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Article abstract

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The author questions the effect of such clauses on the endeavours of the Boards and more directly on their real jurisdiction.

# LABOUR RELATIONS BOARDS AND THE COURTS \*

J. F. W. Weatherill

*The Canada Labour Relations Board and most of our provincial Boards are protected in the determination of the matters coming before them by « privative clauses ».*

*The author questions the effect of such clauses on the endeavours of the Boards and more directly on their real jurisdiction.*

## Introduction

The Ontario Labour Relations Act provides, by section 80, that « No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings. »<sup>1</sup> The Canada Labour Relations Board, and most of our provincial Boards,<sup>2</sup> are protected in their determinations of the matters coming before them, by similar provisions, not always as sweeping or as blunt as the one I have quoted. This jurisdiction, thus protected from review by the courts, is an exclusive jurisdiction to exercise the powers conferred by the Labour Relations Act, and to determine all questions of fact, or law that arise in any matters before the Board, and the Board's action or decision thereon is final and conclusive for all purpo-

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(1) The Labour Relations Act, R.S.O., 1960, c. 202, s. 80.

(2) There is no privative clause in The Alberta Labour Act, S.A. 1959, c. 42, but see s. 70a of that Act, S.A. 1960, c. 54, s. 19. The powers of the British Columbia Labour Relations Board to make « final and conclusive » decisions are set out in s. 65 of The Labour Relations Act, R.S.B.C., 1960, c. 205, as amended. The Prince Edward Island legislation is unique: see N. 45, *infra*.

ses.<sup>3</sup> These wide powers are not such as to constitute the members of boards « judges » within the meaning of section 96 of the British North America Act,<sup>4</sup> and their jurisdiction and powers seem to have been granted by the provincial legislature within the scope of its legislative competence.<sup>5</sup>

Thirteen years ago, Professor Laskin wrote in the *Canadian Bar Review* that « No form of words designed to oust judicial review will succeed in doing so against the contrary wishes of a superior court judge », <sup>6</sup> and Professor Willis has more recently criticized the courts for having « emasculated » privative clauses « by what amounts to a shameless misinterpretation of their wording ». <sup>7</sup> Certainly it is true that the combined effect of sections 79 and 80 of the Ontario Act, to which I referred at the outset, is in reality little like what the unsophisticated reader of statutes — or the average citizen — might imagine. But history speaks effectively, and should be heeded. The idea of literal interpretation of the *ipsissima verba* of the sovereign legislature is a little naive, as is the understanding of the role of the courts in a parliamentary democracy which it implies. At any rate, in my opinion it is neither surprising nor shocking that the courts have, with ease, overcome the apparent barrier of the privative clause. Superior courts in the common law world have always assumed a jurisdiction to review, within limits, the work of inferior tribunals. This is not to express any satisfaction with the work of Canadian courts in the recent cases which I have been examining. It is the court, or the judge, rather than the applicable rules, which is crucial in determining the outcome of these cases. Indeed, except for the rules of natural justice, which have some useful substance and provide some real guidance, there are no rules as to judicial interference which have sufficient particularity — or sufficient judicial support — to be of much significance or help. One finds, for the most part, either cases where the court cites no authority for interference with a tribunal's determination, or cases in which the grounds for certiorari are recited as a pious incantation before proceeding with the sacrifice.

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(3) The Labour Relations Act, R.S.O. 1960, c. 202, s. 79.

4. *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, [1949] A.C. 134, [1948] 4 D.C.R. 673.

(5) *R. v. O.L.R.B., ex parte Taylor* (1964), 41 L.D.R. (2d) 456.

(6) Laskin, *Certiorari to Labour Boards: the Apparent Futility of Privative Clauses* (1952), 30 *Canadian Bar Review* 986.

(7) Willis, *Administrative Law in Canada* (1961), 39 *Canadian Bar Review* 258.

While it is obvious that the courts do not heed the apparently plain provisions of privative clauses excluding them from any consideration of a Labour Relations Board matter, it does not follow that the privative clause is useless verbiage. And while it is desirable that administrative tribunals should not be interfered with by the courts so as to defeat the purposes for which they were established, it is also desirable that these tribunals be subject to some form of control, in the interests of an orderly legal system, as well as justice in individual cases. The declared basis of judicial intervention seems to me to be incontrovertible, namely, that an administrative tribunal or agency cannot, by an erroneous interpretation of its statute, confer upon itself a jurisdiction which it otherwise would not have.<sup>8</sup> Just what is meant by « jurisdiction » is the real issue, and it is one involving the attitudes of judges toward their own roles and their prejudices regarding administrative tribunals.

### What is Meant by Jurisdiction

The question is, who decides what? Jurisdiction, in the present context, means authority to decide, whether correctly or incorrectly. Where courts quash the decisions of boards on grounds of incorrect decision, it means the board is required to decide a certain point correctly and in no other way. A duty is imposed to make the particular decision the court wants. Thus, for example, the *Police Mechanics* case.<sup>9</sup> Here the court quashed a decision of the Ontario Labour Relations Board that mechanics were excluded from the provisions of the Labour Relations Act, under section 2 (g) of the Act. This determination required an interpretation of The Police Act.<sup>10</sup> In the result, the Board was required by the court to consider certain particular persons as within the scope of the Labour Relations Act. The Board, that is to say, had no *jurisdiction* to decide the question of the scope of the Act. This use of the term « jurisdiction » may be a somewhat special use of language. As such, it should not surprise lawyers, but nevertheless it seems to be at the root of many problems which have arisen. To say the Board had no « jurisdiction » to decide the issue is not at all the same thing as to say it had no business in deciding it. Yet this is what,

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(8) *Jarvis v. Associated Medical Services* 35 D.L.R. (2) 375, 380 (Ont. C.A.) per Aylesworth, J.A. The decision was affirmed by the Supreme Court of Canada (1964) 44 P.L.R. (2d) 407, and these remarks were adopted by Cartwright J. at p. 411.

(9) *R. v. O.L.R.B., ex parte C.U.P.D. Local 453* (1964), 45 D.L.R. (2d) 202 (Ont.).

(10) R.S.O. 1960, c. 298, s. 13.

for a time, it seemed the Ontario Court of Appeal was maintaining. The judgment of the late Mr. Justice Laidlaw, giving the opinion of the court in the *Ontario Food Terminal Board* case,<sup>11</sup> included the following statement (referring to the question whether the Ontario Food Terminal Board was a Crown Agency, and hence within the purview of the Labour Relations Act) : « I may say at once that in my opinion the Ontario Labour Relations Board had no right or power to determine that question. It is a pure question of law which can be determined only by a Judge or Judges appointed by the Governor General pursuant to the provisions of the British North America Act. » While admitting that any tribunal had to make a preliminary decision whether to hear a case or not, he went on to give his opinion that « when the question of jurisdiction or any other question of pure law is raised in a proceeding before a tribunal so constituted, the proceeding should be stayed until such question has been finally determined by a court of competent jurisdiction. »<sup>12</sup> As Professor Laskin pointed out in a critical note,<sup>13</sup> it is one thing to say that determinations of this sort whether described as collateral or not are subject to judicial review. It is quite another thing to say that the Labour Relations Board is constitutionally incapable of making them as part of the routine of its function. This extreme view has, I am happy to say, won no acceptance, and indeed it conflicts with previous judgments of the Supreme Court of Canada and of the Privy Council. In the *Taylor* case,<sup>14</sup> which came before the courts a few months after the *Food Terminal* case, Chief Justice McRuer, reviewing the authorities concluded that « the sections of the Labour Relations Act in question are constitutional and I do not think it was beyond the powers of the legislature to clothe the Labour Relations Board with jurisdiction to make decisions of law incidental to its administrative duties. Obviously the Board must decide many incidental questions of law in the performance of its administrative functions but in saying this I do not wish it to be taken that I think that the Board has power to make decisions in law with respect to collateral matters which may not be reviewed on *certiorari*. In other words, it cannot give itself jurisdiction by wrong decisions in law. » It is gratifying that the rather slighting view of Laidlaw J.A. concerning the « legal com-

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(11) *R. v. O.L.R.B. ex parte Ont. Food Terminal Board* (1963), 38 D.L.R. (2d) 530, 532 (Ont. C.A.).

(12) *Idem*.

(13) (1963) 41 *Canadian Bar Review* 446.

(14) *Supra*, N. 5. See also the remarks of Haines, J. in *Armstrong Transport v. Int'l Brotherhood of Teamsters* (1963) 64 C.L.L.C. 804. (Ont.).

petence » of Boards (he denied they had any, and characterized their intervention in such questions as « unauthorized and unlawful »), may now be set beside the more flattering view of Mr. Justice Abbott (giving, alas, a minority view). In the *Associated Medical Services* case<sup>15</sup> he stated that « A Board such as the Labour Relations Board, experienced in the field of labour management relations, representing both organized employers, organized labour, and the public, and presided over by a legally trained chairman, ought to be at least as competent and as well suited to determine questions arising in the course of the administration of the Act as a Superior Court Judge ». -

### Specialized Tribunals for Specialized Matters

So, I believe, it was intended. For specialized matters of frequent occurrence, involving continually the interests of certain defined interest groups, and calling for some degree of expertise, a specialized tribunal is necessary. The establishment of boards or commissions having broad powers both of investigation and of action is nothing new — and neither is judicial review of their endeavours. Whether the result of judicial review is seen as the frustration of a worthwhile legislative enterprise, or the preservation of individual liberty against tyrannical excess depends, not just on one's point of view, but on the nature of the case. Where legislation embodying a basic social consensus — such as our labour relations legislation — is concerned, the duty of the courts is to lend assistance to the effecting of its purpose. This requires, I suggest, a fair appreciation of the tasks to be performed by Labour Relations Boards and confirmation of the confidence which legislatures have placed in them. The history of judicial review, however, is largely a history of interference — sometimes very laudable and for the best of motives, sometimes simply as result of reactionary attitudes. The writ of *certiorari* may be followed through six centuries — a fact which should provoke our minds to wondering why we haven't developed a somewhat more sophisticated set of rules for its issue.

I hope it is true, as Abbott J. suggested, that members of Boards are at least as competent as Judges to decide questions arising in the course of the administration of the Labour Relations Acts. But difficulty arises because the question of jurisdiction itself is not a question « arising in the course of the administration of the Act » — or rather, it appears to

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(15) *Supra*, N. 8 at p. 412.

most of our judges not to be such a question. Here again, the meaning of the term is in issue, and the hard question of practical politics is, who ought to decide what? In any case, isn't it true that *every* determination necessary for the implementation of a statute involves the making of *other* determinations (usually of a simple, unobjectionable kind), which take the decider outside the strict confines of the Act? In commenting<sup>16</sup> on the *Ontario Food Terminals* case, in which the court considered the correctness of the Board's determination that the Food Terminals Board was not a Crown Agency, Professor Laskin pointed out that the Board's function in such a case was like the function it might be called upon to perform with relation to section 2 of the Labour Relations Act, by which members of a police force within the meaning of The Police Act, full-time firefighters within the meaning of The Fire Department Act, and teachers as defined in The Teaching Profession Act are excluded from the purview of the labour relations legislation. «The Ontario Court of Appeal», he wrote, «would have it that the Labour Relations Board can no more decide any of these questions than it can decide whether a statutory agency enjoys Crown immunity.» Of course, Boards can, must, and do decide such questions — but it was just such a question — namely whether certain persons were excluded as members of a police force — on which the courts intervened to quash a decision of the Ontario Board. And in the *Associated Medical Services* case,<sup>17</sup> 7 of the 9 Judges who sat in the Supreme Court of Canada (and all of the Ontario Court of Appeal) held that it was proper for the court to consider the merits of the Board's decision that a certain complainant was a «person» for the purposes of the Labour Relations Act. The basis of interference, of course, is that the question is «collateral», «extrinsic» or «preliminary», that it goes to the question of jurisdiction. These assertions need to be analysed, and not merely by the puzzled victim, but by the courts themselves. Such analysis is, in the majority of cases, not to be found. To say that a question is «collateral» or «preliminary» is not to apply a test, or state a criterion, but rather, to announce a result. There is no doubt that any test or criterion of jurisdiction would have to be of as general nature as, say, the test of reasonable conduct in the law of torts, but such a test at least has the virtue of reminding the decider as well as his critics that these are not simply questions of black or white. What needs to be considered is the *concept* of «jurisdiction», and the pros and cons of a rela-

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(16) *Supra*, N. 13.

(17) *Supra*, N. 8. Spence, J., who dissented in the result, agreed with the majority on this point.

tively broad, as opposed to a relatively narrow concept. The word just does not have the simple meaning which the language of the cases would suggest. The possibilities may be arranged in a sort of spectrum: at one end, put the question whether certain operations of an employer are subject to the legislation, with respect to labour relations, of the Province or of the Dominion. This is a question of constitutional law, and it is a question over which the courts have jurisdiction. The Boards of course, despite the strictures of Laidlaw J.A. must, when faced with such an issue, decide it, but they have no jurisdiction to decide it other than correctly.

Next to constitutional questions, consider general questions of interpretation, such as the meaning of « day » or « month » which probably could not be said to have a special meaning under the Labour Relations Act. Another sort of question which there is not much doubt a court would determine is the question going to the status of the board, and including, perhaps, questions of the propriety of appointments of board members (although, by section 80, *quo warranto* is excluded).<sup>18</sup> The whole set of rules of natural justice fall into this category, as Boards are said to « lose jurisdiction » by their breach.

Somewhere about the middle of the spectrum I would place questions such as those mentioned earlier: is a person a member of a police force?<sup>19</sup> is he, indeed, a « person »?<sup>20</sup> These questions undoubtedly involve reference to matters and statutes extrinsic to the Labour Relations Act itself; and yet at the same time they involve consideration of circumstances of the sort with which the statute is primarily concerned. How different, then, is the question whether a certain person is an employee of a particular employer? This question surely involves many considerations extrinsic to the statute, but at the same time it goes to the heart of the matter with which Labour Relations Boards are concerned. The Supreme Court of Canada, in the *Trader's Service* case,<sup>21</sup> held that this question was entirely within the jurisdiction of the Labour Relations Board of British Columbia.<sup>22</sup> Of a similar shade, I think, is the question whether an organization is a trade union,

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(18) *Supra*, N. 1.

(19) See N. 9, *supra*.

(20) See N. 8, *supra*.

(21) *Labour Relations Board and Att'y-Gen. for B.C. v. Traders' Service Ltd.* (1958), 15 D.L.R. (2d) 305 (S.C.C.).

(22) Some of the court's language in the *White Lunch* case (1963) 42 D.L.R. (2d) 364 (B.C.) is surely suspect in view of the *Trader's Service* decision.



a question, again, over which the Board's jurisdiction has been confirmed by the Supreme Court of Canada.<sup>23</sup> At the other end of the spectrum are questions over which the Board's jurisdiction is clear, questions concerning unfair labour practices,<sup>24</sup> I suggest, or, clearest of all, perhaps, the question whether a person, being an employee, is a member of the trade union involved.<sup>25</sup> Express reference to the board of questions of employment status, such as whether a person exercises managerial functions, and of the appropriateness of bargaining units makes it abundantly clear that such questions are for Boards alone to decide, whether a court agrees with the decision or not. (I am aware that cases involving bargaining units have been before the courts several times, but I think these will be found to turn on questions of natural justice, or particular limiting provisions of the statutes concerned, rather than on the merits of the determination itself.)

### The Distinction Between « Collateral » and « Main » Question

The sorts of questions which may arise in the course of a Board's administration of the matters coming before it may thus be arranged on a spectrum from clearly reviewable to clearly not reviewable. The difficulty is that the judicial criterion is of an either-or variety: does a question go « to the very essence of the enquiry » (that is, is it beyond review), or is it « extrinsic », « collateral », « preliminary » or « not the main question the tribunal has to decide », (that is, subject to review)? These phrases, I have suggested, are really descriptive of result. Any question which a tribunal has to decide before it can make its decision is, in a sense, necessary, and can hardly be called « extrinsic ». In other jurisdictions in the common-law word, courts have been able to state somewhat more significant criteria. Dixon J. set out the view of the

23. *Labour Relations Board of British Columbia v. Oliver Co-operative Growers Exchange and Okanagan Federated Shipping Association*. (1962) 35 D.L.R. (2d) 694. (S.C.C.). See also *Re Hamilton Construction Association & Builders' Exchange and Ontario Labour Relations Board* (1963) 39 D.L.R. (2d) 338 (Ont.).

24. *Re Westeel Products Ltd. and Saskatchewan Labour Relations Board* (1963) 39 D.L.R. (2d) 108 (Sask. C.A.). See also *R. v. Labour Relations Board (B.C.) ex parte Pulp and Paper Workers of Canada, Watson Island, Local No. 4* (1964) 45 D.L.R. (2d) 437 (B.C.).

The exclusive jurisdiction of the British Columbia Labour Relations Board to determine the question whether a matter is arbitrable was confirmed in *Re Galloway Lumber Co. Ltd. and British Columbia Labour Relations Board* (1965) 48 D.L.R. (2d) 587 (S.C.C.).

25. See *Re Ontario Labour Relations Board, Bradley v. Canadian General Electric Co. Ltd.* (1957), 8 D.L.R. (2d) 65, (Ont. C.A.).

High Court of Australia in *The King v. Hickman*,<sup>26</sup> where the privative clause was not unlike that in the Ontario Labour Relations Act, as follows :

« - - They are not interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body. »

On this test, many of the Canadian *certiorari* cases would have been decided differently. The determination of the issue whether a Board's decision « reasonably refers » to the power granted it remains, of course, within the jurisdiction of the courts. Mr. Justice Spence, in his opinion given in the *Associated Medical Services* case,<sup>27</sup> urges, in effect, that the criterion suggested by Dixon J. begs the question, since, where an inferior tribunal interprets the power granted to it in broader terms than the court thought proper, then the court would simply conclude that the exercise of the Board's power was not « reasonably capable of reference » to the power given it. With respect, this view is unfair to judges. Similar reasoning would reduce any test of « reasonableness » to one of « judge's preference », and while the results sometimes suggest such a thing, it would be wrong to conclude it was the general rule.

Canadian cases, nevertheless, continue on the basis of a distinction between collateral matters, reviewable by courts, and questions going to the main issue the Board must decide, as to which its jurisdiction is exclusive. In one of the rare Canadian Judgments examining the criteria by which the distinction might be drawn in any case, Mr. Justice Freedman, giving the judgment of the Manitoba Court of Appeal in

26. *The King v. Hickman, ex parte Fox and Clinton* (1945) 70 C.L.R. 598, 614-5. A similar test was suggested to Canadians by Rand, J. in his dissenting judgment in *Toronto Newspaper Guild v. Globe Printing Co.* [1953] 3 D.L.R. 561, 572-3 (S.C.C.): «—is the action or decision within any rational compass that can be attributed to the statutory language? »

(27) *Supra*, N. 8.

the *Parkhill Bedding* case,<sup>28</sup> examined the leading cases in which it had been held that the issue before the Board was a collateral or preliminary question. The common factor in these cases, Freedman J. pointed out, was that the point for determination involved an examination of legal principles and considerations that went beyond the simple confines of the statute under which the Board operated. However, as I have argued earlier, every case involves reliance on principles beyond the simple confines of the statute : it is a question of degree.

While the distinction between « collateral » and « main » questions continues to be drawn, and as a rule, drawn without any real analysis, I cannot leave discussion of the problem of jurisdiction without reference to the remarks of Lord Esher, made in the *Income Tax Commissioners* case,<sup>29</sup> and referred to with approval by the Ontario Court of Appeal in the *Bradley* case.<sup>30</sup> Lord Esher suggested that in some cases the legislature might « entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more ». Judicial intervention, in such a case, would be a stage removed.

### The Rules of Natural Justice

Where a tribunal which is required to act judicially fails to do so, it deprives itself of the jurisdiction it would otherwise have. Its decision in such circumstances, is no longer « really » a decision. The rules of natural justice are thus a special chapter in the question of jurisdiction. These are well-documented and, speaking generally, there is nothing

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(28) *Parkhill Bedding & Furniture Ltd. v. International Molders & Foundry Workers Union of North America, Local 174 and Manitoba Labour Board*. (1961) 26 D.L.R. (2d) 589 (Man. C.A.).

29. *R. v. Com'rs for Special Purposes of Income Tax Act* (1888), 21 Q.B.D. 313.

30. *Supra*, N. 25. Cp. De Smith, *Judicial Review of Administrative Action* (1959) 72, 73 :

« We have hitherto considered only two classes of situations : (i) a tribunal has to inquire into a question, and its findings thereon are conclusive because they are not preliminary or collateral to the merits ; (ii) a tribunal has to inquire into a question and its findings thereon are reviewable because they are preliminary or collateral to the merits. But there is a third class of situation : a tribunal has to inquire into a question which is preliminary or collateral, but its findings thereon are conclusive because of the wording of the relevant legislation — e.g., where a matter collateral to the merits is to be proved « to the satisfaction of » the competent authority. The scope of judicial review in this third class of situation is the same as in the first class of situation, and the two are often confused with each other, although they are analytically distinct. »

remarkable in the recent Canadian cases on this score. Questions of bias of course are very likely to arise in tribunals constituted in tripartite form, because of the interests with which the representative members are associated. Interesting legal developments on this question are more likely to arise with respect to the operations of arbitration boards, where the statutory sanction is less clear, and the likelihood of impartiality far less.

Questions of lack of notice arise with disturbing frequency. I must admit it is a surprise, on reading some of the reported decisions, to discover that evidence, or some communication containing evidentiary assertion would be received by a Board without the other party being so informed. These lapses are most likely to occur, I think, after there has been a hearing and where further information is needed. Surely it is the rule that wherever information may adversely affect a party other than the informant, then that other party must be apprised of the information. The same is true of argument. It is not always necessary that opportunity for reply be given. Some comfort may be taken from the decision of the Supreme Court of Canada in the *Forest Industrial Relations* case,<sup>31</sup> in which Judson J., giving the judgment of the court, stated, «after hearing from one side, and hearing from the other side in reply, it is not a departure from the rules of natural justice for the Board to hold that the debate had gone on long enough and that it was time to stop». <sup>32</sup> I should add that in the more recent *Loomis Armored Car Service* case,<sup>33</sup> *Forest Industrial Relations* is distinguished on the basis that in that case, the parties had ample opportunity of knowing each other submissions and were allowed to cross-examine on those submissions. Here, the court said in the latter case, there was nothing even resembling a debate. One party was allowed to see the submissions of the other party and to reply to them. But that reply was not shown to the other party and they knew nothing of it until certification was granted. Even in the area of natural justice, however, there are one or two ominous signs. In the *Jim Patrick* case,<sup>34</sup> the Saskatchewan Court of Appeal quashed a certification on the ground there was a denial of natural justice in the refusal to grant an adjournment. In that

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(31) *Forest Industrial Relations Ltd. v. Int'l Union of Operating Engineers, Local 882*, (1961) 31 D.L.R. (2d) 319 (S.C.C.).

(32) *Id.*, at p. 321.

(33) *R. v. Labour Relations Board (B.C.) ex parte Loomis Armored Car Service Ltd.* (1963) 42 D.L.R. (2d) 49 (B.C.).

(34) *Jim Patrick Ltd. v. United Stone & Allied Products Workers of America, Local No. 189, AFL-CIO.* (1959), 21 D.L.R. (2d) 189 (Sask. C.A.).

case the responsible officer of the company was away on a motor trip to Mexico when an application for certification was made. Probably the court was moved by the circumstance that the Board seems to have said to the company's solicitor that an adjournment would be granted, but when the case came on, heard it. One would hope, in any event, that this decision does not mean that a court will always intervene when, in its view, an adjournment should have been given, or, in particular, that a case must await the availability of a party.

A somewhat disturbing variation on the notions underlying the requirements of notice appears in questions dealing with the reception of evidence. A characteristic of the matters coming before Labour Relations Boards is that certain facts or types of facts are recurrent. In particular, the question whether an organization is a trade union is a question that arises, with respect to the same organizations or cognate organizations, time after time. Although the courts have recognized the Boards' exclusive jurisdiction in this regard, their procedure in exercising that jurisdiction is still open to supervision. Does this require a full-dress investigation to support the finding in each case? It is not likely, and the common statutory provisions giving Boards the right to establish their own procedure, subject to the right of the parties to be heard, probably support this obvious requirement of common sense. Some basis for the finding must be established in any case.

In the *Trenton Construction Workers Association* case,<sup>35</sup> where an organization's status as a trade union was in issue, the court held that the Ontario Labour Relations Board erred in resorting to evidence that had been given before a Board differently constituted in regard to another application. It would seem to me that if this is error, it would be error regardless of the constitution of the panel hearing the case. The Board relied upon material set out in the endorsement of the record in an earlier case. If the decision means that findings of fact in previous cases may never be relied on, then I submit with respect that it goes too far. It can be supported, I suggest, as finding the Board to be in error in relying on the evidence in another case as establishing anything more than the facts there found. Whether there are any real dangers here for the efficient conduct of Boards' regular business remains to be seen.

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(35) *R. v. O.L.R.B. ex parte Trenton Construction Workers Association, Local 52* (1963) 39 D.L.R. (2d) 593 (Ont.).

### « Error of Law on the Face of the Record »

The question which the Board had determined in the *Trenton Construction Workers* case was whether an organization was a trade union. The rightness or wrongness of this decision in itself would not be reviewable on *certiorari*. It was admitted by counsel for the Board, however, that if it appeared on the face of the order of the Board that it considered evidence it could not legally consider, or if the Board misinterpreted the statute under which it made its order, then the Board's order ought to be set aside. It may be that counsel admitted more than he needed to : it raises the last ground of review which I wish to consider, and the most confusing : « error of law on the face of the record ». This is a difficult phrase to understand. It is asserted as a ground for review side by side with the assertion that determinations made within a board's jurisdiction are not open to review even where there is error of fact or of law.<sup>36</sup> « Error of law on the face of the record », then, is some special sort of mistake. In the *Tag's Plumbing* case<sup>37</sup> the finding of the Saskatchewan Labour Relations Board that an applicant in an unfair labour practice case was a trade union « directly concerned » with certain events was attacked on *certiorari*. Having found that such a matter was within the Board's jurisdiction, so that the order could not be attacked on that basis, Culliton J.A. went on to deal with the argument that there was error of law on the face of the record. He said « The allegation of error of law on the face of the record can only be substantiated if the Board is bound not only to record its findings, but also the evidence upon which the findings were based. » It was concluded that the Board was not so bound. Counsel for the applicant had referred the court to the judgment of MacDonald J.A. speaking for the Saskatchewan Court of Appeal in the *John East* case,<sup>38</sup> that « not only is it the duty of the Board to find the necessary facts, but it is also its duty to record them. » In *Tag's Plumbing* Culliton J.A. went on to say that he did not construe that statement as a requirement that the Board

(36) Thus, Balfour J. in *R. v. Saskatchewan Labour Relations Board, ex parte Dickl* (1963) 41 D.L.R. (2d) 79, 85 (Sask. Q.B.): « In dealing with an application for a writ of *certiorari*, and having regard to [the privative clause], it appears to me that the decisions of the Board are not open to judicial review, including *certiorari*, even if there was error in matter of fact or in law and that I am restricted to determine whether or not the Board acted within its jurisdiction or whether there is error of law on the face of the record ».

(37) *R. v. Labour Relations Board of Sask., ex parte Tag's Plumbing and Heating Ltd* (1962) 34 D.L.R. (2d) 128 (Sask. C.A.).

38. *Supra*, N. 4. See also *MacCosham Storage & Distributing Co. (Saskatchewan) Ltd. v. Canadian Brotherhood of Railway Employees and Other Transport Workers, Division No. 189*. 14 D.L.R. (2d) 725 (Sask. C.A.).

record the evidence upon which its findings are based. But all this seems to carry the implication that a court will review the correctness of conclusions drawn by Boards from the evidence in cases where the Boards see fit to describe such evidence in their decision. What then as to the right of Boards to be « wrong », provided they act within their jurisdiction? A jurisdiction to be right only is no jurisdiction, as that term is used in this context.

The mystery — or mystique — of this ground of review can I think be explained on a historical basis. The modern case which has made the idea of « error of law on the face of the record » common coin in the *Northumberland* case,<sup>39</sup> which has been referred to in many Canadian decisions. It was there held for the first time that *certiorari* would issue to quash the decisions of a statutory administrative tribunal for error of law on the face of the record. This was in reality a new application of a long-established principle. From the 17th century the King's Bench had issued *certiorari* to quash convictions and orders of inferior courts (the *Northumberland* case extends this to tribunals). And in aid of this process, the courts had gone to some lengths in requiring the lower courts to complete their records — that is, to provide the rope with which they would be hung. Convictions were quashed for error of substantive law, for what seemed to be lack of evidence on a material point or for trivial formal defects. Parliament retaliated with the privative clause, and with Summary Procedure Statutes, and finally by prescribing in the Summary Procedure Act, 1848, a standard form of conviction that omitted all mention of the evidence or the reasoning by which the conviction had been reached. This did not alter the law relating to *certiorari*, but it made it virtually impossible for the courts to correct errors of law other than those going to jurisdiction, since evidence in a *certiorari* application may not be admitted to prove lack of evidence or concealed error of law. The « face of the record » then became, in the words of Lord Sumner, « the inscrutable face of sphinx ». <sup>40</sup> For this reason « error of law on the face of the record » was little used until it was applied to administrative tribunals in 1952. While it is likely the case that Boards would not actually be required to expand the record so as to include the sort of material which would support review, nevertheless it is surely undesirable that they should be led, in the hope of protecting themselves, to reduce the records now pro-

(39) *R. v. Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1951] 1 K.B. 711, aff'd. [1952] 1 K.B. 338 (C.A.).

(40) *R. v. Nat Bell Liquors Ltd.* [1922] 2 A.C. 128, 159.

duced — that is, to avoid giving substantial reasons. In summary conviction cases lengthy reasons are of little practical use, but in matters such as those coming before the Labour Relations Boards there is a continuing clientele, and the giving of reasons, is, it is hoped, of some value. In any event, during the century — long desuetude of « error of law on the face of the records », courts had accustomed themselves to treating a wide range of errors of law and fact as going to jurisdiction. This, I suggest, is enough.

### The Question of the Privative Clause

I should like now to return to the question of the privative clause. No privative clause, nothing short of reconstitution of our whole judicial system, will prevent the courts from supervising the *jurisdiction* of inferior courts or statutory tribunals, as has been demonstrated. The privative clause, however, should be given its proper effect, that is, preventing the courts from supervising the *work* of the Boards within that jurisdiction. In attempting to understand the proper operation of the privative clause we should, I think, consider what the situation would be *without* one. It would not be the case that the courts would interfere at will. Just because certiorari proceedings may be freely brought has never meant that a court would, in every case, concern itself with the merits of the contested determination. There have been, broadly speaking, two grounds for certiorari: 1) defect of jurisdiction (in which I include denial of natural justice, and fraud) and 2) error of law on the face of the record. But without the establishment of one of these grounds, there would be no certiorari, even in the absence of a privative clause, and even if the court considered the determination to be wrong. We all know that were there is a privative clause, it does not prevent certiorari where ground 1) is established — defect of jurisdiction. The effect of a privative clause, then, must be the elimination of ground 2) as a basis for certiorari. This indeed seems to be the effect of the judgment of Roach J.A. speaking for the Ontario Court of Appeal in the *Bradley* case : <sup>41</sup>

« Where the matter is not collateral but constitutes part or the whole of the main issue which the inferior tribunal had to decide, the Court is limited to examining the record to determine whether there was any evidence before the inferior tribunal. I hasten to add, however, that the Court can do that only in the absence of a privative clause. If there is a privative clause in the Act creating the tribunal, the Court cannot do that. »

41. *Supra*, N. 25.



In the *Parkhill Bedding* case,<sup>42</sup> Mr. Justice Freedman, referring to this passage, spoke of it as touching upon a distinction as between privative clauses. With respect, a distinction based on the relative explicitness of privative clauses seems to me rather forced (assuming the form of words is explicit enough to be a privative clause in the first place), and at any rate there is no such distinction in the judgment of Roach J.A. who refers only to the distinction between the case where there is a privative clause and the case where there is not. A distinction as between privative clauses is, nevertheless, being drawn by our courts. Thus, in the *Federal Electric* case<sup>43</sup> Smith J. stated :

« In my view, it is at least doubtful that the privative clause in the Industrial Relations and Disputes Investigation Act (s. 61(2)), is sufficiently express in its terms to exclude certiorari where the question is one of error on the face of the record. No privative clause excludes an application for certiorari where the question is one of the inferior tribunal having jurisdiction, refusing jurisdiction or exceeding jurisdiction. »

## Conclusion

The only conclusion left, it seems to me, is that the privative clause in the Industrial Relations and Disputes Investigation Act means nothing, since, on Smith J's reasoning, it cannot exclude certiorari on ground (1) and is not « express » enough to exclude it on ground (2). The only possible ground for optimism here is the thought that presumably some privative clause might mean something, as long as it is sufficiently « express ». De Smith suggests this in his work on Judicial Review of Administrative Action, and cites Australian and New Zealand authority for the proposition.<sup>44</sup> The *Bradley* case, which was contemporaneous with De Smith's work, would have provided a strong Canadian authority.

It is worth nothing that in Prince Edward Island the court sees the merit of privative clauses. In the *Journal Publishing* case,<sup>45</sup> in which the court held, on appeal (for such is their procedure), reversing the Labour Relations Board, that the Charlottetown chartered local of the

(42) *Supra*, N. 28.

(43) *R. v. Canada Labour Relations Board, ex parte Federal Electric Corporation* (1964) 44 D.L.R. (2d) 440, 458 (Man. Q.B.).

(44) De Smith, *op. cit. supra*, N. 30, at p. 228 N.

(45) *Journal Publishing Co. Ltd. v. Charlottetown Typographical Union, Local 963* (1964) 44 D.L.R. (2d) 711 (P.E.I. S.C.).

International Typographical Union was not a trade union within the meaning of the Industrial Relations Act, Tweedy J. stated :

« It was alleged by counsel that this is the only Province in Canada that gives this right of appeal to the Supreme Court nor has the right been given by Legislatures in the various states of the United States of America. I might digress to say that in my opinion the inclusion of such a right of appeal defeats many purposes of the Act.

Tweedy J. concluded his judgment in the case simply by noting, rather wistfully, the provisions of section 80 of the Ontario Act, the private clause with which we began.

To anyone attempting to analyse (as far as they allow) the cases decided in this field, their most striking and depressing characteristic is the lack of consideration of the *real* issues which were before the courts in these cases. On the question of jurisdiction, for instance, the real issue, I suggest, is : who is to determine this sort of question? The adoption of a criterion such as that suggested by Dixon J., or by Rand J., while it would in itself, solve no problems, would at least have the virtue of focussing our attention on real problems, rather than forms of words. Even although the question of jurisdiction must be, in the final analysis, up to the courts, it is nevertheless a problem which each of us, in the course of carrying out our duties, must face. In the form of questions of natural justice, I think, it presents its most serious aspect.<sup>46</sup> It would be helpful to have some considered judicial determination with respect to problems of notice as these arise in labour relations matters, because these problems do arise in a peculiar form in this area. But these are our problems even before they go to the courts, and we must constantly remind ourselves that, could we but achieve a just equilibrium between the demands of efficiency and general justice on the one hand, and the rights of the individual and particular justice on the other, then judicial review of our proceedings would be superfluous.

## LES COMMISSIONS DE RELATIONS DE TRAVAIL ET LES TRIBUNAUX

### INTRODUCTION

« Le Conseil canadien des relations ouvrières » et la plupart de nos Commissions provinciales possèdent une compétence exclusive dans les cas qui leur sont

(46) See Finkelman, *The Ontario Labour Relations Board and Natural Justice* (1965) Queens University Industrial Relations Centre, Reprint Series No. 7.

soumis, en vertu de textes restrictifs de l'intervention judiciaire (privative clauses), contenus dans les lois qui les régissent. Au tout début du texte original nous citons la section 80 de la Loi des relations de travail de l'Ontario qui est explicite à ce sujet.

Cette compétence exclusive place donc les Commissions à l'abri de la révision des tribunaux. Cependant, ces pouvoirs ne sont pas larges au point de constituer les membres des tribunaux, au sens de la section 96 de l'Acte de l'Amérique du Nord. De plus, leur compétence et leurs pouvoirs semblent avoir été accordés par les législatures provinciales dans les limites de leur compétence législative.

Il y a treize ans, le professeur Laskin écrivait qu'« aucun libellé de texte tentant d'éviter la révision judiciaire ne sera effective advenant les désirs contraires d'un juge d'un tribunal supérieur », et plus récemment, le professeur Willis a blâmé les tribunaux d'avoir « émasculé » les « clauses privatives » à ce qui équivalait à une misinterprétation honteuse de leur libellé. Mais l'histoire parle efficacement et on doit en tenir compte. L'idée d'interpréter à la lettre les *mots eux-mêmes* de la législature souveraine est un peu naïve. Les tribunaux supérieurs dans le monde du « common law » ont toujours eu le pouvoir de réviser, à l'intérieur de limites, le travail des tribunaux inférieurs. En effet, à l'exception des règles du droit naturel, il n'y a pas de critères quant à l'interférence judiciaire qui sont suffisamment spécifiques pour être d'un grand secours.

Même s'il est évident que les tribunaux ne tiennent pas compte des dispositions apparemment claires des « clauses privatives » qui les excluent de toute considération d'un objet relevant d'une commission de relations de travail, il ne s'ensuit pas que la « clause privative » constitue du verbiage inutile. En même temps qu'il est désirable que les tribunaux administratifs soient soustraits jusqu'à un certain point de l'intervention des tribunaux, il est aussi souhaitable que ces commissions soient soumises à une forme quelconque de contrôle. Mais au fond, le réel problème réside dans la définition de la compétence elle-même.

#### LE SENS DE LA COMPÉTENCE

On doit se demander qui décide quoi. La compétence dans le contexte présent, signifie l'autorité de décider, soit correctement, soit incorrectement. Mais quand les tribunaux annulent les décisions des commissions sous prétexte d'une décision incorrecte, ceci signifie que les commissions doivent décider correctement et pas autrement. On a par exemple le cas « *Police Mechanics* ». Ici la cour cassa une décision du Ontario Labour Relations Board à l'effet que ces mécaniciens étaient exclus des dispositions du Labour Relations Act, selon la section 2(g) de cette Loi. De même, dans le cas « *Ontario Food Terminal Board* », feu M. le juge Laidlaw déclarait que le Ontario Labour Relations Board ne pouvait déclarer le « *Ontario Food Terminal Board* » une compagnie de la couronne ou non. Dans le cas *Taylor*, qui survint quelques mois après le cas *Food Terminal*, le juge en chef McRuer concluait qu'évidemment la « Commission » doit se prononcer sur plusieurs questions légales incidentes dans l'exécution de ses fonctions administratives, mais il ne voulait pas laisser entendre qu'il croyait la Commission habilitée à rendre des décisions judiciaires en regard de sujets connexes sans possibilité de révision par voie de certiorari.

## DES COMMISSIONS SPÉCIALISÉES POUR DES OBJETS SPÉCIALISÉS

Pour des objets spécialisés, se présentant souvent, impliquant continuellement les intérêts de groupes ayant un certain intérêt défini et exigeant un certain degré d'expertise, une commission spécialisée est nécessaire. L'établissement de commissions possédant de larges pouvoirs à la fois d'enquête et d'action n'est rien de nouveau, non plus que la révision judiciaire de leurs conclusions. Dans la législation du travail, c'est le devoir des tribunaux de faire en sorte qu'elle atteigne son but. J'espère qu'il est vrai, comme le suggérait le Juge Abbott, que les membres de commissions sont au moins aussi compétents que les juges pour rendre des décisions sur des questions qui surgissent dans l'administration des Lois de relations de travail. Dans son commentaire sur le cas « *Ontario Food Terminals* » le professeur Laskin signala que la fonction de la Commission dans un tel cas était semblable à celle qu'elle aurait pu être appelée à accomplir en vertu de la section 2 de la Loi des relations de travail. Dans le cas « *Associated Medical Services* », 7 des 9 juges soutinrent qu'il était normal pour le tribunal en question de considérer les mérites de la décision de la Commission à l'effet qu'un certain plaignant était une « personne » pour les fins de la Loi des relations de travail. Au fond, ce qui importe, c'est le concept de « juridiction » et les pour et les contre d'un concept relativement large ou relativement étroit. Les possibilités peuvent être arrangées en une sorte d'éventail. A une extrémité, les questions ressortissant du droit constitutionnel, dans lesquelles les tribunaux ont compétence. Puis les questions générales d'interprétation et l'ensemble des règles de la justice naturelle. Et à peu près au milieu de l'éventail, diverses questions : une personne est-elle membre d'un corps de police ? Une certaine personne est-elle un employé d'un certain employeur ? Une telle organisation est-elle une union ouvrière ? A l'autre extrémité de l'éventail, on trouve toute une série de questions qui relèvent de la compétence des commissions ; le meilleur exemple serait celui-ci : une personne, en tant qu'employé, fait-elle partie de l'union ouvrière impliquée ?

## LA DISTINCTION ENTRE QUESTION PRINCIPALE ET QUESTION CONNEXE

Ainsi, on peut classer les questions entre celles qui peuvent nettement être révisées et celles qui ne le peuvent pas. Le critère juridique est le suivant : une telle question est la question principale soumise au tribunal ou plutôt elle en est une « extrinsèque », « connexe » et « préliminaire ». Evidemment, ce sont les tribunaux qui possèdent la compétence pour déterminer si une commission peut se prononcer sur une question selon les pouvoirs qui lui sont conférés.

Même si on continue à distinguer la question « principale » de la question « connexe », je ne peux laisser le débat sans référer à Lord Esher qui suggérait, dans les cas « *Income Tax Commissioners* et *Bradley* », que la législature pourrait conférer à la commission une compétence telle que, selon moi, l'intervention judiciaire serait reportée à un stage ultérieur.

## LES RÈGLES DE LA JUSTICE NATURELLE

Les règles de la justice naturelle constituent un chapitre spécial dans la question de la compétence. Celles-ci ont été longuement étudiées et, en règle générale, il n'y a rien de remarquable dans les récents cas canadiens sur ce point.

Des questions de défaut d'avis surviennent avec une fréquence alarmante. Pour sûr, c'est la règle que toute information qui peut nuire à une partie autre que celle qui informe doit être fournie à cette autre partie. Ceci est également vrai pour la plaidoirie. Ainsi dans le cas *Forest Industrial Relations*, le juge Judson déclarait qu'après avoir écouté une partie et également la réponse de l'autre, la Commission peut, sans déroger aux règles de la justice naturelle, déclarer que le débat a duré assez longtemps et qu'il est temps d'y mettre fin. Dans le cas *Jein Patrick*, la Cour d'Appel de la Saskatchewan cassa une accréditation prétextant une encoche à la justice naturelle par le refus d'accorder un ajournement.

Une variation quelque peu troublante sur les notions sous-jacentes aux exigences d'avis apparaît dans des questions concernant l'acceptation de la preuve. Dans le cas *Trenton Construction Workers Association*, où le statut d'une organisation comme union ouvrière était en question, le tribunal décida que le Ontario Labour Relations Board s'était trompé « in resorting to evidence that had been given before a Board differently constituted in regard to another application ». Si la décision signifie que les faits découverts dans des cas précédents ne peuvent jamais être utilisés, alors j'estime respectueusement que c'est aller trop loin.

Le dernier motif pour révision que je désire considérer s'exprime par cette phrase difficile à comprendre et d'une grande source de confusion : « erreur en droit *prima facie* ». Il s'agit d'une sorte d'erreur quelque peu spéciale. Dans le cas *Tag's Plumbing*, on s'appuya sur ce motif pour attaquer par voie de *certiorari* la décision du Saskatchewan Labour Relations Board à savoir qu'un requérant dans un cas de pratique interdite de travail était une union ouvrière « directement concernée » dans certains événements.

Le mystère de ce motif de révision peut, selon moi, trouver son explication sur une base historique. Le cas moderne par lequel l'idée d'une « erreur en droit *prima facie* », devint monnaie courante fut le cas *Northumberland*, auquel on a référé dans plusieurs décisions canadiennes. Le *certiorari* pour casser une décision était en réalité une nouvelle application d'un principe depuis longtemps reconnu. La question du *prima facie* devint alors, d'après les mots de Lord Summer, « le visage impénétrable du sphinx ». C'est pour cette raison que ce motif fut très peu utilisé jusqu'à son application aux tribunaux administratifs en 1952.

#### LA QUESTION DE LA CLAUSE PRIVATIVE

Aucune clause privative n'empêchera les tribunaux de réviser la compétence de tribunaux inférieurs ou de tribunaux statutaires (*statutory*), comme il a été démontré. Cette clause cependant devrait s'appliquer proprement, en empêchant, par exemple, les tribunaux de réviser le travail des Commissions à l'intérieur de leur compétence. Qu'advierait-il sans une telle clause ? Ce n'est pas le cas que les tribunaux interféreraient à volonté. Il y a eu, règle générale, deux motifs pour le bref en *certiorari* : 1) défaut de juridiction et 2) erreur en droit *prima facie*. L'effet de la clause privative doit être l'élimination du deuxième motif. Ceci est d'ailleurs confirmé par le jugement rendu par le juge Roack dans le cas *Bradley*.

## CONCLUSION

La seule conclusion valable, selon moi, c'est que la clause privative ne veut rien dire. En effet, d'après le raisonnement du juge Smith, cette clause ne peut exclure le bref en certiorari sous aucun des deux motifs énoncés plus haut. Donc la seule raison d'être optimiste ici c'est la pensée que présumément une clause privative quelconque puisse signifier quelque chose, dès qu'elle est suffisamment « formelle ».

## DÉPARTEMENT DES RELATIONS INDUSTRIELLES XXI<sup>e</sup> CONGRÈS DES RELATIONS INDUSTRIELLES DE LAVAL

18 et 19 avril 1966

### UNE POLITIQUE GLOBALE DE MAIN-D'OEUVRE ?

LUNDI, 18 AVRIL 1966

#### Une politique de main-d'oeuvre: problèmes impliqués

Quels sont les problèmes que posent l'élaboration et la mise en application d'une politique de main-d'oeuvre ? Quelles sont les forces et les faiblesses des politiques actuelles de main-d'oeuvre ? Est-il opportun de songer à l'élaboration d'une politique globale en matière de main-d'oeuvre ? Quelle serait la nature d'une telle politique ?

#### Nécessité d'une politique globale de main-d'oeuvre

Est-ce qu'une coordination des politiques et programmes de main-d'oeuvre s'avère nécessaire ? Est-ce que les changements technologiques et leurs implications nous invitent à considérer la possibilité d'une politique globale de main-d'oeuvre ?

COMMENTAIRES ET POINTS DE VUE

MARDI, 19 AVRIL 1966

#### Mise en oeuvre d'une politique globale de main-d'oeuvre

- a) *Mécanismes institutionnels* : Est-il possible de jeter les bases d'un organisme supérieur qui se chargerait de l'élaboration et de la mise en application d'une politique de main-d'oeuvre ? Quels seraient la nature, les objectifs, la composition d'un tel organisme ?
- b) *Rôle des partenaires* : Points de vue syndical et patronal sur le rôle des partenaires dans l'élaboration et l'application d'une politique de main-d'oeuvre.

#### Négociation collective et politique de main-d'oeuvre

La négociation collective présente-t-elle un instrument adéquat en matière de préservation et allocation de main-d'oeuvre ? En quoi une politique de main-d'oeuvre peut affecter le processus actuel de la négociation collective ?

#### Politiques de main-d'oeuvre: implications constitutionnelles

BANQUET DE CLÔTURE

Education et politique de main-d'oeuvre