THE ONTARIO DIVISIONAL COURT:

F O R E W O R D

A great deal of interest has been shown by those outside Ontario in the Divisional Court. Although the Court remains unique, I am aware that many have contemplated the prospect of establishing something similar in other provinces. Alternatives exist; some may be better, some not as good. I leave comparison to others. I have written this paper more with the object of describing an institution, "warts and all", than to justify it, in the hope that such a course may be at least reasonably edifying for the interested bystander.

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November 1982.

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The Divisional Court came into being in April 1972 as part of a package of reforms intended to improve administrative procedure and simplify its supervision by the Courts. Since it has remained virtually unchanged it is fair now to consider the Court's effectiveness: it has had a ten year trial.

The package of reforms implemented recommendations of the McRuer Commision.[1] They included a basic code of procedure for administrative tribunals established under Ontario legislation (now the Statutory Powers Procedure Act, R.S.O. 1980, Ch. 484) and a simplification of existing procedures for judicial review of those tribunals (now the Judicial Review Procedure Act, R.S.O. 1980, Ch. 224). These statutes are appended as, respectively, Riders "A" and "B".

When the bulk of the legislation required to bring into effect the McRuer reforms was in place the Divisional Court began sitting. Since that day, April 17th, 1972, the Court has been constantly engaged. At present a three Judge panel sits continuously in Toronto throughout

the regular Court term. For one week in each of January, June, September and December, a second panel sits in Toronto. Twice a year, a panel sits for one week in each of London and Ottawa. In addition, two panels sit concurrently in Toronto during the first two weeks in July and one panel sits during the last two weeks of August, both months that are otherwise part of the Long Vacation.

The Court's schedule calls for continuous sittings Monday through Friday from 10.30 a.m. to 4.30 p.m. Its habits resemble those of the trial court from which its Judges are drawn. Thus, it frequently sits later than its scheduled closing time, sometimes much later, to accommodate counsel or to complete a case. It has frequently convened earlier for similar reasons. Almost all cases that come before the Court are substantial. A study done a few years ago shows that the average hearing time per case was about three hours. Some idea of the effectiveness of the Court can be gained from the fact that between April 1972 and the end of 1981, it heard and disposed of 2,893 cases. Its present case load is running at the rate of 450 a year. The number of its reported decisions to the end of 1981 exceeded 700. I think it can fairly be said that the Court has not been idle.

THE PLACE OF THE COURT IN THE ONTARIO JUDICIAL SYSTEM:

In order to understand the relationship of the Court to the other Courts in Ontario it is necessary to know a little about our system. There are essentially three levels of courts in Ontario, beginning at the Provincial Court (formerly the Magistrates' Court) and rising through the County Court (a federally appointed Court) to the Supreme Court of Ontario. The Supreme Court of Ontario (to which I will refer for convenience as the Supreme Court) is divided into two branches: the High Court and the Court of Appeal. Unlike some other jurisdictions our Supreme Court is a single unit composed of two branches. (the Judicature Act, R.S.O. 1980, Ch. 233, s.3). The High Court is the trial branch. At its head is the Chief Justice of the High Court. Its 46 Judges (with, at present, 2 supernumeraries) hear trials and motions in Toronto and throughout the Province travelling on circuit in the process during each year to 49 other judicial centres. ("Motions" are matters ancillary or preliminary to trial such as applications for summary judgment and matters that may be dealt with on affidavit evidence such as applications for injunctions or for the construction of wills and written instruments). The High Court is essentially the forum of first instance of the Supreme Court but it does exercise some appellate jurisdiction. It hears appeals from certain decisions of the

County Court; from interlocutory decisions of County Court Judges sitting as "Local Judges" of the Supreme Court and from "Masters", who are officers of the Supreme Court having jurisdiction to deal with disputed pleadings and other ancillary issues the resolution of which is unlikely to resolve an action.

The circuit is patterned to occupy about 30% of a High Court Judge's sitting time. The length of time spent "out of town" can vary considerably in accordance with the number and length of trials set down for hearing. The major part of the High Court Judges' judicial year is spent sitting in Toronto. Supreme Court Judges are required to live reasonably close to Toronto.

The Court of Appeal comprises 16 Judges (with, at present, 2 supernumeraries). At its head is the Chief Justice of Ontario who is, as well, the head of the Supreme Court of Ontario. Except for sittings held on one day a month to hear appeals presented in <u>personam</u> by prisoners in penitentiary, when a panel of three travels to Kingston for the purpose, the Court remains in Toronto throughout the year. The Court usually sits in panels of three and, occasionally, five. There are usually three panels sitting concurrently in Toronto.

Apart from the difference in the duties they perform, there is little to distinguish between members of the two branches of the Court. All appointees are "Judges of the Supreme Court". Appointees to one branch are ex-officio members of the other. The Judicature Act provides that the Judges of the Supreme Court have, except where it is specifically otherwise provided, "equal jurisdiction, power and authority", (s.9). While in practice it rarely occurs, there is no jurisdictional inhibition against a member of one branch sitting as a member of the other. Members of both branches occupy chambers in Osgoode Hall in Toronto. They share a common library, lunch room and other facilities. There is no such separation between the Trial Court and the Court of Appeal as occurs elsewhere.

THE STAFFING AND FUNCTIONING OF THE DIVISIONAL COURT:

The Divisional Court is simply a division of the High Court; hence its name. The Court consists, by statute, of the Chief Justice of the High Court and "such other Judges of the Divisional Court as may be designated by him from time to time", (the Judicature Act, s.7). The statute goes on, however, to provide that "every Judge of the High Court is also a Judge of the Divisional Court" (s.7(2)). In practice the right of the Chief Justice to designate and the existence of an implied right in all members of the High Court to sit in the Divisional Court have not caused difficulty. The system I shall describe reflects both the Chief Justice's right to designate and the Judges' right to sit.

In practice the Divisional Court is composed of Judges of the High Court who choose to sit there. It is not a "permanent" Court in the sense that its Judges are permanently assigned to it and that therefore its complement is unchanging. The Court sits in five different panels during the regular term. (A sixth covers the out-of-town and extra Toronto Sittings.) Four High Court Judges comprise each panel. They rotate during their two month term through

"sitting" and "judgment" weeks. The panels sit consecutively through the ten months from September to June. The legislation requires the Court to sit in Toronto continuously "except during vacations and holidays" (the Judicature Act, s.46). In fact the Court does better than that. As the Long Vacation approaches a supplementary list is made up for sittings of the High Court during the Long Vacation. For several years now High Court Judges have contributed two weeks of their vacation in an attempt to cope with the Court's rising workload. The "vacation term" includes provision for sittings of the Divisional Court. Thus there is no month of the year in which the Court does not sit. The pattern is for one panel to sit in January and February, a second to sit March and April and so on throughout the year. It is rare now for a Judge to be a member of more than one panel during the year, although one might be assigned to fill a temporary vacancy or to meet some other exigency.

The Judicature Act makes the arrangements for holding Courts and the transaction of business by the High Court the responsibility of the Judges of the High Court in conclave. There is, however, power in the Chief Justice of the High Court "to make such readjustment or reassignment as is necessary from time to time" (the Judicature Act, s.45(3)). Traditionally, the Judges of the High Court

annually consider and approve a list of sittings for the forthcoming year (excluding the Long Vacation) throughout the province. The lists are drawn in an attempt to create a fair division of judges' time between Toronto and the circuit and also between various kinds of work such as Non-Jury and Assize sittings, sittings in the Family Division, in Motions Court and so on. "The List" is, in fact, made up of 45 separate lists representing the number of Judges who travel on circuit. When The List has been settled and approved by the Court, the Judges select individual lists in order of seniority. Twenty lists contain provision for sittings of the Divisional Court.

The practice of staffing the Court has varied somewhat with the three Chief Justices of the High Court who have held that office during the past ten years. The Judicature Act would empower the Chief Justice of the High Court to designate a full complement of Judges for the Divisional Court and to sit himself as President or to designate a President in his absence. The present practice is, however, for the Chief Justice to designate only one Judge for each panel. Normally done with the consent of the designate, the object is to provide some continuity by ensuring that the Court always has a member with previous experience. Thus the designate will be a Judge with some

seniority, and is designated as "Panel Leader". The other three places are then filled by way of the Judges selecting lists. The result is that a Judge who does not wish to sit in Divisional Court is unlikely to be required to do so. As my colleague Krever has observed "the Court chooses itself".

I have said that the Court sits usually in panels of three. Its complement, as I have mentioned, is four, to permit members to rotate through regular "judgment weeks" for the writing of reserved judgments. Each Judge sits for three weeks and is on judgment week for the fourth. In this the Court again reflects the practice of the High Court rather than that of the Court of Appeal which, I understand, sits two weeks "on" and two weeks "off". The practice in Divisional Court is for the senior Judge of the three sitting to sit as President. That may or may not be the Judge designated to the panel by the Chief Justice. If for some reason a Judge listed to sit in the Divisional Court cannot do so his or her place will be filled by way of arrangements made between Judges rather than by designation. I am sure that the system may sound a little odd: oddly enough, it works.

SINGLE JUDGE SITTINGS:

Substantive matters.

One of the objectives of the McRuer Commission was to create a Court that would sit in panels of at least three. I will discuss the reasons for this later but I wish to mention at this point that there is provision for individual Judges to sit singly during their term in the Divisional Court. This is one respect in which the Court has changed a little since its inception. It has changed with a view to increasing the amount of business that the Court can do, the thought being that not all matters justify a panel of three.

The Judicature Act, faithful to the McRuer Commission, provides that "except where otherwise provided, every proceeding in the Divisional Court shall be heard, determined and disposed of before three Judges thereof sitting together ..." (s.46). It is now "otherwise provided" (by s.46(2) introduced in 1979) that individual Judges may hear and dispose of certain matters that were in the past required to be heard by the full Court. These are (1) appeals from Local Judges and Masters and (2) any matter

which the Chief Justice of the High Court is satisfied "can and ought to be heard by a Judge sitting singly" because of the nature of the issues involved and the necessity for expedition. A "Practice Direction", dated 3rd, December 1979, issued by the Chief Justice of the High Court,(2) expanded on this by providing that the Judges of the Divisional Court will sit singly on the first Friday of each month to hear (a) appeals from the Small Claims Court "as may be directed by the Chief Justice of the High Court"; (b) appeals from final decisions of local Judges and Masters of the Supreme Court; (c) proceedings "in which there is a consent to an expedited hearing and a hearing by a Judge sitting alone subject to the approval of the Chief Justice" and (d) "such appeals or judicial review applications as the Chief Justice may from time to time direct".

There is provision for a party to request of the Chief Justice of the High Court a three person panel in place of a single Judge.

Interlocutory matters.

There was from the beginning an informal procedure whereby during their term in Divisional Court

Judges sat singly to hear motions involving interlocutory matters. Section 40 of the Judicature Act has read since 1976:

> In any cause or matter pending before the Divisional Court, any direction incidental to it not involving the decision of the appeal may be given by a judge of that court, and a judge of that court may, during vacation, make any interim order that he thinks fit to prevent prejudice to the claim of any of the parties pending an appeal, but every such order is subject to appeal to the Divisional Court.

The enactment of section 46(2) (supra) in 1979 and a detailed "Practice Direction" issued in 1979 formalized the section 40 proceedings.[3] Such motions are heard by the individual sitting Judges at 9.30 a.m. on Monday of each week with a view to their disposition prior to the convening of the full panel at 10.30. This is not always possible and it has proven to be frequently necessary to adjourn a motion for continuance later. Thus they may be adjourned to the lunch break or to 9.30 or 4.30 later in the

week. The Practice Direction I have appended as note three describes fully the kinds of motions that are heard: they include such things as extension of time to appeal, stay of execution pending an appeal, and, in respect of applications for judicial review, the stay of proceedings, applications to add parties or for directions.

The result is that, in addition to interlocutory matters which never have been thought to require a full panel, a number of substantive issues may now be heard by Judges sitting singly. There are no statistics available but Mr. Justice Osler, who was designated by Chief Justice Evans to watch over the Divisional Court, has expressed the opinion that the recently-granted authority in the Chief Justice of the High Court to designate certain cases to be heard by single Judges has been "an important factor in keeping the situation under control" in light of the ever-increasing volume of work for the Court. (In 1980 the increase was some 20%. Mr. Anthony Bridges, the Registrar of the Divisional Court, informs me that an increase of 16% in new appeals and applications has been recorded so far this year over the previous highest figure for this time of year.).

Practice Directions are not formal Rules of Court but are issued as the need arises by the Chief Justice

of the High Court in an attempt to meet the procedural needs of the new Court. They have proven to be a useful device and by now cover pretty well all the procedure not set forth in the Rules. They are accepted as authoritative and anyone searching out the procedure of the Divisional Court must include them.

URGENT MATTERS:

Provision was made for single Judges of the High Court sitting in Motions Court, that is, not as Judges of the Divisional Court, to hear "urgent" applications for judicial review that could not be left to stand in the line-up for the Divisional Court (the Judicial Review Procedure Act, s.6(2)). This provision has turned out not to be greatly used. A recent spot check of a three month period in the Spring of this year shows that ten applications were made for "urgent" hearings in Motions Court.

Applications to Motions Court amount to only a trickle compared to the stream flowing through Divisional Court. In the three months in which nine applications were

moved through Divisional Court, a great difference appears. In the period January to June of this year judicial review applications were argued and disposed of in Divisional Court at three to four times the Motions Court rate.

When one considers that certiorari and mandamus proceedings have traditionally had an air of urgency it is interesting to consider the discrepancy between these figures and the reasons that might lie behind it.

Is one the stringency of the conditions to be met in order to obtain the leave necessary for an "urgent" application in Motions Court? It must be shown that a failure of justice is likely to occur if the application must await the DivisionalCourt.(4) There was in the beginning a perceptible reluctance on the part of Judges sitting in Motions Court to deal with urgent applications. This reluctance stemmed principally from the stringency of the legislation itself but owed something to deference thought to be owing to the Divisional Court. It was difficult for counsel to show the "urgency" required. That attitude seems, however, to have changed. The reluctance seems largely to have disappeared. Of the ten applications in the three month period that I have mentioned in only one was leave not granted (the tenth was transferred to Divisional Court: an alternative open to the Motions Court

Judge.) The difficulty of obtaining leave does not appear to be a reason.

It is possible that no great advantage in terms of time is perceived by the Bar. The waiting period from the time an application to the Divisional Court is "perfected" by counsel (i.e. made ready for hearing) and thus placed by the Registrar on the "peremptory" list and the actual hearing varies from time to time. A fair average would be three and one-half months.

In theory, an applicant should be able to be heard in Motions Court in less time. But it might not turn out to be as simple as that. Motions Court is no less swamped with work than Divisional Court. A system was introduced in 1977 to separate "long motions", i.e., motions that required over two hours to be heard, from the general motions list. This was to facilitate the hearing of the shorter motions which comprise the bulk of the list. For "long motions" counsel were obliged to seek a special date for hearing before the "Duty Judge".

Such has been the pressure of business that at present dates for long motions are being set three to four months ahead. The figures that I gave at the outset show

that the average time for the hearing of a judicial review application before the Divisional Court is about three hours. I cannot think why one should take any less time in Motions Court: indeed, it might well take longer. It could easily take several months for a long motion to be reached before a Duty Judge. The result is that most motions for judicial review are unlikely candidates for expedition in Motions Court.

One reason to account for the relative disuse of the Motions Court procedure appears to be the December 1979 Practice Direction which provided the (then) new procedure for an application to stay proceedings (or for some other interim order) on an application for judicial review to be brought by way of motion before a Divisional Court Judge sitting singly. There was from the beginning jurisdiction in the Divisional Court to issue interim orders and thus facilitate the disposition of urgent matters. Section 4 of the Judicial Review Procedure Act reads:

> On an application for judicial review the Court may make such interim order as it considers proper pending the final determination of the application.

There were occasional applications but the necessity of convening the full Court stood in the way of

expeditious disposition. Now that such applications may be brought before single Judges sitting in the Divisional Court litigants appear inclined to prefer to launch "urgent" motions for judicial review in Divisional Court and deal with the urgency by way of an application for an appropriate interim order before a single Judge of that Court.

This has a particular relevance to stays of proceedings. Unlike a Notice of Appeal, an application for judicial review does not operate as a stay. Stays of proceedings may, however, be granted by the Divisional Court in respect of Judicial review applications as interim relief pursuant to section 4. Indeed it has been held that an interim order may be made in the absence of the "urgency" required by section 6(2) of the Judicial Review Procedure Act.(5)

The current waiting period for such an application to be heard is only two to three weeks from a request for an appointment. That is much shorter than the period required for "long motions" and probably much shorter than the waiting period for "short motions".

For those cases in which an interim order will not defuse "urgency" this procedure would not help.

Another factor may be the possible loss of time resulting from a failure to obtain leave in Motions Court. On an urgent application the Motions Court Judge may (1) grant leave and hear the motion, or (2) grant leave and set the motion over for hearing before another Judge, or (3) refuse leave and dismiss the motion, or (4) refuse leave and transfer the motion to the Divisional Court for hearing. The result is that if the matter is not dealt with in the Motions Court, the time that has elapsed from "perfection" of the application to the hearing will have been lost. This is so if applicant decides to begin again in Divisional Court on a "non-urgent" basis but is also the case if the application is transferred by the Judge from Motions Court to Divisonal Court. The ironic result may be that an attempt to expedite matters may delay them.

Another reason is, in my opinion, a clear preference by the Bar for Divisional Court. This cannot be documented by any set of statistics but it is there, and it is important enough for me to deal with later when I attempt a general appraisal of Divisional Court.

THE JURISDICTION OF THE COURT:

The Court's principal function is to hear appeals from tribunals established under provincial legislation and applications for judicial review. It is still theoretically possible to commence applications for certiorari, prohibition and mandamus but they are now "deemed" to be applications for judicial review and "shall be made, treated and disposed of" as if they were applications for judicial review. [5a] In fact, that provision is no longer necessary. All applications are now made simply for judicial review.

I have mentioned that the Court's jurisdiction goes beyond the supervision of tribunals. It hears appeals from final decisions of local Judges and Masters (appeals from interlocutory decisions lie to Motions Court); from interlocutory decisions of Judges of the High Court, (appeals from most final decisions of the High Court lie to the Court of Appeal: a few statutes provide for appeals from final decisions of the High Court to the Divisional Court, e.g., the Business Corporations Act and the Assessment Act) and certain applications for appeal by way of stated case.

In the course of exercising its jurisdiction, the Court will thus hear appeals from a limited category of decisions of the County Court (the bulk of appeals from the County Court lying directly to the Court of Appeal) and some of these will involve offences committed under provincial legislation ("quasi-criminal" offences). The Court has no jurisdiction to hear criminal matters. Its jurisdiction in respect of divorce and family law is extremely limited, the generality of such appeals lying, again, to the Court of Appeal.

The Court is, therefore, not an intermediate appeal court of general jurisdiction.

Its judicial review jurisdiction brings to the Court a very large number of decisions made by arbitrators in the labour-relations field. It was early settled in Ontario that such arbitrations were subject to certiorari, although I am aware that this is not so elsewhere.

Ontario's tribunals are all now subject to some form of supervision by the Divisional Court, either by way

of appeal or judicial review. These are not just regulatory bodies, such as the Ontario Municipal Board and the Ontario Labour Relations Board, but self-governing professional bodies such as the Law Society of Upper Canada and the College of Physicians and Surgeons. They include such diverse instrumentalities as the Land Compensation Tribunal, the Health Services Appeal Board, the Licencing Appeals Board, the Social Assistance Review Board and the Liquor Licence Appeal Board.

P R O C E D U R E:

The Divisional Court was not furnished with any new procedures. It simply followed the procedures that prevailed in Motions Court for judicial review proceedings and in the Court of Appeal for appeals.

The appeal procedure was satisfactory, but there were some inadequacies in motions procedure. They have been the source of some difficulty that I will deal with later when I attempt an appraisal of the Court. Suffice to say at the moment that some changes had to be made to tailor Motions Court procedure to the requirements of Divisional Court and other changes are in the offing.

Perhaps I need not dwell at any length on the procedure laid down for an appeal because it is probably very like appeal procedures elsewhere. The procedure has been articulated and refined over the years and is set out in the Rules of Practice at length and in detail. The result of it is that by the time the parties reach the hearing stage, both the Court and the disputants have all the documents that they need for dealing with the appeal.

In addition to the relevant documents the Court and the parties have an outline prepared by the parties called, in our practice, a "statement of fact and law". This somewhat resembles a factum in the Supreme Court of Canada but is less elaborate; indeed our Rules call for a "concise statement of the relevant law and facts". All of these documents are available to the Court well before the appeal is heard.

In contrast to all this is the procedure on a motion for judicial review. It begins with service upon opposite parties(6) of a notice of application for judicial review. By the service and filing of that document an applicant invokes all of the jurisdiction that the High Court previously had with respect to certiorari, prohibition, mandamus, injunction and declaration. By this simple means an applicant places himself in a position to ask the Court to grant any one or more orders that could not all have even been sought in the same proceeding in the past because of procedural impediments. Thus, in effect, an applicant for judicial review has launched at the same time, in the same place and before the same Court, a motion for certiorari, prohibition and mandamus and as well for a declaration and an injunction.

In order to "perfect" the application, and thus set it in train for ultimate hearing by the Court, an applicant must furnish to the Court and opposite parties a record containing the relevant documents including, a statement of fact and law and, where applicable, the evidence.

There is no obligation on a respondent to file material other than a formal "Appearance". He may choose to file nothing without prejudice to his right to participate in the hearing. If he wishes, a respondent may file material and may file a statement of fact and law but he need not do this until one day before the matter comes on for hearing. The comparative informality of this procedure has brought some problems which I shall deal with later. The usual practice is, however, that respondents almost always file such material as they consider necessary to their case that has not already been placed before the Court by the applicant and almost always file statements of fact and law.

In the result, therefore, as far as the Court is concerned, there is little difference in the differing proceedings. The Court has for study before the hearing all

of the documents that are necessary for the effective consideration of either an application or an appeal and a brief statement of the facts and law relevant to the issues. This greatly facilitates the expeditious disposition of the case.

THE HEARING:

It would be difficult for anyone watching a proceeding in the Divisional Court to know whether it was initiated by way of a notice of appeal or a notice for judicial review. There is, however, a substantive difference of which the Court and counsel are aware. I need not expand upon the principle that judicial review is not an appeal for it is common to administrative law, not just to hearings in the Divisional Court. But this might not reduce the amount of material to be considered for the absence of the evidence before the tribunal might well be counterbalanced by the record that the tribunal must file. This is no longer left to chance. The Statutory Powers Procedure Act requires tribunals subject to it to compile a record. Section 20 sets out what must be included and reads:

> 20. A tribunal shall compile a record of any proceedings in which a hearing has been held which shall include,
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> (a) any application, complaint, reference or other document, if any, by which the proceedings were commenced;
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> (b) the notice of any hearing;
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> (c) any intermediate orders made by the tribunal;
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> (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceedings;

> (e) the transcript, if any, of the oral evidence given at the hearing; and
>
> (f) the decision of the tribunal and the reasons therefor, where reasons have been given.

Not many tribunals require transcripts of the evidence they hear, thus the "if any" in clause (e).

The Judicial Review Procedure Act provides that the tribunal's record must be filed on an application for judicial review. Section 10 provides:

> 10. When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application, the record of the proceedings in which the decision was made.

The result is that, notwithstanding the confused state of the law on what comprises "the record" [7] the Court is almost always in possession of all the documents that it or the parties might require. Thus, by a

simple procedural change, disputes that might have arisen in the past are avoided. If anything, the Court is likely to have more material than it needs rather than less.

The result is that on Friday of each week a sitting Judge will have brought into his Chambers a stack of papers relating to the hearings scheduled for the next week. There are usually two or three cases scheduled per day. It is difficult to tell beforehand how long individual cases might require for hearing. Sometimes the stack is formidable. It is rare for any case to take less than an hour. It is not unusual for one to take several days. The effective scheduling of cases turns on the capacity of the Registrar of the Court to estimate the time that the various cases will take. The Court was provided with its own Registrar at the beginning. Mr. Anthony Bridges, who fills that position, has displayed an exemplary capacity both to administer the Court smoothly under sometimes difficult conditions and to predict the length of time that cases might take.

I think it is generally agreed that the hearing that counsel receive in the Divisional Court is a good one. The Court is familiar with the issues through

examination of the papers beforehand. Oral argument is not restricted by any set rules (although motions for leave before individual Judges are subject to very severe time restrictions). The Court is blessed for the most part with experienced counsel. Cases are presented and heard with care and attention. For both Bench and Bar the hearing is likely to be stimulating and satisfactory.

The Court pours an unending stream of decisions into the jurisprudence of Ontario. The great bulk of this is in the form of oral judgments given shortly after the completion of argument. The Court retires to consider: cur ad. vult. The President calls upon the junior Judge first to express his opinion. A discussion will frequently disclose unanimity. In that case the decision will likely be given orally by the President. If there is a dissent the Court will normally issue written reasons although oral dissents have been known. When a decision has been given or reservation has been announced the Court proceeds to the next case.

The Court strives to dispose of cases orally and expeditiously. This is no doubt true of other appellate bodies but in light of the fact that the members of the panel will disperse, possibly to the four corners

of Ontario when their stint is over, possibly never to sit together again, and the resulting difficulty in gathering up members of the panel again, this Court has a particular anxiety to dispose of matters while the three members are together as a group. Various expedients have been adopted, such as setting a case over after its completion for decision to be given orally later in the term of the sitting panel. This is a way of securing some time for the preparation of reasons in a case where something more than extemporaneous oral reasons at the conclusion of the hearing is appropriate.

However, not all cases can be disposed of orally and there is a substantial stream of reserve decisions that pours constantly from the Court. Even then the delay is unlikely to be great.

It is sometimes necessary for a panel to give further consideration to a matter after it has completed its sittings. It has been found possible almost always to do this by way of written submissions, which are circulated by the pro-tem President of the Court to the other Judges. A decision is reached that is expressed in

writing. It is rare for a panel to have to reconvene for such a purpose.

APPEALS FROM THE DIVISIONAL COURT: (8)

The legislation provides for appeals from decisions of the Divisional Court (with a minor exception) to the Court of Appeal with leave of the Court of Appeal on any question that is not a question of fact alone. (9) Similarly, an appeal lies to the Court of Appeal, with leave of that Court, from a final order of the High Court made on an urgent application in Motions Court. (10)

No specific provision exists with respect to appeals from single judges of the Divisional Court exercising jurisdiction in substantive matters. That is perhaps because the Judicature Act makes it clear that such a Judge is exercising the jurisdiction of the Divisional Court (11) and his decisions would therefore impliedly be appellable on the same basis as a decision of a full panel.

Appeal experience:

Mr. Bridges' figures reveal that over the life of the Court only about 40% of the matters initiated by way of appeal or judicial review are pursued to a hearing.

The rest are abandoned or settled.

Of those cases that are heard and decided by the Divisional Court, some 24% are made the subject of an application for leave to appeal to the Court of Appeal. Of those applications about 1% are abandoned. Of the remaining 23% some 42% result in a grant of leave to appeal. Of those some 3% are abandoned before the appeal is heard. Of those that are heard some 45% are allowed.

The result is that over the life of the Court only 3.8% of its decisions have not survived the gauntlet of the Court of Appeal.

I have given these figures as constants because of Mr. Bridges' opinion that these proportions have not changed significantly over the life of the Court.(12)

It can thus be said that the Divisional Court has become established as virtually the final source of supervision for provincial administrative tribunals.

APPRAISING THE DIVISIONAL COURT:

At the time of its introduction, and for sometime thereafter, the Divisional Court was seen as a flawed but forward step. With Professors Mullan and Evans chief among them, academic commentators expressed a variety of concerns: that the Divisional Court and the package it was designed to implement would unduly "judicialize" the administrative process; that the Court would have difficulty in working out some of the conundrums posed by bad draftsmanship of its constituent legislation; that the ambit of traditional methods of judicial review, taken together, would be reduced; that in attempting procedural reform only the McRuer Commission ensured the continuance of the substantive-law snarl; that many historically difficult issues, such as locus standi, were left unaddressed. There was good reason in my opinion for most of these concerns. Some proved very quickly to be justified. (13)

After ten years' experience it is fair, I think, to observe that not all were justified. But for those who are seeking an objective appraisal of the Court, it is worth reviewing the problems the Court has in fact

experienced as well as its achievements.

In my opinion, the major difficulty was fitting the Court into the circuit system. I have already described the circuit system as it is known in Ontario. There has been much debate among both Bar and Bench over the prospect of creating a permanent Divisional Court. A permanent or semi-permanent Court of experts appears to be what the McRuer Commission had in mind.

The concept is that the expertise of Judges assigned to it, or the expertise a permanent cadre would quickly gain from experience, would facilitate in some way the disposition of cases brought before the Court. As a single-panel Court it would be able to "speak with one voice" and thus create a prospect of predictability.

Against this and similar arguments is the stubborn fact that the High Court is inevitably a Court of generalists. A Judge on circuit must be capable of dealing with any case brought before the High Court, be it murder, divorce or domestic dispute, tort, contract or

bankruptcy. So long as the circuit continues the need for generalist judges will continue. The Court simply could not operate on any other basis. You cannot send three Judges to a county town simply because three kinds of case have been set down for hearing. The logistics are impossible, having in mind that some county towns are hundreds of kilometres from Toronto and some nearly 2000, (Kenora is 1875) and that some places have dozens of cases ready to be heard and some have only a few.

Apart from logistics there are other obstacles to the creation of a permanent court of experts. One is the almost unanimous resistance of the members of the High Court. This stems in part, no doubt, from the fear that if enough present members of the High Court are hived-off to form a permanent Divisional Court the burden of the circuit will fall even more heavily on the shoulders of those left.

Another, and, in my opinion, more cogent source of this resistance is the general opinion held by our Judges that Judges should be generalists for their own good and the good of the law. There is a sincere and

general fear of specialist courts that exists quite apart from the exigencies of a circuit system: a fear of compartmentalization and a loss of continuity with the law's seamless web, a loss of refreshment from a common source of principle, that makes the resistance of Judges to a specialist Court a force to be reckoned with.[174] It is worth noting that the first recognition of the most enlightened advance in administrative law of modern times: the "fairness" doctine, occurred in two decisions of a Judge who, while expert in other fields of law would not have claimed the expertise in administrative law thought by the McRuer Commission to be essential.[174a]

For one reason or another, although the idea has been discussed for years and repeated polls taken of the opinions of members of the High Court, there is almost no support even for extension of the annual two month terms that now prevail. Almost no one is in favour of a Court that would sit, let us say, a year or even six months at a stretch. While the present pattern may honestly be described as successful, it is nevertheless obviously the result of compromise. After years of experimentation the Court has found an acceptable means of fitting the Divisional Court into the circuit system. No

great change is likely to be accepted or even tolerated. To those few, such as myself, who would prefer to sit in the Divisional Court rather than elsewhere, this is disappointing. But it is so, and likely to remain so and, like it or not, it is a tribute to the Court's ability to adapt to a demand almost wholly at odds with its nature.

The next most serious problem experienced by the Court has been the interpretation of its constituent legislation. In creating the remedy of judicial review the McRuer Commission's principal object was clearly procedural. There is nothing in the Commission's report that suggests any restriction on the traditional powers of the High Court to supervise tribuanls by way of the traditional means. Yet the legislation was drawn in such a way that it has led, as the academic community feared, to decisions which acknowledge that the Court's powers are confined within a narrower compass than hitherto, i.e., to the exercise of a "statutory power", or even more narrowly, the exercise of a "statutory power of decision". If this were the correct interpretation of the legislation and become embedded in the law the reach of judicial review would suffer a severe and, I believe, unwarranted restriction.

Anyone with even a passing interest in administrative law is aware that the modern burgeoning of administrative tribunals posed problems for the Courts. Legislatures, in the hope of creating a decision-making system that would avoid the delay and expense of legal process and, as well, what were perceived as pettifogging lawyers and reactionary Judges, sought to shield administrative tribunals against interference by the Courts. This was commonly done in two ways, one by the negative measure of failing to provide an appeal, even on questions of law, and another by the positive sanction of privative clauses. There were few examples where review by way of appeal was provided by statute. The general tendency was to the contrary. Thus, for a time, instead of a statutory appeal to the Courts there was more likely to be in place a privative clause seeking to prevent review by the Courts.

The result was that persons complaining of unlawful action on the part of tribunals were forced to resort to ancient remedies which, while perhaps approp-

riate to an earlier age, were seriously deficient when it came to dealing with the enormous proliferation of administrative action seen in modern times. Those remedies could be secured only by procedures which in a modern day began to appear more and more cumbersome, complicated, and defeating. It was not unusual for an applicant desiring to challenge an administrative tribunal to fail simply because he had chosen the wrong procedure. The power of the Court to correct administrative wrongs was broad enough: the trick was to press the right switch to turn the power on.

As I read the McRuer Commission report the principal object of its proposal for the Judicial Review Procedure Act was the avoidance of procedural pitfalls by substituting a simple procedure for judicial review. It was an attempt to facilitate Courts in getting to the heart of the problem and using the formidable armoury of remedies to right wrongs and do justice.

These considerations disincline me from reading the legislation restrictively so as to diminish the traditional scope of the High Court's power of supervision. Yet the legislation is strangely constructed. If

the object was merely to subsume under "judicial review" all of the Court's diverse traditional means of review, it would have been simple enough to accomplish. Nothing more would have been required than to provide that any attempt to invoke the Court's traditional jurisdiction could be set in train by a simple "application for review". There would have been no need to include highly articulated definitions of the "exercise of a statutory power" or of a "statutory power of decision". I must admit that the deliberate introduction of such concepts, and a generous sprinkling of them throughout the Judicial Review Procedure Act, justifies a suggestion that, on a literal reading of the statute but nothing more, judicial review is a new and defined jurisdiction, standing alone and separated from the traditional processes it replaces.

It is therefore not difficult to understand how panels of the Divisional Court have read the legislation not only as confining judicial review by way of declaration and injunction to the exercise of a statutory power, which it literally does (see the Judicial Review Procedure Act, s.2(1)(2)),[15] but as confining judicial review by way of certiorari, prohibition or mandamus to the exercise of a statutory power of decision, which it literally does not.[16] That now appears to have been an

incorrect interpretation.[17] The fact that it was made, and that a basis for it clearly existed in the legislation, and that had it been permitted to prevail it would have caused serious mischief, illustrates my point.

Those who seek to expand and simplify review of administrative action by the Courts must take care that legislation drawn to accomplish these objectives does not confound them.

Another problem has been posed by the legislation. That problem concerns the basic nature of the Court and affects decisions on its jurisdiction. It was produced by the failure of the legislation to make clear just what the Court was intended to be. Common-law Judges are conscious of the rule that no appeal exists save by statute. Similarly, appeal courts have only the jurisdiction that they are given by statute. The legislation bringing the Divisional Court into being is extremely sparse. Literalist members of the Court have seen in the absence of provisions expressly conferring this or that power upon "the Divisional Court" as leaving the Court bereft of such power. Thus, notwithstanding that by virtue of the Judicature Act "every Judge of the High Court is also a Judge of the Divisional Court", one panel held the

view that the Court had no power to award interest (on an arbitrations award) and, in a dissent, one member expressed the strong conviction that the Divisional Court had no power to deal with contempt. Happily, the issue has not often arisen but to me the spectacle of the Divisional Court feeling constrained by the inadequacy of its constituent legislation to hold that three Judges of the High Court sitting together have less authority than each would have sitting singly is an embarrassment.

My own view, which I can express because I have done so in published decisions, is to the contrary. It is that the object of the legislation was not to strip High Court Judges of their powers and treat them as if they were laymen gathered from the street and invested with only such powers as it literally conferred. If that were so, the Court would not be able to deal even with costs for there is nothing in the legislation that expressly confers the power to deal with costs upon the Divisional Court.

However, I am mindful that my opinion is contrary to that expressed by some colleagues. I mention it not to deprecate the contrary view but to illustrate a problem that has shown up in the past and might show up again.

There are other problems with the legislation which I will not trouble you with now for I must hasten to say that while these problems have posed difficulty from time to time, they have not in general impeded the effectiveness of the Court. The legislation was roundly criticized at the beginning. It is safe to say that while some problems have indeed arisen they have not proven to be either so numerous or so serious as some criticisms suggested.

Another criticism that was made at the time was, in my view, more cogent. It was that the legislation did not go far enough. It was regretted that instead of pushing for a power of judicial review free of past trammels the McRuer Commission settled for a mere improvement in procedure. It would have been much more daring and, at the same time, helpful, to have wiped the slate clean, created a jurisdiction to deal by simple means with illegality and put the prerogative writs finally to rest. It is not for me to comment on the wisdom of the course chosen by the government but to those considering the prospect of reform or improvement in this area of the law the bolder gesture would, I respectfully suggest, bring greater benefits.

Not all problems with the legislation are problems of interpretation. Some stem from omissions: failures to face some very obvious problems of administrative law. I have mentioned locus standi. Again, it has been suggested that a statutory formula might easily have been introduced to clarify the law on this hoary conundrum.

I have touched upon some of our problems of organization and interpretation. The Court had as well to cope with a number of procedural problems. Motions Court procedure assumes an applicant's desire to move ahead with expedition. Unlike a notice of appeal no stay or other positive sanction is occasioned by the mere launching of a motion. Even a motion for an injunction does not by itself force anything to stop. Without an order, one has nothing. To get anywhere in Motions Court one must press ahead. The launching of a motion in Motions Court was unlikely to cause any inhibition upon the actions of anyone: hence, no administrative procedure existed for ridding the files of lifeless motions and none was needed.

The situation has not proven to be the same in Divisional Court. Why, I am not sure. The figures compiled by Mr. Bridges indicate that only 40% of all applications to the Divisional Court are pursued to a hearing. For one reason or another, the existence of lifeless, or apparently lifeless notices of application for judicial review, has frequently proven to be at least an embarrassment to respondents. That may be because of the potential disruption that a successful application might work in the life of the tribunal at which it was aimed: I have said that most applications in Divisional Court are substantial matters. For whatever reason, the absence of an administrative procedure for cleaning out bare notices of motion or for forcing life to be pumped into dilatory ones has proven to be a problem. At the very least, it is an anomaly when compared to the effective authority enjoyed by the Registrar to deal forcefully with dead or dilatory appeals. Delay on an appeal can be dealt with when it becomes excessive. There is power in the Registrar to dismiss an appeal that has not been perfected (i.e. made ready for argument) after a year, or not pressed ahead with reasonable expedition.

The Divisional Court is not wholly without power to deal with delayed applications: the present

practice is to bring them forward before Judges sitting to hear Divisional Court motions but this is cumbersome and a waste of Judges' time.

Fortunately, we can expect that the problem may be cured in the near future. New legislation is about to be introduced in Ontario to replace the Judicature Act and the County Courts Act and other statutes with one unified statute. A committee, under the chairmanship of Mr. Justice Morden, is engaged in preparing new rules to replace the present rules of Court. Rules have been drafted to deal with the problem of delay in Divisional Court. We can thus look forward to a resolution of the problem. My only concern is that it has been permitted to continue for ten years.

Another problem that arose stemmed as well from the informality of Motion Court proceedings. The appeal rules are framed in such a way that an appellant must move the appeal along with expedition. There are time limits which appellants must observe or risk dismissal for delay. Similarly, when appellant has perfected his material, there is an obligation arising within a limited

time on a respondent to file material. Both sides are thus compelled by the rules to move the appeal forward. Both will have filed all necessary material and their statements of fact and law well before the matter comes on for hearing. There is little room for last-minute requests for adjournment to meet new issues.

The Motions Court procedure placed no obligation on a respondent to file material until the day before the hearing. While again this was appropriate to motions prior to the introduction of the Divisional Court and caused no difficulty, it has been a source of dissatisfaction and delay in the Divisional Court. There is no justification for requiring the applicant to have his material available to the Judges well in advance of the hearing and not have a similar obligation placed upon the respondent. (The present Rules require a respondent to an appeal to the Divisional Court to file his statement within 14 days after perfection.)

The consequence is that Judges might not have the same opportunity to prepare for judicial review applications as they have for appeals. It is unfair for an

applicant whose statement of fact and law has been in respondent's hands for a substantial period, to be made aware of the respondent's position only the day before the hearing, or have to face new affidavits filed then. Sometimes delay is caused by reason of applicants having to apply for an adjournment, in order to cross-examine.(18)

Again, it is reassuring to know that this problem is, as well, under consideration by the Morden Committee but it is unpleasant to have to report its long continuance.

THE DIVISIONAL COURT AND THE McRUER OBJECTIVES:

The McRuer Commission contemplated a permanent, perambulating intermediate Court of Appeal having general jurisdiction and expertise in administrative law. Perhaps this was too much to hope for from any Court. The Court has become virtually the final arbiter of administrative law but, in terms of the Commission's objectives, little else.

Permanency is at odds with the circuit system: "expertise" antipathetic to the consensus of judicial opinion. Perambulation has proven to be inefficient and unnecessary. The Divisional Court has not failed by failing to realize the McRuer objectives: it has proven that some of them were ill-conceived.

The Court has experienced problems. Its demise has more than once been predicted. Its problems, however, have proven to be more apparent than real. Its awkward interpretation of its constituent legislation has received a good deal of notice and adverse comment from academics[19] yet the experience of sitting in the Divisional Court is altogether contrary to the appearance of difficulty that

that those comments tend to suggest. The Court moves through a great deal of work with ease and expedition. It is highly productive. It has achieved a degree of real authority. The acceptance by the majority of litigants of its decisions may, as Mr. Scott has publicly suggested,[19A] owe a good deal to the collegiality of a three-person tribunal. I would very much doubt if we in Ontario could get along without the Divisional Court. I doubt very much if there is any real support for the dismantling of the Court and the return to individual Judges in Motions Court the task of supervising Ontario's tribunals.

The problem most often mentioned in the early years of the Divisional Court was that of delay. In those days the Bar had not much experience of delay in Motions Court. The comparison placed the Divisional Court in an ill light. Today the comparison shows simply that delay is not confined to the Divisional Court. It does take longer to move a matter to hearing after perfection in the Divisional Court than it does in the Court of Appeal. That problem could not, in my opinion, be met simply by returning Divisional Court matters to individual Judges sitting in Motions Court as has been sometimes suggested. That would do nothing more than exacerbate delay in Motions Court. The discussions I have conducted with Mr. Bridges and with Mr. Elliott, the experienced Registrars responsible for the Divisional Court

and the Motions Court respectively, indicate to me that little gain in terms of expedition by such a device could be expected and that whatever gain was achieved would likely be short lived. More realistically, if one wished to tackle the problem of delay one would create a second panel for the Court. The Court of Appeal sits three panels concurrently. To sit a second continuously sitting panel for Divisional Court would require at least four appointments to the High Court. If a second panel were constantly available the problem of delay would disappear overnight.

In my opinion, the Divisional Court, when compared with other attempts to solve the same problems, may reasonably be counted a successful and useful answer.(20) It could be improved. But dismantling it in the name of improving it would, in my opinion, be wholly unwarranted. I think it has earned a niche and is here to stay.

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N O T E S:

(1). The Royal Commission Inquiry Into Civil Rights (Chairman, The Hon. James Chalmers McRuer, former Chief Justice of the High Court).

(2). The practice direction reads:

> Take Notice that pursuant to the above noted Act, (the Judicature Act) the Judges of the Divisional Court will sit singly on the first Friday of each month. The following matters will generally be heard at such sittings:
>
> (a) appeals from the Small Claims Court as may be directed by the Chief Justice of the High Court, pursuant to the Act to Amend the Small Claims Courts Act, S.O. 1977, Chapter 52, Section 11(1);
>
> (b) appeals from the Master, S.C.O., Local Master, S.C.O., pursuant to Rule 515;
>
> (c) a proceeding in which there is consent to an expedited hearing and a hearing by a judge sitting alone, subject to the approval of the Chief Justice, or a Judge designated by him;
>
> (d) such appeals or judicial review applications as the Chief Justice may from time to time direct.

If any party considers the circumstances of a case make it desirable that the matter be heard by a three- by a three-judge panel, he may forthwith, in writing, communicate his request and the reasons thereof to the Registrar and to the other parties. Upon the receipt of such a request, the Registrar shall bring it to the attention of the Chief Justice, or a judge designated by him, for directions.

This procedure shall be effective from January 1st, 1980.

(3). Practice Direction -- Motions to a Judge of the Divisional Court -- Effective January 7th, 1980:

TAKE NOTICE THAT save for vacation periods applications for the following relief may be made to a judge of the Divisional Court, at 9:30 A.M., Monday of each week:

Re: Appeals

(a) Extension of time pursuant to Rule 504;

(b) Stay of execution pending appealing, or removal thereof;

(c) Directions;

(d) Motions to quash an appeal;

(e) Applications for leave to appeal (see memo re practice);

(f) Any other motion incidental to an appeal which does not finally dispose of the same;

(g) Consent to judgment.

Re: Applications for Judicial Review

(a) Stay of proceedings;

(b) Application to add a party;

(c) Directions;

(d) Application to dismiss an application for lack of prosecution;

(e) Any motion incidental to an application for judicial review which does not finally dispose of the same;

(f) Consent to judgment.

An appointment for such an application shall be obtained from the Registrar of the Divisional Court. The Applicant's material shall be filed with the Court office not later than 1 P.M. of the Wednesday prior to the return date of the motion. The respondent's material, if any, shall be delivered before 4 P.M. of the Thursday before the return date of the motion.

Counsel will generally limit argument on such motions to 15 minutes each. Where, because of the nature of the circumstances of the application more time will be needed to argue the same, counsel will advise the Registrar upon the taking out of the appointment and at

that time advise the Registrar of his estimate of the time required for the motion. The respondent may, if the circumstances warrant it, have an equal amount of time for his argument.

In the case of an application for leave to appeal the following material shall be filed for the use of the Court:

An "Application for Leave to Appeal Book", which shall contain the following:

(i) an index;

(ii) the notice of application;

(iii) the decision appealed from;

(iv) the reasons for decisions, if any;

(v) any other material which is to be referred to at the hearing.

(b) A concise statement of fact and law.

The respondent, if so advised, may deliver a concise atatement of fact and law.

Where the time for obtaining leave to appeal expires before the motion can be heard on its merits, it is sufficient to deliver the application within the time prescribed by the statute under which the application is being

brought and to make the application returnable on the next motions day.

In the case of a motion to quash an appeal, the applicant shall give 7 days notice and shall serve the parties and file for the use of the Court the following material:

(a) A "Motion to Quash Book", which shall contain the following:

(i) an index;

(ii) the notice of application;

(iii) the notice of appeal;

(iv) the decision or judgment appealed from;

(v) such pleadings and proceedings as are to be referred to upon the hearing of the application.

(b) A concise statement of fact and law.

The respondent may, if so advised, may deliver a concise statement of fact and law.

Where a delay in the hearing of any of foregoing motions will result in the failure of justice, time may be abridged or directions may be given by a judge of the Divisional Court.

As such motions will be dealt with in court prior to the regular court sitting, it will be necessary for counsel to gown.

DATED at Toronto this 3rd day of December, 1979.

(4) The Judicial Review Procedure Act provides:

> 6.(2). An application for judicial review may be made to the High Court with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice.

(5) Re Dylex et al. (1977), 17 O.R. (2d) 448. There are unreported decisions to a different effect.

(5a) Judicial Review Procedure Act, s.7.

(6) In addition, applicants for judicial review must serve notice of their application upon the Attorney General for Ontario who "is entitled as of right to be heard in person or by counsel on the application": Judicial Review Procedure Act, s.9(4).

(7) See de Smith, Judicial Review of administative action (4th. ed. by J.M. Evans) at p. 404 and Reid & David, Administrative Law & Practice, c. 14, What is the record?

(8) An appeal "To the Divisional Court" is provided from an order made by a Judge during his term in Divisional Court in the exercise of the "chambers" jurisdiction conferred by section 40 of the Judicature Act (sup.). "Divisional Court" is interpreted to mean a full panel of the Court.

(9) The exception is from appeals from Small Claims Court.

(10) There is a curious difference between the appeal provisions with respect to decisions of full panels of the Court and decisions of the High Court exercising the same jurisdiction. Decisions of the former are appellable under s.28(1)(6) of the Judicature Act which provides for an appeal from "any judgment or order of the Divisional Court ..." on any question that is not a question of fact alone", whereas s.6(4) of the Judicial Review Procedure Act provides for appeals from "final orders" of Motions Court Judges deciding urgent applications. Why the former appeal is confined to questions that are not of fact alone and the latter is not, is not clear to me. It appears to have been inadvertent drafting. The fact is that the discrepancy has not caused any difficulty known to me, perhaps because the requirement for leave in both cases permits the Court of Appeal to winnow out appeals on fact alone.

(11) Section 46(2) provides that "a proceeding in the Divisional Court may be heard, determined and disposed of by a Judge of the Divisional Court sitting singly ...".

(12) It should be as well observed that of the decisions reversed in the Court of Appeal, a number have been further appealed to the Supreme Court of Canada. This has resulted in a substantial number of restorations of the Divisional Court's decision. One of the latter was the celebrated Nicholson and Haldimand Norfolk Regional Board of Commissioners of Police, (1978) 88 D.L.R. (3d) 671, [1978] 1 S.C.R. 524, which, as everyone knows, has had far-reaching consequences for administrative law.

(13) See, in particular, these valuable comments: Willis, The McRuer Report: Lawyer's Values and Civil Servant's Values (1968) 18 U. of T. L.J. 351; Atkey, The Statutory Powers Procedure Act (1971), (1972), 10 O.H.L.J. 155; Mullan, "Reform of Judicial Review of Administrative Action - The Ontario Way, (1974), 12 O.H.L.J.

125; Mullan, "Confusion Perpetrated: The Judicial Review Procedure Act before the Divisional Court". (1974), 22 Chitty's L.J. 297 and Evans, "Judicial Review in Ontario - Recent Developments in the Remedies - Some Problems of Pouring Old Wine Into New Bottles (1977) 55 Can. Bar. Rev. 148.

(14) Fondness for the generalist is common also among members of the Bar. In his chapter on John J. Robinette, Jack Batten writes, "And he praised in all forms the generalist over the specialist, the man who trains and educates himself to move confidently in a whole range of disciplines rather than the man who hews to a single form." "I prefer", Robinette said, "the generalist". (see "In Court", MacMillan of Canada 1982, p. 135.

(14a) R.E. Holland J. speaking for the Divisional Court in re Cardinal and Board of Commissioners of Police of the City of Cornwall (1973), 2 O.R. 2d, 183, 42 D.L.R. (3d) 328 and in dissent in Re Robertson, infra.

(15) Why that was done I do not know for the High Court's traditional jurisdiction extended to domestic tribunals.

(16) See re Robertson et al and Niagara South Board of Education, 1 O.R. (2d) 548, and comments by Mullan, Confusion Perpetrated, (sup). and Evans, (sup).

(17) A much less literal approach was adopted by the Divisional Court and the Court of Appeal in the later case of Re Abel et al and Advisory Review Board, 24 O.R. (2d) 279 and 31 O.R. (2d) 520 which, by inference, overrules, or it at least counter-balances, the Re Robertson approach. The headnote to the latter report states, accurately, "Whether a board's or tribunal's function is characterized as being judicial, quasi-judicial or administrative, a duty to act fairly has been recognized where its decision will affect the rights, interests, property or liberties of any person on it will be instigating and making a report that may result in a person being subjected to "pains and penalties"

or in some such way adversely affected by the investigation and report".

(18) Applications for adjournment recently increas- with the increasing tendency of respondents to rely on the Charter of Rights, with the consequent obligation to give notice to the Attorney General for Canada.

(19) I hasten to add - quite properly and quite usefully.

(19a) The National July/August 1982.

(20) The most extensive and illuminating comparison of attempts to cope with the problems known to me is Professor Mullan's "Reform of Administrative Law Remedies - Method or Madness?" [1975] 6 Fed. Law Rev. 340.

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