Prerogative Remedies In Federal Income Tax Cases: A New Perspective

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The author presents a novel approach toward federal tax appeal procedure in Canada with respect to the use of prerogative remedies. In his analysis of the trial and appeal decisions of Parsons et al *v.* The Queen, *[1983] D.T.C. 4329 and [1984] D.T.C. 6345, a convincing argument is forwarded regarding both the authority of the Federal Court (Trial Division) and the viability of prerogative remedies in appealing tax assessments.*

Cet article propose une nouvelle approche à la procédure d'appel en matière fiscale au niveau fédéral au Canada en ce qui concerne l'emploi de brefs de prérogative. En analysant les jugements de la Division de première instance et de la Cour d'appel dans l'affaire Parsons et. al. *c.* The Queen, *[1983] DTC 5329 et [1984] DTC 6345, l'auteur présente des arguments convaincants à propos de l'autorité de la Division de première instance de la Cour fédérale et de la viabilité des brefs de prérogative pour interjeter appel des cotisations d'impôts.*

The relationship between Sections 18 and 28 of the *Federal Court Act*[1] has been the subject of considerable judicial comment and consideration. In addition to the interpretative questions — both of language and policy — spawned by these provisions, there is an overall limitation contained in Section 29 of the *Federal Court Act* restricting jurisdiction of the Court where other appeal rights are given in Federal statutes. This article examines the use of prerogative remedies vested in the Federal Court in the context of the *Income Tax Act*[2], and as well, the limitations imposed by Section 29 of the *Federal Court Act*. Issues and arguments raised here are by no means limited to income tax matters and may serve as a starting place for their more general application throughout many areas of law at which decisions are made by Federal Ministers, boards and tribunals.

In *Parsons et al.* v. *The Queen*[3], the Federal Court of Appeal reversed the decision of Mr. Justice Cattanach at the trial level[4], where he held that an assessment made by the Minister of National Revenue pursuant to Section 159 of the *Income Tax Act* against company directors for a portion of the tax assessed against a company, of which they were directors, should be quashed,

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[1]R.S.C. 1970, Chap. 10 (2nd Supp.).

[2]R.S.C. 1970, Chap. 1-5.

[3][1984] D.T.C. 6345.

[4]*Parsons et al* v. *The Queen*, [1983] D.T.C. 5329.

and enjoined the Minister from taking any further steps toward collecting the tax. As far as one can find (since passage of the appeal provisions of the *Income Tax Act*) this was the first time an attack, by way of prerogative remedy on an assessment, had been made. The Federal Court of Appeal set aside the judgment on the specific and perhaps narrow ground that Section 29 of the *Federal Court Act* prohibited the trial judge from hearing the matter, and he was therefore without jurisdiction.

A proper understanding of the decision requires a short summation of the background and facts upon which it came to the Court.

The two individual Applicants and Hugh John Flemming Sr., who died on 16 October 1982, were directors of North Carleton Land Co. Ltd. ("North Carleton"), a company incorporated under the laws of New Brunswick.

On 14 June 1979, the Minister of National Revenue issued a notice of assessment against North Carleton showing nil taxes payable for the 1978 taxation year which ended on 30 September 1978. Subsequent to the filing of the 1979 return, the Minister of National Revenue reassessed North Carleton, and issued notices of assessment dated 27 May 1981 showing total taxes payable in the amounts of $681,321.67 and $36,758.72 respectively for the 1978 and 1979 taxation years.

In the interim, the board of directors of North Carleton held a meeting on 16 October 1979 at which three of five directors were present. At this meeting, it was resolved that a dividend in the amount of $454,425.27 be declared payable, and that it be paid to Flemming Industries Limited, the sole shareholder except for directors' qualifying shares.

On 8 February 1983, the Minister of National Revenue issued notices of assessment against two directors and the Estate of Hugh John Flemming Sr. who had died following declaration of the dividend, showing the amount unpaid as $454,425.27, and referring to liability under Section 159(3) of the *Income Tax Act*, and to the unpaid taxes of North Carleton. It is these assessments which were the subject matter of the proceedings.

North Carleton filed Notices of Objection and then a Notice of Appeal to the Tax Review Board (now the Tax Court of Canada) after the reassessments for the 1978 and 1979 taxation years were confirmed by the Minister of National Revenue.

The taxpayers (hereinafter called "Applicants") filed Notices of Objection to the assessments on 5 May 1983. Before a response was received from the Minister of National Revenue, these proceedings were commenced in the Federal Court of Canada, Trial Division, on 21 June 1983, and they were heard beginning on 28 June 1983 before Mr. Justice Cattanach.

Prior to filing the said Notices of Objection, the Applicants requested the Minister to consent to an application pursuant to Section 173(1) of the *Income Tax Act*, but the same was refused.

The relevant provisions of the *Income Tax Act* are set out as follows:

ASSESSMENT

152. (1) The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine

(a) the amount of refund, if any, to which the taxpayer may be entitled by virtue of section 129, 131, 132 or 133 for the year, or

(b) the amount of tax, if any, deemed by subsection 120(2) or 122.2(1) to have been paid on account of the tax under this Part for the year.

152. (3) Liability for the tax under this Part is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made.

PAYMENT OF REMAINDER

158. (1) The taxpayer shall, within 30 days from the day of mailing of the notice of assessment, pay to the Receiver General any part of the assessed tax, interest and penalties then remaining unpaid, whether or not an objection to or appeal from the assessment is outstanding.

(2) Where, in the opinion of the Minister, a taxpayer is attempting to avoid payment of taxes, the Minister may direct that all taxes, penalties and interest be paid forthwith upon assessment.

PAYMENTS ON BEHALF OF OTHERS

159. (1) Every person required by section 150 to file a return of the income of any other person for a taxation year shall, within 30 days from the day of mailing of the notice of assessment, pay all taxes, penalties and interest payable by or in respect of that person to the extent that he has or had, at any time since the taxation year, in his possession or control property belonging to that person or this estate and shall thereupon be deemed to have made that payment on behalf of the taxpayer.

CERTIFICATE BEFORE DISTRIBUTION

(2) Every assignee, liquidator, administrator, executor and other like person, other than a trustee in bankruptcy, before distributing any property under his control, shall obtain a certificate from the Minister certifying that taxes, interest or penalties that have been assessed under this Act and are chargeable against or payable out of the property have been paid or that security for the payment thereof has, in accordance with subsection 220(4), been accepted by the Minister.

LIABILITY

(3) Distribution of property without a certificate required by subsection (2) renders the person required to obtain the certificate personally liable for the unpaid taxes, interest and penalties.

DEBTS TO HER MAJESTY

222. All taxes, interest, penalties, costs and other amounts payable under this Act are debts due to Her Majesty and recoverable as such in the Federal Court of Canada or any other court of competent jurisdiction or in any other manner provided by this Act.

To convince the Court of its grounds for *certiorari*, it was necessary to show an error of law, and that the alleged error was the Minister's failure to properly interpret the relevant sections. The argument is summarized as follows. Section 159 is intended to make persons, who are in control of assets which do not belong to them, liable for the *distribution* of these assets if they

fail to pay the taxes owing by the beneficial owner. The Sections are penal in nature and must be strictly construed. The crucial question in the construction of subsections 159 (1), (2) and (3) is whether liability on the persons mentioned arises if distribution is made *before assessment*. Section 159(3) imposes liability if distribution of property is made *without the certificate required by Section 159(2)*, and subsection (2) clearly requires that a certificate be obtained before distribution certifying that "taxes, interest or penalties *that have been assessed* under this Act...have been paid..."[5] Section 159(1) refers to the date of mailing of the *notice of assessment*. Thus, on its face the Section seems to raise liability *only* where distribution has been made *after an assessment* has been issued.

It was submitted that a "director" did not fall within the ambit of these words. First of all, the word "director" is not included as such in those persons covered. Thus, *prima facie*, it is not included. This omission must have been deliberate and intended in that "director" is a word common to Canadian corporate law and is, indeed, used many times in the *Income Tax Act* itself. Thus, if inclusion was intended, one would have thought a direct reference would have been inserted. If, therefore, it is included, it can only be done by reference to some rule of interpretation, or by implication. But the use of rules of interpretation or necessary implication to read a statute is limited and circumscribed. It was urged that those limits were such as to bar their use in the interpretation of Section 159.

On the basis of the "ejusdem generis" rule of statutory interpretation, it may be argued that the words "... and other like person ..."[6], include a director of a company. There are, however, cogent arguments militating against this construction, and therefore, it was further submitted that:

> 1. The words of the Act are "and other like person." The word "and" rather than "or" together with the word "person" rather than "persons" were emphasized. In this context "and" must refer to the executor because "person" is in the singular and the immediately preceding person is executor. If it has been intended to include the other named persons then surely "*persons*" would have been used.
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> 2. A director is not "like" any of the other named persons. The duties, rights, obligations and motivations of a *director* are surely far different from those of any of an administrator, liquidator or executor. It is impossible as well to see how a director is like an "assignee". This fact also helps to support the proposition that the Act used "*person*" in the phrase "...other like person..." because it knew there was no likeness between a director and an assignee and was limiting "other like person" to an *executor*.
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> 3. The group of persons mentioned ... assignee ... etc. are all mentioned in Section 150 as persons who have an obligation to file on behalf of someone else. It is this fact from which the true context of these words is to be obtained.[7] "Director" is not mentioned in Section 150 because a direct reference is made to "corporation" under Section 150(1). This section makes it clear that a "corporation and an individual" are treated as having an obligation to file on their own behalf. All the other persons mentioned have obligations to file for, or on behalf of, someone else.[8] No Obliga-

[5] *Supra*., footnote 2, s. 159(2).

[6] *Ibid.*

[7] *Ibid.*, (see s. 150(3)).

[8] For example, executor for the estate, curator, or guardian for the infant, ...etc.

> tion is imposed by the Act directly on a "director" to file for a corporation. Thus, the mention in Section 159(1) of Section 150, and in particular to "Every person required...to file a return of the income of any other person...", necessarily relates to Section 150(3).

Cattanach J. accepted these arguments. Counsel for the Minister, on the other hand, based his resistance to the attack essentially on Section 29 of the *Federal Court Act*. Mr. Justice Cattanach dealt with this position when he stated:

> "Section 165 of the *Income Tax Act* provides that a taxpayer who objects to an assessment (as all taxpayers do) may file a notice of objection setting forth the reasons therefor and all relevant facts.
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> Upon receipt of a notice of objection it is the duty of the Minister with all due despatch to reconsider the amount.
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> This has been referred to by counsel for the respondent as an "in house" appeal.
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> If vacated that would no doubt satisfy a taxpayer and end the matter.
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> However, if the assessment is confirmed or varied somewhat provision is made in section 169 for an appeal by the taxpayer to the Tax Review Board or to the Federal Court of Canada pursant to subsection 172(2)."[9]

He went on to suggest the Minister's assessment was void ab initio, and that the appeal procedures normally applicable under the *Income Tax Act* would not apply. In this connection he stated:

> " The assessment by the Minister, which fixes the quantum and tax liability, is that which is the subject of the appeal.
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> The quantum is not the basis of the attack by the applicants in this instance.
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> The basis of the attack upon the assessments is that the Minister did not have the power by law in the circumstances to make the assessments and accordingly they are void as well as illegally made.
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> *An error in law which goes to jurisdiction is alleged in which event certiorari is the appropriate remedy and, in my view, that remedy is available despite the appeal process provided against quantum and liability therefore which is the purpose of the assessment process. That is an appeal provided from a matter far different from the lack of authority in law to make an assessment.* For that reason section 29 of the *Federal Court Act*, in my view, does not constitute a bar to the certiorari and injunctive proceedings taken by the Appellants."[10] (Emphasis added)

In its decision, the Federal Court of Appeal simply took the position that Section 29 of the *Federal Court Act* applied, and that therefore the assessments could not be reviewed, restrained or set aside. On these facts and issues, then, let us examine the relevant principles and statutory provisions with a view to ascertaining whether the Federal Court of Appeal gave perhaps more limiting and restrictive scope to Section 29 than it merits. Section 18 of the *Federal Court Act* states:

> "18. The Trial Division has exclusive original jurisdiction
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> (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

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[9] *Supra.*, footnote 4, at 5332.

[10] *Ibid.*

> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal."[11]

It is generally accepted that the combined effect of Sections 18 and 28 of the *Federal Court Act* is to withdraw from the superior courts of the provinces their traditional powers of supervision and review over matters subject to federal legislative jurisdiction, and to vest those powers in the Federal Court of Canada.[12]

It was submitted that, by virtue of Section 18, the Trial Division enjoys exclusive juridisction to grant the stipulated prerogative writs against federal boards, commissions, or other tribunals, and, generally speaking, is empowered to grant these remedies on the basis of common law principles as circumstances dictate. In addition, Section 28 constitutes an exception to that general jurisdiction, and is limited in application to the review of these orders and decisions which fall within the parameters of that particular provision.

Relevant jurisprudence establishes the principle that the Minister of National Revenue is a federal Board, commission or other tribunal as defined in Section 2 of the *Federal Court Act*, so as to empower the Trial Division of the Federal Court to exercise jurisdiction over the acts of the Minister in appropriate circumstances.[13]

It is equally clear that a claim for an injunction will lie against a Minister of the Crown acting in the performance of his statutory duties in a proper case.[14]

The nature and scope of Section 18 and the relationship between this provision and Section 28 has been examined at length in a number of recent judicial decisions, including *Martineau* v. *Matsqui Institution Disciplinary Board*[15]. There, in the course of his judgment, Dickson J. discussed the broad scope of judicial review available under the federal legislation, and suggested that the power to utilize the old common law remedies formerly vested in the provincial courts now rests with the Trial Division, pursuant to Section 18 with respect to federal tribunals:

> "Restrictive reading of s. 28 of the Federal Court Act need not, of necessity, lead to a reduction in the ambit for judicial review of federal government action. Section 18 is available. Section 28 has caused difficulties, not only because of the language in which it is cast but, equally, because it tended to crystallize the law of judicial review at a time when significant changes were occurring in other countries with respect to the scope and grounds for review. Sections 18 and 28 of the Federal Court Act were obviously intended to concentrate judicial review of federal tribunals in a single

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[11] *Supra.*, footnote 1.

[12] *Howarth* v. *National Parole Board* [1976] 1 S.C.R. 453; and, *Mansata Co.* v. *Commissioner of Patents*, [1975] F.C. 197, 214.

[13] See: *Royal American Shows Inc.* v. *Minister of National Revenue* [1972] 1 F.C. 269 (F.C.T.D.).

[14] *Beauvais* v. *The Queen et al.* [1982] 1 F.C. 171 (F.C.T.D.); and, *Lodge* v. *Minister of Employment and Immigration* 1 F.C. 775; 94 D.L.R. (3d) 326 (C.A.).

[15] (1979) 30 N.R. 119.

> federal court. *As I read the Act, Parliament envisaged an extended scope for review. I am therefore averse to giving the Act a reading which would defeat the intention and posit a diminished scope for relief from the actions of federal tribunals. I simply can not accept the view that Parliament intended to remove the old common law remedies, including certiorari, from the provincial superior courts, and vest them in the Trial Division of the Federal Court, only to have those remedies rendered barren through the interaction of ss. 18 and 28 of the Act.* I would apply the principle laid down by Brett, L.J., in *Reg. v. Local Government Board* (1882-83), 10 Q.B.D 309, 321, that the jurisdiction of a court ought to be exercised widely when dealing with matters perhaps not strictly judicial, but in which the rights or interests of citizens are affected."[16] (Emphasis added)

In the Martineau decision, following a lengthy review of the authorities relating to the classification of the nature and powers of the Board in question, the Supreme Court of Canada held that *certiorari* was indeed available under Section 18 to quash a decision of a penitentiary disciplinary board, notwithstanding its finding that the decision was not required to be made on a strictly judicial or quasi-judicial basis.

Accordingly, it appears that the significance of the often arbitrary and artificial classification of the impugned act or decision has been minimized by the Courts in an attempt to give full effect to the relevant legislation. Indeed, it appears that the Trial Division has jurisdiction under Section 18 to entertain a claim to quash or to set aside an administrative decision rendered by a federal board...etc., even where the decision was not required to be made on a strictly judicial or quasi-judicial basis.[17]

In *Royal American Shows, Inc.* v. *Minister of National Revenue,*[18] Gibson J., of the Federal Court, Trial Division, considered the validity of an act of seizure under the *Income Tax Act*, and concluded that the exercise of 'judicial discretion' in this respect was subject to review by the Trial Division, pursuant to Section 18. His reasons were as follows:

> The relevant jurisprudence of the consideration of whether or not a seizure under section 231(1)(d) of the Income Tax Act is an act with some "judicial" element, and not a pure administrative act, is difficult. But, after careful consideration of the authorities in relation to the subject procedings, and in the light of the said traditional attitude toward seizures and searches, I am of the opinion that the act of seizure under the authority of that subsection has some judicial element, and that this is so even though the subsection does not expressly or impliedly import a duty to afford a hearing, *it being sufficient that the official deciding and effecting an individual's rights" and thereby exercises a "judicial" discretion; and that a person purporting to exercise such a power of seizure is therefore under a duty to act fairly ("judicially") solely within the ambit of authority of that subsection;* and *that as a consequence any act done by a person purportedly under such authority is subject to review by the Trial Division of this Court at least on the issue of want or excess of jurisdiction.*[19] (Emphasis added)

It is a well-established general principle that a determination based on an

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[16] *Ibid.*

[17] See: *Magrath* v. *The Queen* (1977) 38 C.C.C. (2d) 67 (F.C.T.D.); and, *Sherman and Ulster Ltd.* v. *Commissioner of Patents* (1974) 14 C.P.R. (2d) 177 (F.C.T.D.).

[18] [1976] 1 F.C. 269, [1975] C.T.C. 557, 75 D.T.C. 5375 (F.C.T.D.).

[19] *Ibid.*, at 271; C.F. also, S.A. de Smith, *Judicial Review of Administrative Action*, 4th Ed. (London: Stevens 0 Sons Ltd., 1980) at 346-7.

erroneous interpretation of a statute may be properly categorized as an error in law, so that a decision or order based thereon will be subject to judicial review.[20] In *Siedlebauer* v. *Board of Industrial Relations*[21], it was held that a decision of the Industrial Relations Board, certifying a particular bargaining agent after the wrongful interpretation of the constitution of the trade union in question, was an error of law and, as such was subject to review by way of *certiorari*.[22]

The discretionary power of the Minister of National Revenue to make assessments must be exercised on proper legal authority and can be set aside on the basis of an improper and erroneous exercise of discretion, which includes the wrongful interpretation and application of the relevant legislative provision.[23]

An analogous reference can be made to the line of cases in which the Courts are called upon to consider the propriety of exemptions with respect to the provincial taxation of real property. Examples from New Brunswick case law in which *certiorari* was held to be the appropriate method of challenging the Minister's decision in this respect include *Re Clark House*[24], and *The Minister of Municipal Affairs* v. *Saint John Y's Men's Property Co. Ltd.*[25] where Ritchie, J.A. of the New Brunswick Court of Appeal stated:

> The only right of appeal conferred by the Act is a right to appeal from the amount of an assessment made by the Minister. *There is no right to appeal from a refusal of the Minister to grant an exemption from taxation. If such a refusal by the Minister is to be contested, the contest should be by way of certiorari proceedings or an action seeking a declaratory judgment.* (Emphasis added)

Section 29 of the *Federal Court Act* sets out in very clear terms a number of prerequisites to its application which, it was submitted, did not exist in that case. It provides:

> Notwithstanding sections 18 and 28, where provision is expressly made by an Act of the Parliament of Canada for an appeal as such to the Court, to the Supreme Court, to the Governor in Council or to the Treasury Board from a decision or order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except to the extent and in the manner provided for in that Act.

It must be pointed out that this Section refers to "an appeal as such", which phrase, one submits, contemplates only an appeal to the Courts, and cannot be extended to include the various stages of the assessment process as set out in the *Income Tax Act*. In this respect, reference is made to *Stroud's*

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[20]Reid and David, *Administrative Law and Practice*, 2nd Ed. (Toronto: Butterworths, 1978), at 382-3.

[21](1967), 59 W.W.R. 269; 61 D.L.R. (2d) 401; aff'd (1969) 1 D.L.R. (3d) 81; [1969] S.C.R. 137.

[22]See also *R.* v. *Ontario Labour Relations Board, ex parte Trenton* [1963] 2 O.R. 376; *Anisminic, Ltd.* v. *The Foreign Compensation Commission*, [1969] 1 All E.R. 208 (H.L.); *Metropolitan Life Insurance Company* v. *International Union of Operating Engineers* [1970] S.C.R., 435-6 and the cases cited therein.

[23]*Wrights Canadian Ropes Ltd.* v. *The Minister of National Revenue* [1946] S.C.R. 139; aff'd. [1947] A.C. 109.

[24](1972) 5 N.B.R. (2d) 431 (N.B.C.A.).

[25](1969) 1 N.B.R. (2d) 411, 418.

Judicial Dictionary where "the right of appeal" is defined as "the right of entering a superior court and invoking its aid and interposition to redress the error of the court below."

Moreover, this Section specifically deals with the proper disposition of a "decision or order" in question, and makes no reference to the *acts* of the Minister who acts outside his statutory authority.

Also, the Section clearly states that where the stipulated requirements exist, that decision or order is not... "subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with." Notice must be taken of the fact that the term "quashed", which is the one word traditionally used in the context of *certiorari*, does not appear at all, and is not an expressly prohibited remedy in any event. In *The New Brunswick Teacher's Federation* v. *Province of New Brunswick and Canadian Union of Public Employees et al*, the New Brunswick Court of Appeal held that *mandamus would lie under the Public Service Labour Relations Act* of the Province where *mandamus* was not mentioned in the privative clause.

The words "... that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained...except to the extent and in the manner provided for in that Act," as set out in the last portion of Section 29, clearly demonstrate that the section has a limited application. One must find in the other Act

(a) a right of appeal

(b) a right of review, restraint etc. in that appeal process.

Then, and only to the extent of such right of review or restraint allowed under the other Act, is the right of review under Sections 18 and 28 restricted. Thus, as it was argued in the *Parsons* Appeal, one must find in the *Income Tax Act* a right of appeal which permits review, restraint...etc. This simply did not exist. The first appeal by way of Notice of Objection is to the Minister. He cannot grant review of restraint, nor can he order prohibition. Both the Tax Court of Canada and the Federal Court, Trial Division, are equally limited to dismissing the appeal or varying, setting aside or vacating or referring the assessment back to the Minister. Their powers and authority in an income tax appeal are clearly and strictly limited. Thus, Section 29 of the Federal Court Act had no application in this case by reason of the very wording found within it.

It was submitted that the initial objection procedure provided in the *Income Tax Act* is not an appeal as contemplated by Section 29, and that the conclusion of Cattanach, J. that an objection by a taxpayer is "not an appeal" but rather "part and parcel of the assessment process", is correct. The relevant excerpt from his judgment has already been quoted. It may be added that even if the Notice of Objection is treated as an appeal, then of course Section 29 would not apply in any event because it would not be an appeal to one of the authorities recited in it.

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[26] *Stroud's Judicial Dictionary*, 4th Ed., Vol. 2, at 155.

[27] (1970), 3 N.B.R. (2d) 189 (N.B.C.A.).

[28] *Supra.*, footnote two, ss. 171(1) and 177.

It was further submitted that the appeal procedures provided in the relevant legislation were not necessarily applicable to the case at bar in that the assessment was void *ab initio*. The reasons for judgment of the trial judge reflect due consideration of the applicable principles:

> The assessment by the Minister, which fixes the quantum and tax liability, is that which is the subject of the appeal.
>
> The quantum is not the basis of the attack by the applicants in this instance.
>
> The basis of the attack upon the assessments is that the Minister did not have the power by law in the circumstances to make the assessments and accordingly they are void as well as illegally made.
>
> *An error in law which goes to jurisdiction is alleged in which event certiorari is the appropriate remedy and, in my view, that remedy is available despite the appeal process provided against quantum and liability therefore which is the purpose of the assessment process. That is an appeal provided from a matter far different from the lack of authority in law to make an assessment.* For that reason section 29 of the *Federal Court Act*, in my view, does not constitute a bar to the certiorari and injunctive proceedings taken by the Appellants.[29] (Emphasis added)

Moreover, it is a well-established general principle that the appropriate remedy for an error in law in such circumstances is *certiorari*, notwithstanding the existence of alternate remedies, which is only one of the factors to be considered in the disposition of the application. As Cattanach, J. has stated:

> Whether a director is such a person is a question of the interpretation of the Statue. A determination based upon an erroneous interpretation of a Statute is an error of law on the face of the record and as such is subject to relief by way of *certiorari* almost *ex debito justicia*...[30]

Also, in de Smith's *Judicial Review of Administration Action*,[31] indeed, in one case cited therein (at footnote 17, *R.* v. *Jones (Gwyn)*[32]), "the Court of Appeal actually dismissed an appeal against sentence on the ground that the sentence was a nullity and that the only appropriate remedies were prohibition or *certiorari*."

CONCLUSION

The decision of the Federal Court of Appeal in this matter is the last judicial word on the subject to date. An application for leave to appeal that judgment was taken to the Supreme Court of Canada. However, before the application was heard, the matter of outstanding taxes was settled amicably between the parties and, as part of the arrangement, the taxpayers withdrew the application for leave. One may assume the Minister would not be happy to see the judment of Cattanach J. restored, since this might open the floodgates of litigation in the Federal Court whereby the rather slow process of objections and appeals under the Income Tax Act would be circumvented. Perhaps, in the fullness of time, another courageous taxpayer will arise and press this argument beyond the decision of the Federal Court of Appeal.

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[29] *Supra.*, footnote four, at 5365.

[30] *Supra.*, footnote four, at 5362.

[31] *Supra.*, footnote ninteen, at 425-427.

[32] [1969] 2 Q.B. 33 (C.A.) (Criminal Division).