee at the previous session, and in his final submission he spoke again of judicial review. Of particular interest for this paper is the following:

> These three clauses provide the avenues of appeal and review from federal boards, tribunals and commissions. Under clause 18 the traditional common law prerogative writs, now left to the jurisdiction of the provin-

19. The Deputy Minister of Justice, Don MAXWELL, Q.C., was even more explicit than the Minister. In testimony before the House of Commons Standing Committee on Justice and Legal Affairs, he put the matter bluntly: "Clause 18 is based on the philosophy that we want to remove the jurisdiction in prerogative matters from the Superior Courts of the provinces and place them in our own federal Superior Court" (*Minutes of Proceedings and Evidence*, May 7, 1970, No. 26, 25).

20. Mark MacGUIGAN, *Hansard*, March 25, 1970, 5482. That is precisely what happened, and *C.L.R.B.* v. *Paul L'Anglais Inc.*, (1983) 146 D.L.R. (3d) 202 (S.C.C.), discussed at pp. 451 & ff., *infra*, is a case in point: the initial application for review was made in virtue of section 28 of the *Federal Court Act*, and only when this was refused did the applicant turn to the Quebec Superior Court.

21. *Id.*, 5472 & ff.

> cial superior courts across Canada arising out of their common law jurisdiction, are transferred to the federal court in its trial division, by reason of the statutory transfer found in clause 18. Those prerogative writs as they stand and as they have been judicially interpreted, now would be referred to the federal court in so far as they relate to proceedings before federal tribunals, federal boards and federal commissions. So those common law writs, prerogative writs would, within the envelope of the current jurisprudence, now be interpreted before the federal court.[22]

He also added this:

> We want to make it perfectly clear, first of all, that we seek to preserve prerogative rights as they now exist, merely transferring them to the jurisdiction of the federal court instead of leaving them with the superior courts. The reason for that is this: one of the complaints for having multiple jurisdiction is that a federal board, such as the Canada Labour Relations Board, for example, could, under the present situation be deliberately harassed by a number of jurisdictions. Somebody who wants to attack a decision of the Canada Labour Relations Board by a prerogative writ that is available in any one of the ten jurisdictions in Canada, can do so anywhere at the same time, and that is particularly so if the board is dealing with a matter involving a national employment situation. The same applies to the railway boards and broadcasting boards. I want to make it clear here that the attack open under prerogative writs is still available as they exist under common law, but that they will be now handled in one jurisdiction.[23]

Once again, one can conclude from these remarks that it was the government's intention, in introducing sections 18 and 28, to channel *all* prerogative writs and appeals dealing with federal agencies to this newly-created court, and this to the exclusion of provincial superior courts. This rationale explains the presence of the word "exclusive" in section 18. The government expected that the word would be held to mean what it said.

However, this was not to be. It is now well established that in cases dealing with constitutional competence the common law courts retain their ancient powers.[24] Indeed, as Bisson J.A. said in the Court of Appeal in *L'Anglais*,[25] "il répugne à penser que le Tribunal de droit commun qui existait au moment du pacte fédératif se verrait exclus aujourd'hui, par l'action unilatérale du Parlement, du pouvoir de regard sur les décisions d'organismes

22. John TURNER, *Hansard,* October 28, 1970, 678.

23. *Id.*, 679.

24. See the discussion which follows.

25. [1981] C.A. 62.

fédéraux ... lorsque ces derniers font le départage constitutionnel et ceci au profit exclusif d'un Tribunal statutaire créé en conformité de l'article 101 de l'A.A.N.B. ...".[26]

III. THE CASE LAW

Three pivotal cases deal with the notion of exclusivity in section 18. They are (in chronological order) *Attorney-General of Canada et al.* v. *Law Society of British Columbia et al.*; *Jabour* v. *Law Society of British Columbia et al.* ("Jabour"),[27] *Canada Labour Relations Board et al.* v. *Paul L'Anglais Inc. et al.* ("L'Anglais"),[28] and *Northern Telecom Canada Ltd. et al.* v. *Communications Workers of Canada et al.* ("Northern Telecom").[29]

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26. *Id.*, 67. Similar considerations apply where a provincial superior court is called upon (in virtue of ss. 747 & ff. of the Criminal Code) to hear appeals in summary conviction cases. On this point, see *La Reine et Conseil de la Bande des Mohawk de Kanawake* v. *Rice et al.*, [1980] C.A. 310 (Que. C.A.), where the accused, Rice, had attacked the validity of a by-law enacted by the council of the band (a body held to fall within the definition of a "federal board, commission or other tribunal"). An initial application to the Federal Court to stop the proceedings was rejected, the Court being content to say that "the grounds invoked in the affidavit in support of the motion have less merit than those in the two affidavits on behalf of the Respondent". A motion to quash the complaint, made to the justice of the peace, met with a similar fate and Rice was convicted. Success finally came to the accused in the Superior Court, where the charge was dismissed. On appeal, Mayrand J.A., speaking for the Court, held as follows (at 314): "L'article 737(1) du *Code criminel* reconnaît à l'accusé le droit à une "défense complète", ce qui doit comprendre le droit d'invoquer la nullité du règlement qu'on l'accuse d'avoir violé. L'on conçoit mal que pour faire valoir un moyen de défense l'accusé soit obligé de s'adresser à un tribunal autre que celui devant lequel il a été régulièrement assigné. La nullité du règlement pouvait être invoquée d'abord devant le juge de paix de Caughnawaga, puis devant la Cour supérieure de Montréal, le Tribunal compétent pour entendre l'appel conformément aux articles 748 et suivants du *Code criminel*." In the result, the jurisdiction of the Superior Court to deal with the matter was confirmed and so was the accused's acquittal.

27. (1982), 137 D.L.R. (3d) 1 (S.C.C.).

28. (1983), 146 D.L.R. (3d) 202 (S.C.C.).

29. (1983), 147 D.L.R. (3d) 1 (S.C.C.). Care should be taken to distinguish this case from an earlier *Northern Telecom* case (1979), 98 D.L.R. (3d) 1 (S.C.C.), which also dealt with the constitutional competence of the Canada Labour Relations Board, but did not touch on the "exclusive" jurisdiction of the Federal Court.

1. Jabour

The basic facts in *Jabour* are simple, but procedural manoeuvres complicated matters. Jabour, a member of the Law Society of British Columbia, advertised his professional services in newspapers and also by means of an illuminated sign. The Discipline Committee of the Law Society found this to be "conduct unbecoming a member", and recommended that Jabour's licence to practise be suspended for six months. Jabour countered with a writ in the Supreme Court of British Columbia, seeking a declaration that the rulings of the Law Society were null and void by reason of the *Combines Investigation Act*[30] and also because they violated his freedom of speech.[31]

While these proceedings were in court, the Restrictive Trade Practices Commission began an inquiry under section 8 of the *Combines Investigation Act* into the rulings, policies and activities of the Law Society. The Law Society thereupon addressed itself also to the Supreme Court of British Columbia, seeking a declaration that the *Combines Investigation Act* did not apply to the Law Society or, if it did, that the Act was *ultra vires* the Parliament of Canada. The Law Society sought an injunction to prevent the Director of the Commission from continuing with his inquiry.

The Attorney General of Canada (acting for the Director of the Restrictive Trade Practices Commission) challenged the jurisdiction of the Supreme Court of British Columbia to entertain the Law Society's action. His reason was that, in virtue of the *Federal Court Act*, only the Trial Division of the Federal Court had jurisdiction to rule on the issue. This challenge was dismissed by the trial judge,[32] and this was upheld on appeal.[33] The two actions — Jabour's and the Law Society's — were then tried together: The Law Society lost both and Jabour obtained the declaration he had sought.[34] This was reversed on appeal,[35] and thus two appeals were taken to the Supreme Court of Canada.

30. R.S.C. 1970, c. C-23, as amended.

31. Jabour also sought an injunction, but this was dismissed and is of no consequence to the present discussion.

32. (1978), 92 D.L.R. (3d) 53 (B.C.S.C.).

33. (1980), 108 D.L.R. (3d) 753 (B.C.C.A.).

34. (1979), 98 D.L.R. (3d) 442 (B.C.S.C.).

35. (1981), 115 D.L.R. (3d) 549 (B.C.C.A.).

The Supreme Court dismissed both appeals. The reasons are lengthy — the importance (and complexity) of the issues involved are reflected in the fact that twenty-three counsel appeared for the parties and the intervenants — but for the purpose of this paper we may confine ourselves to Estey J.'s discussion under his heading "Jurisdiction of the Supreme Court of British Columbia".[36]

The question, as settled by the Court, was as follows:

> Does the Federal Court, Trial Division, have exclusive jurisdiction to grant declaratory or injunctive relief against the Attorney General of Canada, The Restrictive Trade Practices Commission, the Chairman of the said commission, and the Director of Investigation and Research, in connection with:
>
> (i) the interpretation or
>
> (ii) constitutional applicability of the *Combines Investigation Act* to the Law Society of British Columbia, its governing body or its members?[37]

In Mr. Justice Estey's view, what the Law Society had sought was a declaration with respect to the constitutional applicability of a federal statute. The injunction was merely an ancillary request, asked for, perhaps, "out of an abundance of caution and as a matter of convenience".[38]

Both remedies sought are covered by the definition of the word "relief", as found in section 2 of the *Federal Court Act*.[39] Sections 17 and 18 of the Act, which deal with actions for "relief", were therefore potentially engaged by the litigation, and the meaning of "exclusive", as found in these sections, became the focal point of the debate.[40]

The precise question was new, but three earlier decisions of the Supreme Court of Canada were of assistance to the Court in this instance. The first of these was *Valin* v. *Langlois*,[41] where Ritchie C.J. said this:

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36. 137 D.L.R. (3d) 1, 12 & ff.

37. *Id.*, 5.

38. *Id.*, 18.

39. This definition reads as follows: "'relief' includes every species of relief whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise."

40. Although the Court examined s. 17, this section does not directly concern us; it deals with cases where relief is claimed against the Crown and, *inter alia*, gives the Trial Division "exclusive original jurisdiction", except where otherwise provided, "in all cases in which the land, goods or money of any person are in the possession of the Crown or in which the claim arises out of a contract entered into by or on behalf of the Crown ...".

41. (1879), 3 S.C.R. 1.

> These courts [provincially organized superior courts] are surely bound to execute all laws in force in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislatures, respectively. They are not mere local courts for the administration of the local laws passed by the Local Legislatures of the Provinces in which they are organized. They are the courts which were the established courts of the respective Provinces before Confederation... They are the Queen's Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislatures...[42]

The groundwork was laid: Provincial superior courts are the descendants of the Royal Courts of Justice; they are courts of general jurisdiction and, as Pigeon J. pointed out in *The Queen* v. *Thomas Fuller Construction Co. (1958) Ltd. et al.*,[43] the federal Parliament may derogate from this principle "by establishing additional courts *only* for the better administration of the laws of Canada".[44]

Finally, in *A.-G. Can. et al.* v. *Canard et al.*,[45] Beetz J., dealt with the jurisdiction of superior courts to review the constitutionality of federal statutes:

> Once it is conceded that the Minister has jurisdiction to appoint an administrator, the exercise of this jurisdiction can only be reviewed in accordance with the *Indian Act* and the *Federal Court Act*... and not by the Courts of Manitoba. It is true that the latter's jurisdiction had not been questioned by the appellants, *presumably because the action taken by the respondent challenged the constitutional validity and the operation of the Indian Act and the Manitoba Courts had jurisdiction to adjudicate upon this issue* as well as upon appellants' counterclaim. The Courts of Manitoba could not on the other hand hear an appeal from the Minister's decision or otherwise review it.[46]

His Lordship took it for granted that provincial superior courts possess the power to inquire into the constitutional validity of federal statutes.

Having canvassed the earlier cases, Estey J., in *Jabour*, found as follows:

> It is difficult to see how an argument can be advanced that a statute adopted by Parliament for the establishment of a court for the better administration of the laws of Canada can at the same time include a provision that the provincial superior courts may no longer declare a statute enacted by Parliament to be

42. *Id.*, 19.

43. (1979), 106 D.L.R. (3d) 193 (S.C.C.).

44. *Id.*, 205; emphasis added.

45. (1975), 52 D.L.R. (3d) 548 (S.C.C.).

46. *Id.*, 583; emphasis added.

> beyond the constitutional authority of Parliament. Sections 17 and 18 of the *Federal Court Act* must, in the view of the appellants, be so construed. In my view Parliament lacks the constitutional authority to so provide. To do so would strip the basic constitutional concepts of judicature of this country, namely, the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the *Constitution Act, 1867*. At the same time it would leave the provincially-organized superior courts with the invidious task of execution of federal and provincial laws, to paraphrase the *Valin* case, *supra*, while being unable to discriminate between valid and invalid federal statutes so as to refuse to "execute" the invalid statutes. For this second and more fundamental reason I conclude that the British Columbia courts have the requisite jurisdiction to entertain the claims for declarations herein made. Moreover, it would amount to an attempt by Parliament to grant exclusive jurisdiction to the Federal court to administer the "laws of Canada" while the validity of those laws remained unknown.[47]

The issue before the Supreme Court of Canada concerned the jurisdiction of the Supreme Court of British Columbia to entertain the Law Society's action. The answer was clear: provincial superior courts retain all powers inherent to high courts of justice to rule on constitutional issues, regardless of section 18 of the *Federal Court Act*. As Professor Whyte pointed out in a comment,[48] "[t]he power to derogate, given by section 101 of the *Constitution Act, 1867* to Parliament, is in respect of the 'laws enacted by the Parliament of Canada' and not the constitutional law of Canada". The learned author continued: "Since an action for a declaration of constitutional invalidity goes beyond the administration of Parliament's laws, Parliament cannot enact a provision giving its section 101 courts exclusive jurisdiction to hear matters in which constitutional issues are raised."[49]

Estey J. did not go beyond the issue raised in the case, and *Jabour* therefore stands for the proposition — and only this proposition — that provincial superior courts may give declaratory relief in matters involving federal statutory authorities. The Court was not, however, required to decide if the Federal Court also may give declaratory relief if it (the Federal Court) happens to be the forum selected by the plaintiff, and it did not, therefore, address itself to this issue, an omission which Professor Whyte considered unfortunate.[50]

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47. 137 D.L.R. (3d) 1, 16. This passage was relied on in two recent cases, *Re Gandam and Minister of Employment and Immigration* (1982), 140 D.L.R. (3d) 363, 366 (Sask. Q.B.), and *Re Williams and Attorney General for Canada et al.* (1984), 6 D.L.R. (4th) 329, 332 (Ont. Div. Ct.).

48. John D. WHYTE, "Developments in Constitutional Law: The 1981-82 Term", (1983), 5 *Supreme Court L.R.* 77, 116.

49. *Ibid.*

50. *Id.*, 117.

2. L'Anglais

The question of concurrent jurisdiction is an important one, and two cases dealing with this issue arose within a short time. The first was *Canada Labour Relations Board et al.* v. *Paul L'Anglais Inc. et al.*[51] which, once again, dealt with the power of a provincial superior court to review a decision of a federal agency.

In *L'Anglais*, one question submitted to the Supreme Court of Canada[52] was this:

> Does the Superior Court of Quebec, despite s. 18 of the *Federal Court Act*, R.S.C. 1970, 2d Supp., c. 10, as amended, have jurisdiction to hear a proceeding in evocation against the Canada Labour Relations Board, when the decision sought to be reviewed concerns the question of whether labour relations within a business fall within provincial or federal jurisdiction?[53]

The facts, briefly put, were as follows: Paul L'Anglais Inc. was a subsidiary of Télé-Métropole Inc., a television broadcasting business. The specific function of Paul L'Anglais Inc. was to sell sponsored air time, and an application was made to the Canada Labour Relations Board seeking a declaration that Télé-Métropole Inc. and its two subsidiaries (Paul L'Anglais Inc. and J.P.L. Productions Inc., which produced programmes and commercial messages) were a single employer. The subsidiaries objected to the Board's jurisdiction, but the Board rejected this objection and, after a lengthy hearing, ruled that Télé-Métropole *and* its subsidiaries were "federal undertakings and that their employees perform work which falls under the jurisdiction established by the Canada Labour Code".[54]

The Respondents then applied to the Federal Court of Appeal for judicial review pursuant to section 28 of the *Federal Court Act*, but this application was dismissed because the decision rendered by the Board "was not really a decision within the meaning of s. 28 of the *Federal Court Act*".[55]

The Respondents then submitted to the Superior Court of Quebec a motion in evocation pursuant to Art. 846 of the Code of Civil Procedure. They argued (in their written pleadings) that

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51. (1983), 146 D.L.R. (3d) 202 (S.C.C.).

52. There was a second question also, but it is not relevant to the present discussion.

53. 146 D.L.R. (3d) 202, 204.

54. *Ibid.*

55. (1979), 99 D.L.R. (3d) 690, 692, *per* Pratte J.

there had been an excess of jurisdiction when the Board had decided the constitutional question that they were "federal undertakings" when, in fact, their activities fell within the exclusive authority of the provincial legislature.[56]

The trial judge rejected the motion. In his view, sections 18 and 28 of the *Federal Court Act* precluded the Superior court from exercising, in this case, its superintending and reforming power: the Federal Court alone had this jurisdiction.

This finding was reversed by the Court of Appeal,[57] which ordered that the writ be issued and that a hearing should be held at which time the facts would be established. I have quoted above from the reasons of Bisson J.A.[58] In his view (which was shared by his colleagues), provincial superior courts were competent to hear the challenge:

> ... il m'apparaît qu'en édictant l'exclusivité décrite à l'article 18 de la *Loi sur la Cour fédérale*, le Parlement ne doit pas être interprété comme ayant voulu couvrir les questions de compétence constitutionnelle.
>
> En effet, si la *validité* constitutionnelle d'une législation ou d'une réglementation fédérale est contestée, il me semble évident de la nature même de la fédération canadienne que le recours en première instance appartient, au moins de façon concurrente sinon de façon exclusive — je ne me prononce pas sur ce dernier aspect — à un Tribunal qui a précédé le pacte fédératif et qui est d'ailleurs le seul qui subsiste toujours: la Cour supérieure.
>
> Mais les appelantes et le Procureur général du Québec nous invitent à faire un pas de plus et à déclarer que la même compétence au moins concurrente — doit être reconnue lorsque se pose une question d'*applicabilité* constitutionnelle.
>
> Pour ma part, je suis disposé à reconnaître que chaque fois que non seulement se pose le problème de la validité constitutionnelle d'une législation ou d'une réglementation fédérale mais encore que se pose comme question de fond — par opposition à une question implicite — un problème de partage des compétences constitutionnelles entre les deux instances, fédérale et provinciale, — ce qui est le cas sous étude — la Cour

56. I would note here that in matters of evocation, as the law stood at the time, the judge to whom the motion was addressed had to, at the initial stage of the proceedings, take all the averments as true. It was only later, if the case reached the stage of proof and hearing, that the facts were tested in the usual manner. This was of importance in *L'Anglais*, because all three courts — the Superior Court, the Court of Appeal and the Supreme Court of Canada — proceeded on the basis that the facts alleged were true.

57. [1981] C.A. 62.

58. See p. 445, *supra*.

> supérieure est compétente et peut être saisie d'une demande de réformation.
>
> Et ceci que la demande de réformation soit sollicitée à l'endroit d'un organisme administratif ou quasi judiciaire de création fédérale ou provinciale.
>
> Ce raisonnement je le tire de la nature même de la Cour supérieure dont l'existence, antérieure à 1867, est confirmée et, pour reprendre une expression à la mode, enchassée dans l'A.A.N.B. par opposition à la Cour fédérale de création statutaire et dont l'article 101 de l'A.A.N.B. limite la compétence à la "meilleure administration des lois du Canada".[59]

The Supreme Court agreed:

> So far as the Superior Court is concerned, in light of the decision in [*Jabour*] ... in my opinion it goes without saying that if Parliament lacks jurisdiction to exclude the superintending and reforming power of the Superior Court by application of s. 18 of the *Federal Court Act*, it also lacks jurisdiction to exclude it by the privative clause of s. 122.
>
> I consider that neither s. 18 of the *Federal Court Act* nor s. 122 of the *Canada Labour Code* has the effect of superseding the superintending and reforming power of the Superior Court and its jurisdiction in evocation over the decision rendered in the case at bar by the Canada Labour Relations Board.[60]

Once again the inherent power of the Superior Court was confirmed notwithstanding section 18 of the *Federal Court Act* but, as Professor Mullan pointed out,[61] this decision still "left open the question whether the Federal Court has jurisdiction co-extensive with the provincial superior courts to deal with issues concerning the constitutionality of statutes and the extent of their constitutional applicability should those questions be raised before it".[62]

The answer came a few weeks later.

3. Northern Telecom

The case was *Northern Telecom Canada Ltd. et al.* v. *Communications Workers of Canada et al.*,[63] and it, like *L'Anglais*,

59. [1981] C.A. 62, 67.

60. 146 D.L.R. (3d) 202, 213, *per* Chouinard J.

61. David J. MULLAN, "Developments in Administrative Law: The 1982-83 Term", (1984) 6 *Supreme Court L.R.* 1.

62. *Id.*, 10.

63. (1983), 147 D.L.R. (3d) 1 (S.C.C.).

concerned the constitutional jurisdiction of the Canada Labour Relations Board to deal with an application for certification. In this case, however, the question was first dealt with by the Federal Court of Appeal on a reference by the Board pursuant to section 28(4) of the *Federal Court Act*.[64]

The constitutional question put by the Board was this:

> Does the Board have constitutional jurisdiction to grant an application for certification with respect to the employees sought to be represented in these two applications for certification?[65]

The Court answered the question in the affirmative.[66] But in the Federal Court, in order to answer at all, the Court first had to determine its own jurisdiction to decide a constitutional question, and on this initial point, Thurlow C.J. found that the Court did have jurisdiction: It did not matter that the issue had arisen by way of a reference, rather than in an application for review, as it might have under section 28(1). But, as Estey J. pointed out, the real question was whether sub-section (4) of section 28 was properly included in the *Federal Court Act*.

One should note that the wording of section 28 of the *Federal Court Act*, unlike section 18, does not confer "exclusive" jurisdiction on the Court. The challenge here, as Estey J. observed, was the "converse" of the challenge in *Jabour*: It was, he wrote, "the competence of the Federal Court to determine the constitutionality of federal legislation, either inherent or in its application in given circumstances".[67]

His Lordship continued:

> It is inherent in a federal system such as that established under the *Constitution Act, 1867*, that the courts will be the authority in the community to control the limits of the respective sovereignties of the two plenary governments, as well as to police agencies within each of these spheres to ensure their operations remain within their statutory boundaries. Both duties of course fall upon the courts when acting within their own proper jurisdiction. The *Law Society* case, *supra*, was concerned with the superior courts of general jurisdiction in the provinces, but the same

64. This section permits "[a] federal board, commission or other tribunal" to refer, "at any stage of its proceedings ... any question or issue of law ... to the Court of Appeal for hearing and determination".

65. 147 D.L.R. (3d) 1, 13.

66. The decision was unanimous, but three judges (Dickson, Beetz and Estey JJ.) wrote concurring reasons.

67. 147 D.L.R. (3d) 1, 15.

> principles apply to courts of subordinate jurisdiction when they are acting within their limited jurisdiction as described by their constituting statute. Such courts must, in the application of the laws of the land whether they be federal or provincial statutes, determine, where the issue arises, the constitutional integrity of the measure in question. Such a court of limited jurisdiction must, of course, be responding to a cause properly before it under its statute.
>
> This is the position of the Federal Court in these proceedings. It is a statutory court. Its parent statute clearly authorizes the proceeding with which it is here engaged. Its parent statute in turn is valid under the Constitution, at least so far as the existence of the court is concerned. The jurisdictional challenge narrows down to whether Parliament may properly include s-s. (4) in s. 28 under which subsection the constitutional or jurisdictional question is here framed and advanced.[68]

IV. AFTER THE TRILOGY

1. Unresolved Issues

The three cases discussed above clarified the meaning of "exclusive" in section 18 of the *Federal Court Act* in respect of certain circumstances. Nevertheless, some questions remain unanswered. Firstly, the issue of constitutionality arose in *Northern Telecom* collaterally, and different considerations might apply where constitutionality is the principal issue. Secondly, *Northern Telecom* did not answer a question put a year before in a comment on *Jabour*, and that is whether provincial superior courts, when called upon to decide a constitutional challenge, may, at the same time, go beyond the constitutional issue and deal with other aspects of the case as well, even though they concern a federal agency?[69]

I would submit that the door to "exclusivity" would be opened to let in the provincial superior courts to decide questions of constitutional competence and then closed again to give

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68. *Ibid.* Although not applicable to the case at bar (which arose under the *Canada Labour Code*), Estey J. saw fit to add this interesting *caveat* (at 18): "The *Constitution Act, 1867*, as amended, is not of course a 'law of Canada' in the sense of the foregoing cases because it was not enacted by the Parliament of Canada. The inherent limitation placed by s. 101 on the jurisdiction which may be granted to the Federal Court by Parliament therefore might exclude a proceeding founded on the *Constitution Act, 1867*".

69. John D. WHYTE, "Developments in Constitutional Law: The 1981-82 Term", (1983) 5 *Supreme Court L.R.* 77, 116.

the Federal Court "exclusive" jurisdiction *ratione materiae*. I do not think we can, on the one hand, accept the *Federal Court Act* as a validly enacted statute and then, on the other hand, chip away at its intent when it is convenient to do so. The Act is clear: The Trial Division has exclusive original jurisdiction ... to give relief against a federal board, commission or other tribunal.

2. The Canadian Charter of Rights and Freedoms

In view of the above, however, there may be a combination of circumstances where the law would sanction doing indirectly that which cannot be done directly. In *L'Anglais*, Mr. Justice Chouinard stated that

> [Parliament] cannot confer such an exclusive power on the Federal Court when what is involved is no longer the administration of a law of Canada, but *the interpretation and application of the Constitution.*[70]

Today, the "interpretation and application of the Constitution" includes not only the attribution of a "matter" to either section 91 or 92, but also the interpretation of the *Canadian Charter of Rights and Freedoms*. We can no longer look only to the traditional division of powers to determine what is or is not "constitutional". A violation of the *Charter* is a violation of the Constitution and may, therefore, raise a constitutional question.[71] To solve such a question would entail "interpretation and application of the Constitution" and Parliament, according to Chouinard J., does not have the authority to confer such power on the Federal Court alone. Thus, notwithstanding section 18, we can envisage circumstances where a provincial superior court would *also* have jurisdiction over federal boards, commissions or tribunals.

For instance, an employee of a federal agency is prohibited by his employer from peaceful picketing and believes that this is a breach of his fundamental freedom to do so according to section 2 of the *Charter*. The only relief he seeks is a declaratory

70. 146 D.L.R. (3d) 202, 213. By negative inference, one may conclude from what he wrote in *Northern Telecom*, 147 D.L.R. (3d) 1, 17, that Estey J. was of the same opinion: "A question of administrative review by the Federal Court under the federal board's parent statute, which raises no *constitutional question*, could not be so referred to the provincial superior court" (emphasis added).

71. But see the *obiter* of Estey J. in note 68, *supra*.

judgment saying he has the right to continue his "peaceful assembly".

According to section 18 of the *Federal Court Act*, the Trial Division of the Federal Court would have "exclusive original jurisdiction" to hear this hypothetical case. However, according to Chouinard J., this is not so. Once the issue is characterized as interpreting and applying the Constitution, Parliament cannot confer exclusive power on the Federal Court to the exclusion of an otherwise competent court to hear the case. In the result, the applicant — an employee of a federal board who would normally be subject to the rules of the *Federal Court Act* — would now have a choice of forum. Moreover, applying section 24(1) of the *Charter*, a court of competent jurisdiction could grant such remedy as it considered appropriate and just in the circumstances.

Therefore, when the interpretation and application of the Constitution are in issue, we have concurrent jurisdiction between the Federal Court and other courts of competent jurisdiction.

Although this result is, I believe, what Chouinard J. intended, it would seriously restrict the power of the Federal Court. It could well take us back to the era the Minister of Justice, John Turner, spoke of when he said:

> This multiple supervision, with a lack of consistent jurisprudence and application, can work serious hardship not only on the boards and commissions but on those who appear before them.[72]

But the superintending jurisdiction to which the Minister was referring was not in respect of an entrenched charter of rights and freedoms. Consequently, when a *Charter* question is raised, and the other requirements of section 18 are met, it would appear that the Federal Court does not possess an exclusive jurisdiction merely because the issue also involves a federal board, commission or other tribunal.[73]

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72. See note 17, *supra*.

73. See, on this point, the remarks of Scheibel J. in *R.L. Crain Inc. et al.* v. *Couture and Restrictive Trade Practices Commission et al.*, (1983) 6 D.L.R. (4th) 478 (Sask. Q.B.), who held (at 491) as follows: "[T]he enactment of the *Constitution Act, 1982*, has altered the role of the judiciary in Canada. The courts are now called on to review the substance of legislation to determine whether the legislation imposes unreasonable restrictions on the rights and freedoms guaranteed by the Charter. The Charter is part of the Constitution of Canada. ... Thus, where legislation is challenged as being inconsistent with the rights and freedoms as guaranteed by the Charter, the constitutional validity of the legislation is

CONCLUSION

The analysis set out above raises again the policy issues faced by the federal government in the late 'sisties, when administrative law was in an embryonic state in Canada. The issues discussed in this paper give rise to much broader questions vis-à-vis the administration of justice in Canada. And this brings into question competing values and necessitates an examination of these values.

Judges and, perhaps, Parliament will have to decide if uniformity and expedience are to be the guiding principles in establishing the authority and jurisdiction of courts,[74] or if Canada will continue to hold sacred the ultimate jurisdiction of her common law courts.

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at issue. Therefore, the reasoning in the *Jabour* case, *supra*, applies with equal force to situations, such as the present situation, in which legislation is challenged as being inconsistent with the fundamental rights and freedoms guaranteed by the Charter." In the result, s. 17 of the *Combines Investigation Act* was held of no force and effect by reason of its inconsistency with s. 7 of the *Canadian Charter of Rights and Freedoms*.

74. According to D. LEMIEUX and N. VALLIÈRES this was the purpose of s. 18: "La compétence de la Cour fédérale comme organisme bidivisionnel de contrôle judiciaire", (1976) *C. de D.* 379, 381. They wrote that "[c]e transfert de compétence découlait de la volonté du législateur d'uniformiser les règles de droit administratif applicables aux organismes administratifs fédéraux, prévenant ainsi les risques d'incertitude et de solutions contradictoires découlant de l'existence de juridiction parallèle de contrôle".