

## Perfecting the Administrative Solution to Labour Disputes: Postscript

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Article abstract

« The judges lack the intimate knowledge of the very dynamic process of industrial relations and collective bargaining. For these reasons...the new labour code has removed the court's jurisdiction over labour disputes...The new law seeks an administrative rather than a judicial solution to labour disputes. »\*\*

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\*\* BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES (1973) (Third Session), at 399-400 per the Hon. W.S. King, Minister of Labour.

# *Perfecting the Administrative Solution to Labour Disputes*

## *Postscript*

**P.A. Joseph**

*«The judges lack the intimate knowledge of the very dynamic process of industrial relations and collective bargaining. For these reasons...the new labour code has removed the court's jurisdiction over labour disputes...The new law seeks an administrative rather than a judicial solution to labour disputes.»\*\**

Subsequent to the time of writing of the author's article «*Perfecting the Administrative Solution to Labour Disputes: The British Columbia Experiment*», published in volume 38, number 2, *Relations Industrielles/Industrial Relations*, the Supreme Court of Canada delivered its hallmark decision in *Crevier v Attorney-General for Québec et al*<sup>1</sup>. The issue for the Supreme Court was whether the Professions Tribunal, a provincially constituted body established under the Québec Professional Code,<sup>2</sup> could competently exercise the extensive powers conferred upon it, or whether these were such as to offend section 96 of the British North America Act, 1867. Delivering judgment of the Court, Laskin C.J.C. acknowledged in Canada the «academic concern with the permitted scope of privative clauses»,<sup>3</sup> that «[o]pinion has varied»,<sup>4</sup> and reflected of the decision rendered: «...this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdictions»<sup>5</sup>.

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1 (1981), 127 D.L.R. (3d) 1, per Laskin C.J.C., Martland, Ritchie Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

2 R.S.Q. 1977, C.C-26, s. 162.

3 *Supra*, note 1, at 14.

4 *Ibid*, citing the articles *infra*, note 29.

5 *Ibid*, at 13.

Thus resolved also was the lingering constitutional question underlying the privative provisions of the *British Columbia Labour Code*<sup>6</sup>. In placing the provincially-constituted statutory tribunal against the broader background of Canadian constitutional law, *Crevier* effectively disposes of any pretense to perfect the administrative solution to labour disputes through novel formulations of the privative clause<sup>7</sup>. The following postscript to the writer's article reflects briefly on the decision rendered and what it will mean for labour statutes committed to the administrative solution.

### THE DECISION IN CREVIER

The Professions Tribunal established under the Québec Professional Code was granted powers to confirm, alter, or quash any decision by a discipline committee constituted under the Code. Included for these purposes were powers encompassing review of fact or law and jurisdiction,<sup>8</sup> the exercise of which was reinforced by a privative provision ousting judicial review<sup>9</sup>.

The Québec Court of Appeal availed itself of the usual construction placed on privative clauses and held<sup>10</sup> that the language employed did not contemplate foreclosing the Superior Court's review where there had been a want or excess of jurisdiction on the part of the Professionals Tribunal. The Supreme Court disagreed. As a matter of ordinary construction, said Laskin C.J.C., «[t]hat is not the case, having regard to the embrasive terms of s.194 of the *Professional Code*»<sup>11</sup>. This rejection of the Court of Appeal's interpretation invited the Supreme Court's further finding,<sup>12</sup> that «... it is...impossible to see the[Professions Tribunal's] final appellate jurisdiction as part of an institutional arrangement by way of a regulatory scheme for the governance of the various professions»: <sup>13</sup>

6 S.B.C. 1973, c. 122.

7 See generally the writer's examination, volume 38, number 2, *Relations Industrielles/Industrial Relations*.

8 See ss. 175, 194 and 195 of the Québec Professional Code.

9 Section 194.

10 [1979] Qué. C.A. 333, per Pare, J.A. and Jacques J., *ad hoc* (Montgomery J.A. dissenting), reversing a judgment of Poitras, J., [1977] Qué. S.C. 324.

11 *Supra*, note 1, at 8.

12 Distinguishing *Tomko v Labour Relations Board (Nova Scotia) et al.* (1975) 69 D.L.R. (3d) 250, [1977] 1 S.C.R. 112, 14 N.S.R. (2d) 191.

13 *Supra*, note 1, at 11.

«The Professions Tribunal is not so much integrated into any scheme as it is sitting on top of the various schemes and with an authority detached from them, although, of course, exercising that authority in relation to each scheme as the occasion requires. There is no valid comparison with the cease and desist orders which the Labour Relations Board in the *Tomko* cases was authorised to issue in its administration of a collective bargaining statute.»<sup>14</sup>

Reflecting on the background jurisprudence underpinning the privative clause in Canada, Laskin C.J.C. observed, «This Court has hitherto been content to look at privative clauses in terms of proper construction and, no doubt, with a disposition to read them narrowly against the long history of judicial review on questions of law and questions of jurisdiction»<sup>15</sup>. Of the «section 96» challenge, «It is enough to deflect s.96 if the privative clause is construed to preserve Superior Court supervision over questions of jurisdiction...»<sup>16</sup>. What if, however, as in the instant case, the language is too specific to admit of such a construction? «[I]s the clause constitutionally valid?» asked Laskin C.J.C.<sup>17</sup> Citing *Attorney-General for Québec et al. v. Farrah et al.*,<sup>18</sup> Laskin C.J.C. replied:

«In my opinion, where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s.96 Court. ...this is the first time this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction.»<sup>19</sup>

### LASKIN C.J.C.'s VOLTE-FACE?

It is ironic that it was Professor Bora Laskin (as he then was) who once observed the «apparent futility» of the initial attempts in Canada to oust the court's jurisdiction over matters assigned to the labour board<sup>20</sup>. «In the face of such enactments», Laskin cautioned, «judicial persistence in exercising a reviewing power involves an arrogation of authority only on the basis of constitutional principle (and there is no such principle) or on the basis of some 'elite' theory of knowing what is best for all concerned» (the paren-

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, at 14.

<sup>16</sup> *Ibid.*, at 12.

<sup>17</sup> *Ibid.*

<sup>18</sup> (1978) 86 D.L.R. (3d) 161, [1978] 2 S.C.R. 638, 21 N.R. 595.

<sup>19</sup> *Supra*, note 1, at 12 and 13.

<sup>20</sup> Laskin, *Certiorari to Labour Boards: The Apparent Futility of the Privative Clause*, 30 Can. B. Rev. 986, (1952).

thesis is Laskin's)<sup>21</sup>. The irony is that three decades hence Bora Laskin *qua* Chief Justice of Canada delivers the very decision of the Supreme Court<sup>22</sup> unequivocally affirming just such a principle. In 1952 he was adamant. «We must not...delude ourselves», he instructed, «that judicial review rests on any higher ground than that of being implicit in statutory interpretation»:<sup>23</sup>

«We may well feel that judicial supremacy is the highest of all values under a democratic regime of law, and a value to which even the legislature should pay tribute. But we have not enshrined it in any fundamental constitutional law or in our political system. On the contrary, the cardinal principle of our system of representative government, inherited from Great Britain, has been the supremacy of the legislature. In Canada this has been modified only through a distribution of legislative power consonant with federalism and by a few guaranties such as those relating to education, language and the independence of the judiciary. We must not then delude ourselves...»<sup>24</sup>

Perhaps the saving qualification in that quotation is Laskin's general reference to Canada's distribution of legislative power. But Laskin was at pains to dispel any suggestion that this, or any aspect of the Canadian constitutional setup, abridged his «cardinal principle» of legislative supremacy for the specific purpose of enjoining judicial obedience to the privative clause. In addition to the above statement berating courts for their disobedience and disavowing any constitutional justification for their «persistence»,<sup>25</sup> Laskin reiterated: «At the threshold of this inquiry it may be well to make the assertion that there is no constitutional principle on which courts can rest any claim to review administrative board decisions»<sup>26</sup>. Whilst he did concede that in constitutional matters involving the distribution of legislative power judicial supremacy is «an accepted fact»,<sup>27</sup> he concluded: «Yet the question remains why the courts, as one agency of government, should not respect the authority and responsibility of another agency, the legislature, in matters where no issue of distribution of legislative power arise»<sup>28</sup>.

The very minimum judicial office implies is independence of thought; even from one's own earlier views if necessary. *Crevier* bears witness. Yet it does not seem from *Crevier* that ivory tower conjecture is simply to be ig-

21 *Ibid.*, at 991.

22 *Crevier*, *supra*, note 1.

23 *Supra*, note 20, at 990.

24 *Ibid.*

25 *Ibid.*, at 991.

26 *Ibid.*, at 989.

27 *Ibid.*, at 1002.

28 *Ibid.*

nored with impunity, for Laskin C.J.C. saw fit to cite four publications<sup>29</sup> expressing, as his Honour himself put it, «academic concern with the permitted scope of the privative clause»<sup>30</sup>. Since these represent the spectrum of thought on the question, dating indeed from the time of his Honour's own publication, one wonders with respect whether it really would have been judicially improper for the Chief Justice to have included, amid the citations given, reference to his own critique.

## AFTER CREVIER

There is little use now in pleading for judicial recognition of the legislative policy underlying section 33 of the British Columbia Code<sup>31</sup>. In fact, on the strength of *Crevier* one must speculate whether those provisions of the Labour Code which emphatically prelude review even on jurisdictional grounds are any longer constitutionally valid. Can these reasonably be construed to preserve Superior Court supervision over the Board's jurisdiction? On the foregoing examination it is submitted not<sup>32</sup>.

Accordingly it seems that the sole focus now must be on the distinction between errors of law within jurisdiction and jurisdictional error: the former may be validly insulated from judicial review, the latter not. Herewith the British Columbia Board must be resigned to the freedom which the conceptualism of *Anisminic*<sup>33</sup> gives courts to gratuitously interfere in issues of labour relations policy more appropriately referred to the administrative agency; lest it be forgotten it was judicial enthusiasm for this freedom that caused British Columbia in 1973 to experiment with its novel method of foreclosing judicial intervention on grounds of jurisdiction. (Is it not also significant that in the two cases in which the Supreme Court has upheld the legislature's intent and ruled in favour of the privative clause precluding all curial review, it has been for purposes of upholding the «section 96» challenge to the agency's jurisdiction?<sup>34</sup>)

<sup>29</sup> Viz. (in order in which they are cited), Lyon, *Comments*, 49 Can. B. Rev. 365 (1971); Lederman, *The Independence of the Judiciary*, 34 Can. B. Rev. 1139 (1956); Hogg, *Is Judicial Review of Administrative Action Guaranteed by the British North America Act?* 54 Can. B. Rev. 716 (1976); Dussault, *Le Contrôle Judiciaire de l'Administration au Québec* (1969) especially at 110-13.

<sup>30</sup> *Supra*, note 1, at 14.

<sup>31</sup> See generally the writer's article, *supra*.

<sup>32</sup> *Ibid.*

<sup>33</sup> 1969 2 A.C. 147 (H.L.).

<sup>34</sup> *Attorney-General for Québec et al v Farrah et al.*, *supra*, note 18; *Crevier v Attorney-General for Québec et al.*, *supra*, note 1.

On the other hand, perhaps there has been more cause for optimism exhibited recently in cases such as *C.U.P.E. Local 963 v New Brunswick Liquor Corporation*<sup>35</sup> where the Supreme Court willingly deferred to the expertise of the Labour Relations Board in specialist matters confided to it. Perhaps this suggests that courts will not now interfere with Board decisions unless the error obviously goes to jurisdiction? But the fact remains that no matter how tolerant the courts or extensive the judicial goodwill, the decision is nonetheless their's, the judges', to resolve what is jurisdictional and what is not. And history may well have it that this depends as much on the state of the judge's indigestion as any legal consideration.

### COMMENT

In retrospect the balance of academic opinion in British Columbia prior to *Crevier* possibly supported the argument eventually upheld there, such that the «section 96» challenge to the British Columbia Board's jurisdiction may well have been more a question of «when» than «if». But whatever once was conjecture is now reality — henceforth the Code's provisions must be read subject to what this decision establishes for the provincially-constituted statutory body. On the other hand, the decision merits no special attention outside of Canada where the «section 96» problem does not arise and the sole issue is the appropriate drafting of an effective privative clause.

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<sup>35</sup> 25 N.B.R. (2d) 237 (1979).