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THE FEDERAL COURT OF APPEAL*

By W. R. JACKETT**

I. THE COURT

Section 101 of the *British North America Act 1867*, which is the authority pursuant to which the Supreme Court of Canada was created, in addition to authorizing the creation of that Court, authorizes Parliament to create additional courts for the better administration of the laws of Canada.

Pursuant to that authority, the Exchequer Court of Canada was created in 1875¹ and it functioned from that time until 1971, as a trial court for causes in which the Government of Canada was involved as a party, for Admiralty matters, for industrial property matters and for certain other matters arising in the field of laws falling within the legislative jurisdiction of Parliament, and as a court of appeal in relation to decisions of certain tribunals and other persons exercising authority conferred by federal legislation.² From a decision of the Exchequer Court of Canada, an appeal lay directly to the Supreme Court of Canada whether the decision was on an appeal or not.

In 1971, by the *Federal Court Act*,³ the Exchequer Court of Canada was continued in existence under the name of "The Federal Court of Canada" (section 3) and it was divided into two courts known as "The Trial Division of the Federal Court of Canada" and "The Appeal Division of the Federal Court of Canada" or "The Federal Court of Appeal" (section 4).

The Federal Court of Appeal has an authorized strength of four judges (section 5). There are eight judges of the Trial Division who are *ex officio* judges of the Court of Appeal (section 5) and who, as a matter of convention, do not sit in the Court of Appeal when it is hearing appeals from judgments of the Trial Division. In addition, retired federally appointed provincial court or federal court judges can, under the statute, sit and act as judges of either division of the Federal Court of Canada (section 10).

The Federal Court of Appeal, just like the Trial Division, can sit anywhere in Canada and, in fact, does sit wherever it is necessary to sit to accommodate the requirements of the parties subject only to the limitations imposed by the availability of judges and by a reasonable regard for the expenditure of public funds involved (section 16(3)).

* This article has been published in French in (1973), 33 R. du B. 94.

** Chief Justice of the Federal Court of Canada.

¹ See chapter 11 of the Statutes of Canada, 1875.

² See the *Exchequer Court Act*, R.S.C. 1970, c. E-11.

³ Chapter 1 of the Statutes of Canada, 1970, R.S.C. 1970 (2nd Supplement) c. 10, which was brought into force on June 1, 1971.

II. JURISDICTION

1. Introduction

The word "jurisdiction" in relation to a court may have different meanings according to its context. In the first instance, it may be said that the Federal Court of Appeal has "jurisdiction" in respect of the various classes of matters that may be brought before it. The Federal Court of Appeal has jurisdiction in respect of four classes of matters and a possible jurisdiction in respect of a fifth. These are

- (a) appeals from judgments of the Trial Division,
- (b) appeals from tribunals other than the Trial Division,
- (c) section 28 applications,
- (d) section 28 references, and
- (e) transfers from the Trial Division.

Secondly, it may be said that the Court has jurisdiction to act on certain grounds. Where the statute says merely that "An appeal lies" from a judgment, without specifying the grounds, the grounds available on the appeal are, impliedly, any error in the making of the judgment. Other times an appeal is limited to error of law or error of law or jurisdiction. In the case of section 28 applications, an entirely new procedure is created and the grounds are defined. Finally, it may be said that the Court has "jurisdiction" to dispose of a matter in a certain way—that is, it has "jurisdiction" to give certain classes of judgments. My plan is to deal with each of the classes of matters in respect of which the Federal Court of Appeal has jurisdiction, including anything that I have to say about them concerning "grounds", and then I will say what I have to say concerning the judgments that the Court has "jurisdiction" to give.

2. Appeals from Trial Division

An appeal lies, as of right, from every judgment of the Trial Division. The only limitation is that the appeal must be brought within a time limit, namely, 10 days for an interlocutory judgment and 30 days for any other judgment, which time limit may be extended by the Trial Division (section 27).

3. Appeals from Tribunals other than Trial Division

The jurisdiction of the Federal Court of Appeal to hear appeals from tribunals other than the Trial Division is to be found in many different statutes. Some statutes provide specifically for appeals to the Federal Court of Appeal. See, for example,

1. section 26 of the *Broadcasting Act*, R.S.C. 1970, c. B-11;
2. section 23 of the *Immigration Appeal Board Act*, R.S.C. 1970, c I-3, as amended by the *Federal Court Act*;
3. section 18 of the *National Energy Board Act*, R.S.C. 1970, c. N-6, as amended by the *Federal Court Act*;
4. section 21 of the *Northern Inland Waters Act* R.S.C. 1970, c. 28 (1st Supplement) as amended by the *Federal Court Act*;

5. section 64(2) of the *National Transportation Act*, R.S.C. 1970, c. N-17, as amended by the *Federal Court Act*;
6. section 172(3) of the *Income Tax Act* (1972).

Other statutes provide for an appeal to the Federal Court of Canada without specifying which division of that Court has jurisdiction in the appeal.⁴ In any such case, the effect of the statute is to give jurisdiction to the Federal Court of Appeal except in three cases, namely, income tax appeals, estate tax appeals and citizenship appeals (section 30(1)), which appeals are heard by the Trial Division in the first instance (sections 21 and 24).⁵ Some examples of provisions that create jurisdiction in the Federal Court of Appeal even though they refer generally to the Federal Court of Canada are

1. section 78 of the *Canadian and British Insurance Companies Act*, R.S.C. 1970, c. I-15;
2. section 60 of the *Excise Tax Act*, R.S.C. 1970, c. E-13;
3. section 48 of the *Customs Act*, R.S.C. 1970, c. C-40;
4. section 15 of the *Pension Benefit Standards Act*, R.S.C. 1970, c. P-8.

Appeals to the Federal Court of Appeal from other than Trial Division tribunals are of different kinds. There are, for example,

- (a) appeals on questions of law or jurisdiction from the Canadian Transport Commission and the Immigration Appeal Board,
- (b) appeals from the Tariff Board on questions of law under the *Customs Act* and the *Excise Tax Act*, and
- (c) unrestricted appeals from the Commissioner of Patents under the *Patent Act*.

As it will be noted, some appeals are unlimited in scope and some are limited to questions of law. In addition, it must be borne in mind that some appeals are appeals as of right while some appeals may be brought only after obtaining leave to appeal. Furthermore, in most, if not all, cases, there are time limits for exercising a right of appeal or for seeking leave to appeal. In each case, the statute that confers the right of appeal must be examined carefully to determine the characteristics of the right of appeal created by it.

4. Section 28 Applications

The section 28 application is a new procedure created by the *Federal Court Act*, which, speaking very generally, replaces and extends the remedy formerly available by way of the prerogative writ of *certiorari* in respect of

⁴ Many statutes prior to 1971 provided for appeals to the Exchequer Court of Canada. After the *Federal Court Act* came into force, these references automatically became references to the Federal Court of Canada (section 61(2)).

⁵ In addition to the jurisdiction of the Trial Division to hear tax and citizenship appeals, where a statute provides for an appeal being heard by the Federal Court of Canada without specifying a particular Division, the Rules may transfer jurisdiction from the Federal Court of Appeal to the Trial Division (section 30(2)). Such a transfer has been made in the case of trade mark appeals (Rule 704(9)), in the case of appeals under section 469(1) of the *Canada Shipping Act* (Rule 1015), and, in the case of appeals, under section 5(2) of the *Public Servants Inventions Act* (Rule 706). Section 469(1) of the *Canada Shipping Act* has now become section 458(1) of R.S.C. 1970, c. S-9.

orders or decisions made under federal legislation. Being a new procedure, there would seem to be no reason to imply into it any of the limitations or complications of *certiorari* unless they are dictated for this new procedure by the words of the statute having regard to the appropriate principles governing the interpretation of statutes.

The section 28 jurisdiction is a jurisdiction to review and set aside certain decisions and orders. As the legislation is framed, there are two problems in defining the jurisdiction, *viz*:

- (a) to what decisions or orders does the jurisdiction apply? and
- (b) on what grounds may the jurisdiction be exercised?

I shall discuss first the question as to what decisions or orders are subject to applications under section 28.

Generally speaking, section 28 authorizes the Federal Court of Appeal to review and set aside any decision or order made, or purporting to have been made, under the authority of a federal statute. To this general proposition, there are a number of exceptions.

The first group of exceptions are inherent in the fact that section 28 only applies to a decision or order of a "federal board, commission or other tribunal" which, by definition, is, speaking very generally, any body or person or persons having powers conferred by a federal statute except

- (a) such a body that has been constituted by a provincial statute,
- (b) such a person or persons appointed under a law of a province, or
- (c) a person who has been appointed as a judge under section 96 of the *British North America Act*.

An example of the exceptions referred to in paragraph (a) *supra* would be a decision or order made by a provincial transport board under the *Motor Vehicle Transport Act*, R.S.C. 1970, c. M-14, whereby Parliament authorized provincial boards having motor carrier jurisdiction to exercise the same jurisdiction in relation to interprovincial and international carriers that they were authorized by provincial legislation to exercise in relation to intra-provincial carriers. The exceptions referred to in paragraph (c) *supra* would extend to all decisions made by superior, district or county courts by virtue of federal statutes.⁶

The next group of exceptions is created by the express exclusion to be found in section 28(1). By virtue of the express words of that provision, it does not apply to a decision or order if

- (a) it is "a decision or order of an administrative nature",
- and
- (b) it is *not* "required by law to be made on a judicial or quasi-judicial basis".

In other words, if we assume for purposes of discussion that all decisions or orders are

- (i) of an administrative nature,

⁶ See *Lavell v. Attorney General of Canada*, [1971] F.C. 347, and *In re Armstrong* (1972) (unreported). (*Editor's Note*: At date of publication, *In re Armstrong* has been reported as *Armstrong v. State of Wisconsin and U.S.A.*, [1972] F.C. 1228.)

- (ii) of a legislative nature, or
- (iii) of a judicial nature,⁷

section 28 applies to all orders or decisions of a legislative or judicial nature *and* to all decisions of an administrative nature that *are* required to be made on a judicial or quasi-judicial basis.⁸ The exception spelled out in section 28(1) is, therefore, an exception of all orders or decisions of an administrative nature that are *not* required to be made on a judicial or quasi-judicial basis.⁹

In addition to the decisions or orders made under federal legislation that are excepted from section 28 to which reference has already been made there are those excepted by section 28(6). These exceptions are

- (a) a decision or order of the Governor in Council,
- (b) a decision or order of the Treasury Board,
- (c) a decision or order of a superior court,
- (d) a decision or order of the Pension Appeals Board, and
- (e) a decision or order in respect of a proceeding for a service offence under the *National Defence Act*.

Finally, there are the exceptions from section 28(1) made by section 29. This class of exception relates to decisions that would otherwise fall within section 28 in respect of which there is a statutory right of appeal

- (a) to the Federal Court of Canada,
- (b) to the Supreme Court of Canada,
- (c) to the Governor in Council, or
- (d) to the Treasury Board.

Section 29 says that "to the extent that it may be so appealed" a decision may not be reviewed under section 28.

To summarize, a superficial examination of the *Federal Court Act* would indicate that a section 28 application may be brought to review and set aside any decision or order made under a federal act except

- (a) a decision or order of a body constituted by provincial statute,
- (b) a decision or order of a person or persons appointed under a law of a province,
- (c) a decision or order of a superior, district or county court,

⁷I am inclined to think that "administrative" in section 28(1) is used in contrast to legislative or judicial and is not used in the somewhat vague sense it has acquired when it is used concerning "administrative tribunals" which exercise judicial or quasi-judicial powers.

⁸In appreciating the effect of the language of section 28(1), it is important to keep in mind that it does not speak of orders or decisions of a judicial or quasi-judicial *nature* but of orders of an *administrative nature* made on a "judicial or quasi-judicial *basis*".

⁹This is not the place to discuss the meaning of the much debated words "judicial or quasi-judicial". I am satisfied that, for practical purposes, a decision *is* made on a "judicial or quasi-judicial basis" whenever there is an express or implied requirement that it be made only after giving a person affected thereby an opportunity to be heard. Just when such a requirement will be implied and how much further the ambit of the expression "judicial or quasi-judicial basis" extends is a matter that must be left for consideration at other times and places.

- (d) a decision or order of an administrative *nature* that is *not* required to be made on a judicial or quasi-judicial *basis*,
- (e) a decision or order of the Governor in Council,
- (f) a decision or order of the Treasury Board,
- (g) a decision or order of a superior court,
- (h) a decision or order of the Pension Appeals Board,
- (i) a decision or order in respect of a proceeding for a service offence under the *National Defence Act*, or
- (j) a decision or order in respect of which there is a right of appeal as such to
 - (A) the Federal Court of Canada,
 - (B) the Supreme Court of Canada,
 - (C) the Governor in Council, or
 - (D) the Treasury Board
 "to the extent that it may be so appealed".¹⁰

Before leaving the question as to the decisions or orders to which section 28(1) applies, it is worthy of note that, unlike *certiorari*, there is *no* requirement that a decision or order have a judicial character before it can be reviewed and set aside under section 28(1). In other words, section 28(1) is not restricted to decisions of inferior courts.

I turn now to the grounds upon which a section 28(1) application can be made.

The grounds upon which an application can be made under section 28(1) are stated explicitly in that provision. Section 28(1) provides that the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order "upon the ground" that the body or person or persons by whom the decision or order was made

- (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
- (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Generally speaking, these grounds are of the same general character as the grounds for *certiorari*. They are, however, re-stated in statutory language so that decisions on *certiorari* can have no necessary application. In addition, certain lines of jurisprudence in connection with *certiorari* are definitely inapplicable by reason of the very specific language employed. In particular,

¹⁰ This method of describing the ambit of section 28(1) is intended to describe in general terms the jurisdiction conferred on the Federal Court of Appeal by section 28(1) and is not intended as a means of solving nice questions that may arise with regard thereto.

I refer to the availability of an error in law as a ground whether or not it appears on the face of the record. The precise ambit of the "grounds" set out in section 28(1) is a matter of substantive law upon which I have no intention to suggest any opinion in this article.

5. *Section 28 References*

I turn to the fourth class of matter in respect of which the Federal Court of Appeal has jurisdiction. This arises out of section 28(4), which reads as follows:

(4) A federal board, commission or other tribunal to which subsection (1) applies may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination.

As far as I know, this provision has not yet been invoked and it would not seem to call for any special comment.¹¹

6. *Transfers from Trial Division*

Finally, it is conceivable that the Rules might vest jurisdiction in the Federal Court of Appeal under section 26 of the *Federal Court Act*, which reads as follows:

26. (1) The Trial Division has original jurisdiction in respect of any matter, not allocated specifically to the Court of Appeal, in respect of which jurisdiction has been conferred by an Act of the Parliament of Canada on the Federal Court, whether referred to by its new name or its former name.

(2) Notwithstanding subsection (1), the Rules may transfer to the Court of Appeal original jurisdiction to hear and determine a specified class of matter to which that subsection applies.

As far as I am aware, no transfer has as yet been made under section 26(2). It could only be done, of course, where some statute other than the *Federal Court Act* has conferred jurisdiction in a matter other than an appeal on the Federal Court of Canada without allocating it specifically to either Division, and for some reason it seemed more appropriate to have it dealt with in the first instance by the Appeal Division.

7. *Judgments that the Federal Court of Appeal has jurisdiction to give*

As already indicated, there is an additional aspect of jurisdiction. Having considered what orders or decisions can be brought before the Court, and the grounds upon which they may be attacked, it is relevant to the question of jurisdiction to consider what powers the Court has in disposing of a matter.

¹¹ Since this text was prepared, a reference has been filed under section 28 for the first time.

Section 52 of the *Federal Court Act* deals with that question.¹² The provisions of that section do not call for special mention here in so far as Trial Division appeals are concerned, but it is important to note the difference between the Court's powers when disposing of an application under section 28(1) and its powers when disposing of an appeal from a tribunal other than the Trial Division. In the case of a section 28(1) matter, the Court of Appeal, if it does not dismiss the application, may merely set aside the decision attacked, or it may set aside the decision and refer the matter back to the tribunal for determination in accordance with such directions as it considers appropriate¹³ but it has no power to substitute its own decision for that of the tribunal. On the other hand, on an appeal from such a tribunal in a case where there is special provision for such an appeal, the Court of Appeal has power, in addition to giving the decision that it could have given on a section 28(1) application, to "give the decision that should have been given". As it seems to me, the distinction is one that is appropriate between Court of Appeal decisions concerning decisions of tribunals having discretionary powers in specialized fields and Court of Appeal decisions concerning decisions of tribunals which have no power except to find facts and apply rules of law to them even though they operate in specialized fields.

8. *Comment re Jurisdiction*

Before leaving the question of jurisdiction, some reference should be made to the confusing situation that arises from the fact that there are decisions and orders of tribunals other than the Trial Division in relation to which the Federal Court of Appeal has jurisdiction under section 28(1) as well as appeal jurisdiction under a special statutory provision. This situation arises from the unusual provision in section 29, by which it is enacted that, where there is express provision for an appeal from a decision or order, either to the Federal Court of Canada, to the Supreme Court of Canada, to

¹² 52. The Court of Appeal may

- (a) quash proceedings in cases brought before it in which it has no jurisdiction or whenever such proceedings are not taken in good faith;
- (b) in the case of an appeal from the Trial Division,
 - (i) dismiss the appeal or give the judgment and award the process or other proceedings that the Trial Division should have given or awarded,
 - (ii) in its discretion, order a new trial, if the ends of justice seem to require it, or
 - (iii) make a declaration as to the conclusions that the Trial Division should have reached on the issues decided by it and refer the matter back for a continuance of the trial on the issues that remain to be determined in the light of such declaration;
- (c) in the case of an appeal other than an appeal from the Trial Division,
 - (i) dismiss the appeal or give the decision that should have been given, or
 - (ii) in its discretion, refer the matter back for determination in accordance with such directions as it considers to be appropriate; and
- (d) in the case of an application to review and set aside a decision of a federal board, commission or other tribunal, either dismiss the application, set aside the decision, or set aside the decision and refer the matter back to the board, commission or other tribunal for determination in accordance with such directions as it considers to be appropriate.

¹³ Compare *Nanda v. Public Service Commission*, [1972] F.C. 277 at 310-11 and at 318.

the Governor in Council or to the Treasury Board, that decision or order is not subject to review under section 28 "to the extent" that it may be so appealed. The result is that, frequently, proceedings are brought, at the same time, by way of appeal and by way of an application to set aside under section 28(1). As will be mentioned later, it has been possible, so far, to merge such proceedings in such a way that the result has not been affected by the highly technical situation that might otherwise exist. However, the existence of a state of law under which there are two possible mutually exclusive remedies for one grievance, and under which it is very difficult to determine just where the dividing line runs, gives an appearance of complexity to the person aggrieved which is highly undesirable when it would be relatively easy to simplify the situation.

The solution to this jurisdictional situation, as it seems to me, is to make a study of the statutes that provide for an appeal to the Federal Court of Appeal with a view to deciding, in respect of each decision making authority, whether the Court of Appeal should have power to substitute its decision for that of the tribunal that has power to make the decision in the first instance. If that tribunal's function is essentially that of a court of law in that it merely finds facts and applies rules of law to them, then the Court of Appeal should have the power to substitute its decision for that of the tribunal if it finds that the decision was wrong. Such a case is, I suggest, a proper case for an unrestricted appeal and, if there were such an appeal, section 29 would exclude any resort to section 28(1). Where, however, a tribunal is vested with power to exercise a discretion in a field for which it has a special "expertise" and does not merely apply the law to the facts as established before it, the Court of Appeal should not have any power except to invalidate decisions improperly made and to refer them back to the tribunal for further consideration in accordance with the law. In other words, a court of law should not, in accordance with the policy inherent in the *Federal Court Act*, as I understand it, substitute its decision for a decision of a specialized administrative tribunal. Where, therefore, a review of a statute conferring a right of appeal to the Federal Court of Appeal shows that the tribunal in question has such a discretionary function, then the present situation could be improved by simply abolishing the right of appeal and leaving parties aggrieved to their recourse under section 28(1).¹⁴ If rights of appeal were unrestricted in ambit and were limited to cases where the tribunal functions essentially as a court of law functions, the present confusing situation would be substantially simplified. Where a decision is to be attacked, it would then be clear that either

- (a) there is an unrestricted appeal, in which case there can be no application under section 28(1), or
- (b) there is no appeal at all, in which case the only remedy is an application under section 28(1).

¹⁴ Generally speaking, as it seems to me, where an appeal from an "administrative" tribunal has been restricted to errors of law or errors of law and jurisdiction, the purpose of the limitation was to prevent the Court of Appeal from interfering with the tribunal's exercise of its discretionary powers and such a right of appeal might be abolished leaving the field clear for section 28(1).

III. PRACTICE AND PROCEDURE

1. Introduction

General Rules and Orders have been adopted for the Federal Court of Canada. These govern practice and procedure in both the Trial Division and the Court of Appeal. Certain parts of these Rules are directed specifically at one Division or the other. Part IV applies to proceedings in the Trial Division and Part V applies to proceedings in the Federal Court of Appeal. The remainder of the Rules, however, deal with matters that may apply in both Divisions and, unless a particular provision is restrictively worded — as, for example, by referring only to an “action”,¹⁵ it may be assumed that it applies in both Divisions. So, in connection with proceedings in the Court of Appeal, reference must be made outside Part V in connection with such matters as

- (a) “address for service” (Rule 2(1)(c)),
- (b) computation of time (Rule 3),
- (c) gaps in rules (Rule 5),
- (d) representation of parties (Rule 300),
- (e) effect of non-compliance with Rules (Rule 302),
- (f) amendments to documents (Rule 303),
- (g) method of service of documents (Rule 304 *et seq.*),
- (h) proof of service (Rule 313),
- (i) motions (Rules 317 *et seq.*),
- (j) affidavits (Rule 332),
- (k) judgments and orders (Rule 337),
- (l) costs (Rules 344 *et seq.*),
- (m) transfers of proceedings from one Division to another (Rule 359),
- (n) parties who are infants or are otherwise under disability (Part VI),
- (o) representative parties and partnerships as parties (Part VI),
- (p) change of parties (Part VI),
- (q) enforcement of judgments and orders (Part VII).

This necessity of looking outside Part V, which deals specially with procedure in the Court of Appeal, applies to every kind of proceeding in the Court of Appeal. In addition, there is a special rule that applies to appeals from the Trial Division. This is to be found in Rule 1214, which reads as follows:

RULE 1214. The attorney or solicitor on the record and the address for service of a party on an appeal from the Trial Division shall continue to be the same as they were in the proceeding in which the judgment appealed against was given and, for these and similar purposes, Parts I, II, and III are applicable to such an appeal as though the appeal were a continuation of that proceeding.

The result of this rule may be illustrated by contrasting

- (a) an appeal from the Trial Division, which must be brought on behalf of the appellant by the person who was the solicitor on the record for

¹⁵ See Rule 2(1)(b): “‘action’ means a proceeding in the Trial Division other than an appeal, an application or an originating motion . . .”

him in the action in the Trial Division (unless the necessary steps are taken to change solicitors) and, in respect of which, personal service of the notice of appeal is not necessary (Rule 304(1)) as long as there is an "address for service" arising out of the action in the Trial Division, and

- (b) an appeal from a tribunal other than the Trial Division, which may be brought on behalf of the appellant by any solicitor who has been duly instructed to do so (whether or not he is the solicitor who acted before the tribunal of first instance), who thereupon becomes the solicitor on the record (Rule 300(3)) and, in respect of which, personal service of the notice of appeal must be effected on the respondent (Rule 304(1)).

Having indicated the use that must, as I appreciate it, be made of the general provisions of the Federal Court Rules in connection with Court of Appeal matters, I do not propose to discuss those general provisions except in relation to preliminary motions and interlocutory motions, which have given rise to some difficulties during the first year and a half of the Court's experience.

I also plan to discuss in a very general way the scheme and application of certain provisions in Part V of the Rules, which is the Part that lays down the special rules of procedure for the Court of Appeal.

2. *Preliminary and Interlocutory Motions in the Court of Appeal*

When I speak of a preliminary motion I refer to an application for leave to appeal or to an application for extension of time to launch a proceeding. In the nature of things, such an application is *not* an application during the course of a proceeding because the proceeding cannot be launched unless time is extended or leave is granted, as the case may be. There is no appeal or section 28 application, as the case may be, before the Court at the time of such an application for leave or extension of time. While this fact may not be of any great theoretical importance, it can be of significant practical importance.

An interlocutory motion is, of course, any motion made in connection with a proceeding at or after the launching of the proceeding other than an application for a judgment disposing of the matter.

What I have to say about motions will apply equally to both kinds of motions.¹⁶

The most serious problem that has been encountered in the administration of the Federal Court of Appeal is how to carry out the spirit of section 16(3) of the *Federal Court Act*, which reads as follows:

- (3) The place of each sittings of the Court of Appeal shall be arranged by the Chief Justice to suit, as nearly as may be, the convenience of the parties.

with the judicial strength that is available to the Court. This problem is particularly embarrassing in connection with preliminary and interlocutory motions,

¹⁶ As I have already indicated, however, there may be differences, depending on the circumstances, in the requirements as to service. If there is no solicitor on the record for the opposing party, it will often, if not always, be necessary to effect personal service of the notice of motion.

which, frequently, require relatively short hearings and, equally frequently, call for a familiarity with the applicable rules and the developing practice that can only be available to one of the judges who are full time judges of the Court of Appeal, of which there are only two at the moment. If one of these judges were to hear all preliminary and interlocutory applications to the Court of Appeal orally at a place convenient to the parties and within a reasonable time, having regard to the exigencies of the particular matter, one, if not both, of the full-time judges would be travelling a very large part of the time and would have little or no time to participate in the hearing and disposition of the proceedings themselves.

The most important alleviation of this problem has been the fact that a large proportion of motions have been presented in writing as contemplated by Rule 324. That rule is so important as a means of making it possible to operate the Federal Court of Appeal in the spirit of the statute that I deem it worthwhile to set it out here in full. It reads as follows:

RULE 324. (1) A motion on behalf of any party may, if the party, by letter addressed to the Registry, so requests, and if the Court or a prothonotary, as the case may be, considers it expedient, be disposed of without personal appearance of that party or an attorney or solicitor on his behalf and upon consideration of such representations as are submitted in writing on his behalf or of a consent executed by each other party.

(2) A copy of the request to have the motion considered without personal appearance and a copy of the written representations shall be served on each opposing party with the copy of the notice of motion that is served on him.

(3) A party who opposes a motion under paragraph (1) may send representations in writing to the Registry and to each other party or he may file an application in writing for an oral hearing and send a copy thereof to the other side.

(4) No motion under paragraph (1) shall be disposed of until the Court is satisfied that all interested parties have had a reasonable opportunity to make representations either in writing or orally.

[Rules 319 *et seq.* must, of course, be read with Rule 324.] This same rule was in operation in the Exchequer Court of Canada for some considerable time prior to the creation of the Federal Court of Canada. Rule 324 motions have largely replaced motions presented orally in connection with a substantial part of the housekeeping work of the Court as, for example, the fixing of dates and places for hearing. My impression is that the profession finds it much more satisfactory to work such matters out informally between themselves than to "fight" them out in front of a judge. Even when the parties cannot agree, the matters in issue can usually be put and answered in writing just as satisfactorily as orally. Indeed the apparent success of this method of dealing with motions concerning procedural matters leads me to think that its use might well be extended, with no injustice, to most preliminary and interlocutory matters in the Court of Appeal as long as it is kept in mind that, where the circumstances warrant it, the motion may be continued by way of an oral hearing.

There are, of course, motions that, for one reason or another, cannot be presented adequately in writing and must be presented orally before the Court. There is a fundamental difference between such a motion and a motion under Rule 324. The motion is made orally at the time of the hearing. The motion is *not* made by the documents that are filed in Court. What is filed in

Court is a “notice” of motion (Rule 320) and supporting affidavits (Rule 319(2)), which notice and affidavits must be served on the other parties (Rule 321 and Rule 319(3)). This distinction can be very important when there is a time limit for making the motion. The return date — that is, the time set out in the “notice” of motion for presenting the motion — must be within the time. It is not sufficient to *file* the “notice” within the time. This point is frequently overlooked to the embarrassment of lawyers and to the chagrin of their clients for, if the time limit is in a statute, it cannot always be extended.

Another important misunderstanding of which lawyers have sometimes been guilty during the first year and a half of the existence of the Federal Court of Appeal is to assume that the Court will, by some mysterious process, be available for the presentation of a motion at any time and place that they see fit to insert in a “notice” of motion as the return date for the presentation of the motion. Having regard to the very limited judicial power available to the Federal Court of Appeal and to the very large territory that it has to serve, it will readily be understood that advance arrangements must be made for a date and place for a hearing before a “notice” of motion can be filed and served giving other parties notice that a motion will be presented at that hearing. This is even more obvious when the motion is one that must be presented before a Court consisting of three or more judges, which is the situation in the case of a motion for final judgment or leave to appeal (section 16(1) of the *Federal Court Act*).

To obtain a time and place of a hearing at which a motion may be presented, the party should, before preparing his “notice” of motion, make a request therefor informally to the Registry (Rule 317(4)). Such a request may be made, by telephone or in writing, to one of the local offices of the Registry or to the Court of Appeal office of the Registry in Ottawa. When such a request is made, the Registry should be notified of the nature of the proposed motion, the names of, and solicitors for, the other parties, the probable length of the hearing, the degree of urgency, if any, and the reasons therefor, the proposed place for the motion and the times regarded by the applicant as acceptable for the making of the motion. The appropriate officers of the Registry will then confer with the Chief Justice, who will arrange a hearing to suit the convenience of the parties as nearly as may be (possibly, after seeking further information and views from the applicant and the other parties by way of telephone calls by Registry officers), and the applicant will, ordinarily, be notified of the result by a telephone call confirmed in writing.

Finally, it must be underlined that a “notice” of motion (other than a motion under Rule 324) cannot be accepted for filing or be served unless it contains the date and place of the hearing of the Court at which the motion will be presented, which date and place must have been arranged by the Chief Justice in advance or fixed by the Rules. Possibly, in other kinds of matters, a solicitor might be left to suffer for the lack of results that would flow from any such ineffectual procedure, for, if no hearing has been arranged, a party cannot present his motion. However, as the mere appearance of having a matter in the Court often serves a client’s requirements for practical purposes almost as well as actually having launched a proceeding properly, having

regard to some kinds of jurisdiction vested in the Federal Court of Appeal, it has been emphasized to the officers of the Registry that a "notice" of motion that does not contain a return date for a place and time of a general sitting of the Court or a hearing of the Court that has been specially arranged for the particular motion is not a document that can, under the Rules, be accepted for filing.¹⁷

3. *Procedure in Trial Division Appeals* (Division B of Part V of the Rules)

The requirements for launching an appeal from a judgment of the Trial Division are set out in the statute and the Rules (Rule 1201). I see no point in reproducing them here. Similarly, there are rules governing related appeals (Rule 1202) and cross appeals (Rule 1203), a consideration of which is required when an appropriate situation arises.

What I propose to discuss here is the general scheme adopted by the Rules for getting an ordinary appeal ready to be heard.

Generally speaking, I think it is fair to say that what is necessary to bring an appeal to the point where it may be heard is

- (a) settlement of the record on which the appeal is to be determined and preparation of copies thereof for the use of counsel and the Court,
- (b) preparation, filing and service of factums or memoranda of facts and law by each of the parties, and
- (c) fixing of a date and place for hearing of the appeal and communication thereof to the parties.

The contents of the record or "Case" upon which an appeal from the Trial Division is to be determined are set out in Rule 1204.¹⁸

In so far as preparation of copies of the "Case" for counsel and the Court is concerned, the appellant in an appeal from the Trial Division has a choice. He may, when he files his notice of appeal, give notice that he intends to prepare a printed case in the form required by the Supreme Court of Canada Rules (Rule 1207), in which event, of course, he must prepare such a printed case. In any case where the appellant does not make such an election,

¹⁷ An inquiry at the Registry may show that there is some standing arrangement as, for example, the arrangement, that a Trial Division judge hearing motions will hear applications for extensions of time in the Court of Appeal.

¹⁸ RULE 1204. The appeal shall be upon a case that shall consist (unless, in any case, the parties otherwise agree or the Court otherwise orders) of

- (a) the judgment appealed from and any reasons given therefor,
- (b) the pleadings,
- (c) a transcript of any verbal testimony given during the hearing giving rise to the judgment appealed from,
- (d) any affidavits, documentary exhibits or other documents filed during such hearing,
- (e) any written or other admissions of the parties otherwise put before the Court during such hearing, and
- (f) any physical exhibits filed during such hearing.

the Federal Court Registry will prepare sufficient copies of an "Appeal Book" that will consist of copies of all the relevant documents in the Registry so that all the appellant will have to do, in the normal case, is purchase sufficient copies of the transcript of the evidence for the use of counsel and the Court. Any problems as to when the Appeal Book is to be prepared and as to what it should contain are worked out informally between the Registry and the parties, subject always to the possibility that the Court may have to arbitrate after hearing the parties (Rule 1206).

After receiving the Appeal Book and the evidence, the appellant has one week, in the case of an appeal from an interlocutory judgment, and three weeks in the case of other appeals¹⁹ to file and serve a memorandum of fact and law. Each of the other parties has similar periods to file his memorandum of fact and law (Rule 1208). The Federal Court Rules have adopted the new Supreme Court of Canada requirements for these memoranda. Rule 1208(3) reads as follows:

- (3) A memorandum of fact and law shall consist ordinarily of
 - (a) *Part I — Statement of Facts*
(A concise statement of facts by the appellant or a statement by the respondent of his position with respect to the appellant's statement of facts together with a concise statement of such other facts as he considers relevant);
 - (b) *Part II — Objections by Appellant to Judgment Appealed From or Statement by Respondent of his Position Concerning the Points in Issue;*
 - (c) *Part III — Argument*
(A statement of the submissions to be urged on the Court—not a written argument);
 - (d) *Part IV — Order Sought*
(A concise statement of the order desired including any order sought concerning costs);
 - (e) *Appendix A — Statutes and Regulations Cited or Relied On*
(Where statutes or regulations are cited or relied on, so much thereof as may be necessary for the case shall be printed at length in an Appendix unless the party files with his memorandum 3 copies of the whole statute or regulation or satisfies himself that another party has done or is doing so);
 - (f) *Appendix B — List of Authorities to be Referred To;*
and, where there is a counterclaim or two or more appeals are consolidated or there are other special circumstances, the contents thereof shall be suitably modified.

After the times for filing memoranda have expired, any party may apply for an order fixing a time and place for hearing of the appeal. In almost all cases this is done by a joint application of the parties in a form that is spelled out in Rule 1210(3). If agreement cannot be reached, one or more parties may apply in writing for the necessary order. A procedure intended to cover all eventualities is spelled out in Rule 1210. As a practical matter, it is found possible in most cases to fix a time and place for hearing of the appeal that is acceptable to all parties by dint of "negotiations" conducted between the parties and the Chief Justice through the medium of telephone communications between Registry officers and the parties. Once the order fixing the time and place for the hearing of the appeal has been made, it is communicated to the parties or their representatives by the Registry (Rule 1210(1)).

¹⁹ The parties may extend these times by informal agreement (Rule 1208 (1) & (2)).

4. *Procedure in Appeals from Tribunals other than the Trial Division*
(Division C of Part V of the Rules)

There is such a diversity of tribunals from which appeals may be taken to the Federal Court of Appeal that the rules regulating such appeals, of necessity, are in very general terms.

In connection with the rules relevant to such appeals, the expression "interested person" is of importance. This is defined for Division C of Part V (Rule 1313) to mean a person who appeared as a party in the Tribunal appealed from and any person granted leave to be heard on the appeal by an order under Rule 1310(1).²⁰ Any person who desires to participate in an appeal may file a notice of intention to participate (Rule 1303) and a person who does not file such a notice may lose any right that he would otherwise have to be served with papers in the appeal.

As many of these appeals can only be taken by leave of the Court of Appeal, there are special provisions with regard to obtaining leave (Rule 1301). An application for leave must be supported by an affidavit establishing the facts on which the applicant relies²¹ and notice of the application must be served "personally" on all interested persons and on the Deputy Attorney General of Canada. [The application must, of course, be made for a sitting of the Court consisting of three judges (section 16 of the *Federal Court Act*), for which arrangements have been made by the applicant with the Registry, before the notice of motion is served, in the manner that I have already discussed.] If the applicant desires to have before the Court, on the application for leave, material in the possession of the tribunal from which it is desired to appeal, a method of obtaining such material for that purpose is provided (Rule 1301(3)).

An appeal of this kind must be launched in the manner provided by the authorizing statute if it contains any provision with reference thereto. Otherwise, it is launched by filing a notice of appeal in the Registry of the Court (Rule 1302(2)). Subject to what is provided by the relevant statute, the contents of a notice of appeal are governed by Rule 1302(3). Forthwith after filing, the notice of appeal must be served on the Deputy Attorney General of Canada and the tribunal appealed from and it must be served *personally* on all interested persons.

²⁰ RULE 1310. (1) The Court may in its discretion, upon an application before the hearing or during the course of a hearing, decide what persons shall be heard in the argument of an appeal.

(2) No person who has filed a notice under Rule 1303 shall be refused leave to be heard under paragraph (1) without being given an opportunity to be heard on the question whether he should be heard.

²¹ Rule 1301 merely repeats here, with special reference to applications for leave to appeal, the requirement that would apply anyway, by virtue of Rule 319 (2). It does this to emphasize the burden that rests on the applicant to bring the essential material before the Court in some proper way.

Among other things, there would ordinarily have to be material showing an arguable question of law or jurisdiction. Where, however, a section 28 application has already been launched with regard to the same decision, that may not be necessary. See *Aly v. Minister of Manpower and Immigration*, [1971] F.C. 540.

The contents of the "Case" upon which an appeal other than an appeal from the Trial Division must be decided are regulated by Rule 1305.²² The tribunal appealed from, if it wishes to retain its original documents, may prepare sufficient copies of a "Case" book for counsel and the Court or it may send its material to the Court's Registry so that the Registry may prepare the Case Book (Rule 1306). If part of the "Case" is not in the possession of the tribunal appealed from, the onus is on the appellant to prepare a supplementary "Case" book with the additional material, unless it obtains a dispensing order (Rule 1306(3)).

Each party to an appeal must file and serve a "memorandum of the points to be argued by him" (Rule 1307). While the contents of this memorandum are not regulated specifically as in the case of appeals from the Trial Division,²³ to the extent that the rule applicable to Memoranda in the Trial Division appeals is appropriate, I suggest that counsel would be wise to follow it.

To fix a date and place for hearing, the parties should apply in the manner provided for Trial Division appeals (Rule 1309).

In conclusion, it should be noted that, where there is a section 28 application in respect of the decision appealed from, then a different procedure is ordinarily applicable, once leave to appeal is obtained (Rule 1314). Reference will be made to this procedure after the discussion of the procedure for section 28(1) applications.

5. *Procedure in Section 28(1) Applications*

There is an even greater diversity in the tribunals that render decisions that are subject to attack under section 28(1) than those that render decisions from which appeals can be taken. Any person who has authority to make an order or decision under a federal statute, whether legislative, executive or judicial, may conceivably be such a tribunal. In addition to the difficulty of spelling out a procedure required by such a possibility of different situations, section 28(5) of the *Federal Court Act* requires that section 28(1) applications be heard and determined "without delay and in a summary way". The method adopted to carry out this requirement in each of the many differ-

²² RULE 1305. The appeal shall be upon a case that shall consist (unless, in any case, the interested persons otherwise agree or the Court otherwise orders upon the application of an interested person, the Deputy Attorney General of Canada, or counsel specially appointed to apply on behalf of the tribunal) of

- (a) the order or decision appealed from and any reasons given therefor,
- (b) all papers relevant to the matter before the tribunal whose order or decision is the subject of the appeal (hereinafter referred to as "the tribunal") that are in the possession or control of the tribunal,
- (c) a transcript of any verbal testimony given during the hearing, if any, giving rise to the order or decision appealed from,
- (d) any affidavits, documentary exhibits or other documents filed during any such hearing,
- (e) any physical exhibits filed during any such hearing.

[See Rule 1314 *re joinder of an appeal and an application under section 28 of the Act.*]

²³ See Rule 1208(3) quoted *supra*.

ent types of case that can arise was to leave it to the Court to spell out the procedure for each section 28(1) application as it arises. An order of directions is made in each case specifying (Rule 1403)

- (a) the material that will constitute the case for the decision of the application and by whom copies will be prepared for the parties and the Court,
- (b) the dates for preparation, filing and service of memoranda of points of argument by the parties, and
- (c) the time and place for argument of the application.

In order to avoid delay, the applicant is required by the Rules to obtain an appointment for a hearing for the application for directions before he serves his section 28(1) application and to serve notice of his application for directions with the notice of the section 28(1) application (Rules 1402 and 1403). In practice, it is becoming apparent that, in most cases, with some aid from the Court and the Registry, the order of directions can be worked out between the parties and can be made on consent under Rule 324.

Every effort is made by the Court to comply with section 28(5) and, if it appears that the applicant is not cooperating in bringing his action on without delay, the Court will take steps to quash the proceeding (Rule 1100).

Apart from the differences indicated by what I have already said concerning section 28(1) applications, the remarks that I have made concerning appeals from tribunals other than the Trial Division are, generally speaking, applicable to such proceedings.

6. *Joinder of an Appeal and a Section 28(1) Application*

As already indicated, when section 28(1) of the *Federal Court Act* and the various special laws applicable to the decisions of certain tribunals are read with section 29 of the *Federal Court Act*, it may be very doubtful indeed as to whether the appropriate remedy in any particular case of grievance is by way of an application under section 28(1) or by way of an appeal under the special law, even though it may be perfectly clear that, by way of one procedure or the other, the Federal Court of Appeal has jurisdiction to grant appropriate relief.

From the point of view of the parties to any such procedures, there is nothing to be gained from expensive arguments as to whether the relief should be granted in the appeal proceeding or in the section 28(1) proceeding. To avoid any such unnecessary expense and effort, the Rules provide for a procedure whereby an appeal and a section 28(1) proceeding in respect of the same decision may be joined and treated as one proceeding (Rule 1314). The order effecting such a joinder will set up the procedure for the joint matter in the same way as an order of directions under Rule 1403 sets up such a procedure for a simple section 28(1) proceeding.

7. *Procedure in References under section 28(4)*

The procedure in such a reference (Division E of Part V) is so similar to the procedure in applications under section 28(1) that it does not warrant separate discussion.

8. *Conclusion*

In this discussion of procedure in the Federal Court of Appeal, I have attempted to touch on those matters that are of special importance to, or peculiar to, practice in the Federal Court of Appeal. Not only have I not attempted to outline the effect of the various rules that apply generally in the Federal Court of Canada but I have not dealt with the rules governing relatively routine matters. It will be sufficient to mention, with reference to routine matters, that there are provisions with regard to

- (a) applications to quash (Rule 1100),
- (b) proceedings involving constitutional questions or questions of general public importance (Rule 1101),
- (c) new evidence (Rule 1102),
- (d) amendments (Rule 1104),
- (e) leave to appeal to the Supreme Court of Canada (Rule 1106),
- (f) dilatoriness (Rule 1209, Rule 1308 and Rule 1407),
- (g) discontinuance (Rule 1211, Rule 1311 and Rule 1406),
- (h) consent judgments (Rule 1212), and
- (i) stays of execution (Rule 1213).

It should also be mentioned that, just as there is a rule that there are no party and party costs except "for special reasons" in appeals from tribunals other than the Trial Division (Rule 1312), so there are no party and party costs except for special reasons in section 28 matters (Rules 1408 and 1505).

IV. *ADMINISTRATIVE MACHINERY OF THE COURT*

The administrative arrangements for the Federal Court of Canada apply to the Court of Appeal and to the Trial Division equally. I deem it appropriate, therefore, to repeat here, with some modifications, what I have said elsewhere with regard thereto.

The Court has one Registry for all of Canada. That Registry consists of a principal office in Ottawa and other offices in the different parts of the country where the convenience of litigants makes it expedient that there be such offices (section 14 of the Act). In the principal office, there is a separate section to handle Court of Appeal matters. In the other offices, the same officers deal with Court of Appeal and Trial Division matters.

The officer of the Court who has overall responsibility for the operation of the Registry is known as the Administrator of the Court (Rule 200).

Any party in any proceeding may file documents, issue writs or otherwise do business with the Registry in the office of the Registry which is most convenient to him. Thus, for example, an action may be commenced by filing a statement of claim in the Vancouver office, one defendant may file his defence in the Montreal office, and another defendant may file his defence in the Toronto office. Each of the parties may then continue to deal with the particular office that he finds most convenient (Rule 200(6)).

The way in which this is accomplished is that all original court files are maintained in the principal office of the Registry in Ottawa, but certified photocopies of all documents on any particular file are maintained in each of the local offices where any of the parties finds it convenient to deal with the Registry (Rule 200(6)).

The local offices are of two kinds. In some places, the Court has its own full-time staff and an office operated solely for the Court. These, presently, are Toronto, Montreal and Vancouver. In others, arrangements have been made to operate an office of the Registry in conjunction with some other service. In Halifax, the office of the Registry is operated in conjunction with the office of the Citizenship Court. In Edmonton, Calgary, Saskatoon, Regina, Winnipeg, Fredericton, Saint John (New Brunswick), St. John's (Newfoundland) and Quebec City, there are offices of the Registry operated in conjunction with the Registries of the provincial superior courts by officers whose principal employment is with the provincial courts. Other offices will be established in Charlottetown, Whitehorse and Yellowknife as soon as the necessary arrangements can be worked out.

Having regard to the fact that many of the lawyers who will find themselves with matters in the Court ordinarily practice in some other court, it is accepted by the Administrator that it is an important part of the duties of the Registry to provide information to litigants about the practice and procedure of the Court. Every effort is made to answer inquiries made in person, by telephone or by letter, as helpfully as possible. This does not mean, of course, that the Registry will supplant the lawyer, who must assume the ultimate responsibility for deciding upon the action necessary to protect the interests of his client.

Every effort has been made and will be made, in the administration of the Court, to eliminate any unnecessary formal step that might create delay or expense. To this end parties are encouraged to deal with the Registry by letter and by telephone with a view, where possible, to reducing or eliminating all non-contentious appearances of lawyers or parties before the Court. To the same end, the Rules contemplate the filing of documents by sending them to the Registry by mail (Rule 200(6)). In fact, any business can, as a practical matter, be transacted with the Registry by mail, or by telephone confirmed by appropriate letters.

One important warning should be given concerning reliance upon the mail for filing documents. In most cases, no irreparable harm will flow from a failure to file on a particular day. In such cases, the convenience and economy of using the mail warrants the risk of delay or failure in the mail. Where, however, filing on a particular day is essential to the party's case, steps should be taken to see that it is in fact in the Registry on that day. Rule 200(6) reads, in part:

A document may be deposited in any of the aforesaid offices by being sent there by mail but shall in no case be regarded as having been deposited until it physically reaches the office.

Where, therefore, filing on a particular day is essential, if the mail is used, the document should be despatched in sufficient time so that the solicitor may

telephone the Registry to ascertain whether it has been received at a time when he may still arrange personal delivery to the Registry if the mail has miscarried.

In conclusion, one very important point should be made in connection with administration. The Registry of the Court serves as a repository for documents filed in accordance with the Rules or a statute. No document may be filed in the Registry unless it is authorized by the Rules or a statute. If any doubt arises as to whether it is so authorized, the Registry officer may be asked to obtain a direction from a judge or the party may himself seek such a direction.

