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Section 96 of the British North America Act Re-examined

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I

Through a series of judicial decisions in recent years, the "seemingly innocuous" section 96 of the British North America Act grew in stature and importance until it was virtually elevated to the position of a "due process clause" in the Canadian constitution.[1] Enjoying no express statutory basis, and deriving its substance from the uncertain characterization of judicial and administrative functions, this clause rendered difficult of solution on the provincial level, problems of a modern nature requiring governmental intervention of a continuous and specialized character.

Section 96 simply provides that the Governor General shall appoint the judges of the superior, county and district courts in each province. Three other sections are designed to assure the independence and competence of the judges of these courts. Section 97 provides that they should be selected from the bars of the various provinces. By section 99 their tenure of office is during good behaviour and they are removable by the Governor General only upon address of the Senate and the House of Commons. The salaries of judges of the superior, county and

[1] The judicial interpretation of section 96 is penetratingly analyzed by Prof. John Willis, Section 96 of the British North America Act (1940), 18 Can. Bar Rev. 517.

district courts are, by section 100, fixed and provided by the Parliament of Canada. Although these provisions appear to relate merely to the appointment of the judges of certain courts, they may fairly be regarded as "the principal pillars in the temple of justice"[2] designed to lie "at the root of the means adopted by the framers of the [constitution] to secure the impartiality and independence of the provincial judiciary".[3] As such, they have restrained the provinces from appointing the judges of the superior, county and district courts. In addition, they have prohibited the provinces from appointing judges to courts analogous to the superior, county and district courts.[4] Furthermore, lest a mere modification of terminology by a province should enable its appointees to discharge the functions of such judges, it was held that a provincial legislature may not confer upon its officers jurisdiction exercised in 1867 by any of the judges named in section 96.[5] But section 96 was not allowed to rest there. Three decisions of highest authority appeared to terminate the possibility of any but the slightest growth in provincial administrative institutions. First, the *Martineau* case[6] appeared to limit the power of provincial appointees to the carrying out only of administrative functions and of those few judicial functions actually performed by inferior tribunals existing at the time of Confederation.[7] Secondly, it was held in *Toronto* v. *York Township*[8] that a province may not confer upon its appointees who are members of a tribunal which it has created, power to deal with judicial questions such as are normally determined by courts of justice. Provincial officers sitting upon an administrative body, such as the Local Government Board, were held to be incapable of receiving, and hence exercising, judicial authority. Thirdly, in *Reference re The Adoption Act*[9] it was held that a province might invest its appointees with jurisdiction of a type broadly conforming to that generally exercisable in 1867 by courts of summary jurisdiction, such as those presided over by magistrates and justices of the peace.

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[2] *Per* Lord Atkin in *Toronto* v. *York Township*, [1938] A.C. 415, at p. 426.
[3] *Per* Lord Blanesburgh in *O. Martineau & Sons, Ltd.* v. *City of Montreal*, [1932] A.C. 113, at pp. 120-121.
[4] *Burk* v. *Tunstall* (1890), 2 B.C.R. 12.
[5] *McLean Gold Mines, Ltd.* v. *Attorney General for Ontario et al.*, [1924] 1 D.L.R. 10.
[6] [1932] A.C. 113.
[7] See *Reference re the Adoption Act*, [1938] S.C.R. 398, *per* Duff C.J.C. at p. 415.
[8] [1937] 1 D.L.R. 175, *per* Rowell C.J.O. at p. 186; [1938] A.C. 415, *per* Lord Atkin at p. 427.
[9] *Supra*, *per* Duff C.J.C. at p. 421.

These decisions resulted in two sterilizing concepts. There was invoked into the law of the constitution the "separation of powers" notion, which finds neither expression nor sanction in the British North America Act. By equating the authority to appoint judges of superior, county and district courts to an exclusive exercise by such judges of judicial powers, provincial legislatures were, in effect, confined in their jurisdiction to granting their appointees nothing more than administrative authority. To this concept, a caveat was attached which, while enlarging it slightly, at once became its principal delimiting factor. Judicial functions might be exercised by provincial appointees provided that such functions conformed, generally, with those discharged by inferior tribunals or courts of summary jurisdiction in 1867. Although this might permit magistrates to-day to exercise wider functions than those carried out by their predecessors of a century ago, their character was stereotyped by the social needs and imaginative powers of legislators at the time of Confederation. To validate the work of the Public Service Commission in the *Martineau* case[10] it was necessary to discover its ancestor in the pre-Confederation era. And to sanction the new authority granted the Family Court in the *Reference re the Adoption Act*,[11] it was necessary to trace its basic jurisdiction back to the magistrates and justices of the peace under the poor law system in the time of Elizabeth. The result was to threaten the growth of new judicial functions in the provincial field. Unless they were administrative in character or could be associated with the ancient practices of inferior tribunals, such functions were beyond the authority of the provinces to vest in their agencies or officers. Although their power to deal substantively with the subject matter might be undisputed under the heads of section 92 of the British North America Act, the provinces might very well lack the necessary authority to implement a policy through the instrumentality of their own appointees.

A growing awareness of the necessity to regulate the increasingly complex economic life of the nation served to avoid many of the logical difficulties that would follow from the restrictions placed upon provincial administrative powers. Out of head 14 of section 92, "Property and Civil Rights in the Province", stemmed the greatest number of statutes designed to effect economic and social controls. These policies were, in many cases, premised upon the establishment by the Province of tribunals,

[10] *Supra*, at pp. 131 *et seq.*
[11] *Supra*, at p. 419.

the functions of which varied widely. In practically all instances, they were sanctioned by the courts on the basis that their functions were purely administrative rather than judicial. Public utility boards,[12] a milk control board,[13] a gas conservation board,[14] workmen's compensation boards,[15] committees of professional societies,[16] and industrial standards boards[17] have all been held to discharge administrative functions. In no case could it be said that they were functions discharged by inferior tribunals, by magistrates or justices of the peace in 1867. For the most part, the objectives of these statutes were wholly alien to the Fathers of Confederation. On the other hand, in at least one instance, that of workmen's compensation, the payment of an award for damages suffered by employees was a function performed by superior courts in 1867. Under the Workmen's Compensation Acts, however, it was held that the provincial boards were primarily charged, not with the duty of adjudicating as between the rights of disputants, but rather with administering an insurance fund, which could be described as a non-judicial act.[18]

Since it was difficult if not impossible to discover a relationship between many of the modern functions of government and the functions of government eighty years before, resort was had to an artificial principle of characterization. Although of some validity in analyzing the procedural formalities that accompanied the function and in proceeding with judicial review for the purpose of determining whether a writ of certiorari, prohibition or mandamus lay, it was a principle entirely extraneous to the constitutional problem.[19] This practice appears to have stemmed from Lord Sankey's statement concerning the judicial powers of the Commonwealth of Australia.[20] In interpreting sections 71

[12] See *City of Winnipeg* v. *Winnipeg Electric Railway Co.* (1920), 54 D.L.R. 445; *Northwestern Utilities, Ltd.* v. *Edmonton*, [1929] S.C.R. 186.

[13] *Board of Public Utilities* v. *Model Dairies, Ltd.*, [1937] 1 D.L.R. 96.

[14] *Spooner Oils, Ltd.* v. *Turner Valley Gas Conservation Board*, [1932] 4 D.L.R. 750.

[15] *Tremblay* v. *Kowhanko* (1920), 51 D.L.R. 174; *Attorney General of Quebec* v. *Slanec & Grimstead*, [1933] 2 D.L.R. 289.

[16] *Hunt* v. *College of Physicians and Surgeons*, [1925] 3 W.W.R. 758; *Re Ashby*, [1934] O.R. 421.

[17] *Ontario Boys' Wear & Tolton* v. *Advisory Committee*, [1944] S.C.R. 347; *Hughes* v. *The King*, [1947] 2 W.W.R. 684.

[18] *See* John Willis, Section 96 of the British North America Act, *op cit.*, at pp. 540-541; D. M. Gordon, Note on *Attorney General of Quebec* v. *Slanec & Grimstead, supra* (1933), 11 Can. Bar Rev. 510.

[19] The characterization of functions for procedural purposes has raised countless difficulties. See J. Finkleman, Separation of Powers: A Study in Administrative Law (1936), 1 Univ. Tor. L. Journ. 313.

[20] *Shell Company of Australia* v. *Federal Commissioner of Taxation*, [1931] A.C. 275.

and 72 of the Commonwealth of Australia Constitution Act, 1900, in so far as they restricted the authority of the states to invest its appointees with "judicial powers", the Privy Council enunciated six negative propositions to determine whether a tribunal was in fact a court. It was said:

> 1. A tribunal is not necessarily a court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body.

Actually, these tests were not strictly applicable to the Canadian constitution since the restrictive criteria of the Australian constitution are based upon the exercise of judicial powers, these being within the exclusive jurisdiction of the federal government. Although no reference to "judicial" as distinguished from "administrative" powers is made in the British North America Act, they seemed relevant to an interpretation of section 96 since they referred to the distinguishing features of "Courts", and so they were applied in a number of subsequent Canadian decisions.[21] But all of these criteria being negative in expression, and none of them being regarded as decisive for the purpose of determining whether the tribunal meeting all or any of them falls within the scope of section 96, they were of limited value to the draughtsman and interpreters of provincial administrative statutes. This reference to the Australian constitution, coupled with the statement of Lord Atkin in *Toronto* v. *York Township*[22] that any attempt to give provincial appointees judicial authority must fail, resulted in considerable uncertainty as to the scope and effect of section 96. In the Ontario Court of Appeal, Rowell C.J.O. had said in *Re Toronto* v. *York Township*:[23]

> (1) that the Province is competent to create and appoint an administrative tribunal, and to confer upon it all the powers necessary to enable it to discharge effectively the administrative duties imposed upon it; and

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[21] See *Spooner Oils, Ltd.* v. *Turner Valley Gas Conservation Board*, [1932] 2 W.W.R. 461; [1932] 3 W.W.R. 477; *Rex ex rel. Stamford* v. *McKeown et al.*, [1934] O.R. 662; *O'Connor* v. *Waldron*, [1935] 1 D.L.R. 260; *Bartley & Co.* v. *Russell*, [1935] 2 W.W.R. 64; *Kerr* v. *Wiens*, [1937] 2 D.L.R. 743; *Re Toronto and York*, [1937] O.R. 177; *Dartmouth* v. *Roman Catholic Episcopal Corp. of Halifax*, [1940] 2 D.L.R. 309; *North American Life Assurance Co.* v. *McLean*, [1941] 1 W.W.R. 430; *Grimshaw Bros.* v. *York Township*, [1942] O.R. 582; *Giroux* v. *Maheux*, [1947] Que. K.B. 163.

[22] *Supra*, at p. 427.

[23] [1937] O.R. 177, at p. 191.

> (2) the Province is not competent to confer upon a tribunal created and appointed by it power to determine purely judicial questions such as are normally determined by Courts of Justice.

When the Privy Council reviewed the case on appeal, Lord Atkin agreed with Rowell C.J.O. in holding certain of the powers confided in the Ontario Municipal Board *ultra vires* because

> whatever be the definition given to Court of Justice, or judicial power, the sections in question do purport to clothe the Board with the functions of a Court, and to vest in it judicial powers. . . . So far as legislation has purported to give it judicial authority that attempt must fail. . . . The result is that such parts of the Act as purport to vest in the Board the functions of a Court have no effect.[24]

The interpretation of section 96 in terms of judicial and administrative functions constituted a marked departure from the ordinary rules of statutory interpretation; but, in addition, it resulted in a deviation from the constitutional interpretation that had been applied by a vast number of courts for more than sixty years. A long line of decisions had already sanctioned the exercise of judicial functions by provincial officers, and the words of the section could not reasonably be extended to exclude all such functions from the provincial sphere.[25] But following *Toronto* v. *York Township*,[26] a number of courts applied the broad test of the "judicial function" to determine whether a provincially appointed tribunal had been properly constituted. In *Reference re The Adoption Act*,[27] Duff C.J.C. steered away from this criterion and interpreted section 96 by an historical approach to the functions of justices of the peace and other

[24] [1938] A.C. 415, at p. 427.

[25] See *Regina* v. *Coote* (1873), L.R. 4 P.C. 599 (fire marshals); *Ganong* v. *Bailey* (1877), 1 Pugs. & Burb. 324 (small debts court); *Regina* v. *Bush* (1888), 15 Ont. Rep. 398 (justices of the peace); *Burk* v. *Tunstall* (1890), 2 B.C.R. 12 (mining court); *In re Small Debts Act* (1896), 5 B.C.R. 246 (small debt jurisdiction); *Polson Iron Works* v. *Munns* (1915), 24 D.L.R. 18 (Master in Chambers); *Winnipeg Electric Railway Co.* v. *Winnipeg* (1916), 30 D.L.R. 159 (public utilities commissioner); *Re Small Debts Recovery Act* (1917), 37 D.L.R. 170 (jurisdiction of justices over small debts); *Re Toronto Railway Company and Toronto* (1918), 46 D.L.R. 547 (Ontario Railway and Municipal Board); *Tremblay* v. *Kowhanko* (1920), 51 D.L.R. 174 (Manitoba Workmen's Compensation Act); *Re Marcella Smith*, [1925] 2 D.L.R. 556 (Land Titles Registrar); *Hunt* v. *College of Physicians and Surgeons*, [1925] 3 W.W.R. 758 (discipline committee of professional society); *Spooner Oils Ltd.* v. *Turner Valley Gas Conservation Board*, [1931] 3 W.W.R. 477 (Gas Conservation Board); *O. Martineau & Sons Ltd.* v. *City of Montreal*, [1932] A.C. 133 (public service commission: compensation); *Attorney General of Quebec* v. *Slanec & Grimstead*, [1933] 2 D.L.R. 289 (Quebec Workmen's Compensation Board); *Re Ashby*, [1934] O.R. 421 (Board of Examiners in Optometry for Ontario); *Board of Public Utility Commissioners* v. *Model Dairies, Ltd.*, [1936] 3 W.W.R. 601 (public utilities board).

[26] *Supra*.

[27] [1938] S.C.R. 398.

courts of summary jurisdiction as they existed in 1867. In respect of these, the learned Chief Justice stated, "the provinces became endowed with plenary authority under section 92(14)" of the British North America Act.[28] The jurisdiction of inferior courts could not be deemed to have been "fixed forever as it stood at the date of Confederation".[29] So long as the jurisdiction conferred upon provincial appointees "broadly conforms to a type of jurisdiction generally exercised by courts of summary jurisdiction rather than that exercised by Courts within the purview of section 96", whether a judicial function or not, it could be validly exercised by provincial appointees.[30]

In a majority of other decisions that followed, however, the "judicial function" was of prime consideration. Thus, in *North American Life Assurance Company* v. *McLean*,[31] O'Connor J. considered the functions of the Alberta Debt Adjustment Board and concluded that, because in the main they were not "judicial", it was a tribunal validly constituted by the Province. The Debt Adjustment Act, 1932,[32] was considered by the Supreme Court of Canada in *Attorney General for Alberta and Winstanley* v. *Atlas Lumber Company*,[33] on which occasion Davis J. stated[34] that the board "is an administrative body and is not validly constituted to receive what is in fact judicial authority". At the same time, Hudson J. said:[35]

> Normally the administration of justice should be carried on through the established Courts, and the Province although it has been alloted power to legislate in relation to the administration of justice and the right to constitute courts, cannot substitute for the established Courts any other tribunal to exercise judicial functions.

Similar views were expressed by the Ontario Court of Appeal. In *Re York Township By-Law*,[36] Gillanders J.A., referring to *Toronto* v. *York Township*,[37] expressed the view that certain powers of the Ontario Municipal Board were *ultra vires* since they "purported to confer judicial functions rather than administrative duties"; and Fisher J.A. stated that the Privy Council had decided that "to the extent that the Act conferred upon a municipal board judicial powers it was *ultra vires*". Again

[28] *Ibid.*, at p. 414.
[29] *Ibid.*, at p. 418.
[30] *Ibid.*, at p. 421.
[31] [1941] 1 W.W.R. 430, at p. 433.
[32] 1932 Alta., c. 9.
[33] [1941] S.C.R. 87.
[34] *Ibid.*, at p. 105.
[35] *Ibid.*, at p. 109.
[36] [1942] 4 D.L.R. 380, at p. 388.
[37] *Supra.*

dealing with the authority of the Ontario Municipal Board, Roach J.A. in *Waterloo* v. *Kitchener*[38] referred to *Toronto* v. *York Township*[39] and said:

> The relief which the plaintiff seeks is beyond the sphere of the jurisdiction of the Board because it does not come within the scope of the administrative functions of the Board. The matter in issue is strictly judicial . . .

In the field of labour relations, a matter clearly within exclusive provincial jurisdiction,[40] administrative tribunals have always occupied a position of considerable importance. With the exception of Ontario's brief experiment with a Labour Court in 1943 and 1944,[41] all labour relations laws in Canada have been administered extra-judicially. It is not surprising that this should be so, since the field is one that depends to a considerable extent upon expert knowledge not necessarily acquired by experience on the bench or at the bar. It is also a field in which a measure of informality is highly desirable since workers are often unrepresented by counsel and informality itself may make a compromise feasible and practicable where a formal judgment would fail. Speedy disposition of matters in dispute is also of great importance, since labour is a perishable commodity and delay in hearings or in protracted appeals may often destroy the very *res* of litigation. It is significant, too, that the British[42] and American[42A] experience has resulted in the employment of the same species of administrative agency to maintain industrial peace. The use of a provincial tribunal for such purposes was

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[38] [1945] 2 D.L.R. 133.

[39] *Supra.*

[40] See *In re Hours of Work*, [1925] S.C.R. 505; *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396; *Attorney General for Canada* v. *Attorney General of Ontario* (Labour Conventions Case), [1937] A.C. 326; *Tolton Manufacturing Co.* v. *Advisory Committee*, [1943] 3 D.L.R. 474; aff. [1944] S.C.R. 349.

[41] The Labour Court was established by the Collective Bargaining Act, 1943 Ont., c. 4, assented to April 14th, 1943; its jurisdiction was transferred to the Wartime Labour Relations Board established by Dominion Order in Council P.C. 1003, February 17th, 1944, by the Labour Relations Board Act, 1944 Ont., c. 29.

[42] The Conditions of Employment and National Arbitration Tribunal Order, 1940, made under the Defence (General) Regulations, 1939, established the National Arbitration Tribunal having wide powers to settle industrial disputes from a point of view different from that adopted by the courts. See *Rex* v. *National Arbitration Tribunal, Ex parte Horatio Crowther & Co., Ltd.*, [1947] 2 All E.R. 693, *per* Lord Goddard C.J. at p. 696.

[42A] See the National Labour Relations Act, 1935 U.S., c. 372; the Railway Labour Act, 1926 U.S., c. 347; the Fair Labour Standards Act, 1938 U.S., c. 676. Commenting on this aspect of labour relations, Ludwig Teller, author of "The Law Governing Labour Disputes and Collective Bargaining, 1940" in The Requirements of a National Labour Policy (1947), 52 Case & Comment, no. 2, p. 12, at p. 15, said:

upheld in *Hughes* v. *The King*,[43] where Farris C.J.B.C. considered the British Columbia Industrial Conciliation and Arbitration Act, 1947.[44] This Act established a Labour Relations Board and invested it with power to certify trade unions for purposes of collective bargaining and to prohibit certain undesirable practices. In referring to *Toronto* v. *York Township*,[45] the learned Chief Justice said:

> there is no question that the province has jurisdiction to give to the board judicial rights so long as they are not repugnant to the sections of the *B.N.A. Act* above referred to by Lord Atkin [secs. 96, 97, 99, 100].

But this interpretation of *Toronto* v. *York Township* was not generally accepted by Canadian courts and the recent decision of the Judicial Committee in *Labour Relations Board of Saskatchewan* v. *John East Iron Works, Ltd.*[46] has therefore come as a welcome commentary upon the scope of section 96. Its significance lies in the clarification there made of the three cases of *Martineau*,[47] *Toronto* v. *York Township* [48] and *Reference re The Adoption Act*.[49] In interpreting the curial provisions of the British North America Act in a comprehensive and authoritative manner, this latest judgment will limit the extent to which section 96 will hereafter restrict the scope and effective operation of provincial boards and tribunals. It is a decision which affirms the jurisdiction of the provincially established labour relations boards that are now functioning in many parts of Canada. It affects not only provincial legislation in the labour field, but Dominion legislation as well. For under the federal Industrial Relations and Disputes Investigation Act of 1948,[49A] provincially-appointed magistrates are granted authority not only to impose penalties upon parties found guilty of unfair labour practices, but they may order the payment of monetary loss and the rein-

"The judicial function has proved unequal to the task of formulating an adequate labour policy. This has been due, in part, to the individualism of the common law, which the industrial revolution intensified. The doctrine of conspiracy has demonstrated a lack of sufficient substance and content upon which to predicate a meaningful labour policy. Judges have too often lacked expertship and court procedures have been uncentralized and inexpeditious.

"By contrast, the hallmarks of the administrative process are expertship, centralization, and expedition. Especially in the complicated field of labour relations, a knowing approach is indispensable to the drawing of proper lines of right and wrong."

[43] [1947] 2 W.W.R. 684.
[44] 1947 B.C., c. 44.
[45] *Supra*.
[46] [1948] 2 W.W.R. 1055.
[47] [1932] A.C. 113.
[48] [1938] A.C. 415.
[49] [1938] S.C.R. 398.
[49A] 1948 Can., c. 54.

statement of employees discharged contrary to the provisions of the Act, on much the same basis as the Labour Relations Board under the Saskatchewan legislation. Since the Dominion Parliament had so recently endowed provincial appointees with these powers under its own legislation, the Government of Canada was in a somewhat inconsistent position when, in the *Labour Relations Board* case, it opposed the exercise of like powers when granted to provincial appointees by the provinces. Finally, the decision removes the anomaly by which provincial boards administering statutes enacted under section 92 of the British North America Act were enjoined from doing precisely what Dominion boards were allowed to do within the scope of section 91, notwithstanding that the members of neither the Dominion nor the provincial tribunals enjoyed the protection or security of "the pillars of justice" which sections 96 to 100 were designed to be.[50]

II

The case came before the Privy Council by way of an appeal from the Court of Appeal for Saskatchewan[51] which held section 5(e) of the Trade Union Act, 1944,[52] to be *ultra vires* the Legislature of Saskatchewan, "conferring as it does judicial powers exercised by the courts named in section 96"[53] upon the Labour Relations Board, the members of which are appointed by the province. The board consists of seven members appointed by the Lieutenant Governor in Council, who are selected "so that the board shall be equally representative of organized employees and employers, and if the Lieutenant Governor in Council deems it desirable, of the general public".[54] The purpose of the Act appears upon the face of its long title, being "An act respecting

[50] *Per* Lord Atkin in *Toronto* v. *York Township*, *supra*, at p. 426. The anomaly of endowing federally-appointed administrators with powers denied provincial appointees would be especially apparent under the Industrial Relations and Disputes Investigation Act, 1948, Canada, ss. 62 and 63 of which would permit delegation by the provinces of jurisdiction over labour disputes to the Dominion Labour Relations Board established by the Act, while unable to exercise precisely the same jurisdiction through their own officers, though the method and tenure of employment might be identical in each case.

[51] *John East Iron Works, Ltd.* v. *Labour Relations Board of Saskatchewan* (No. 1), [1948] 1 W.W.R. 81; [1948] 1 D.L.R. 652; (No. 2), [1948] 1 W.W.R. 247. The powers of the Labour Relations Board of Saskatchewan under s. 5(e) were first upheld in *Rex ex rel. Wallace* v. *Jacob Shelly*, by B. M. Wakeling P.M., November 21st, 1947, in a written but unreported judgment.

[52] 1944 (2nd Session) Sask., c. 69, as amended by 1945 Sask., c. 108; 1946 Sask., c. 98; 1947 Sask. c. 102.

[53] [1948] 1 W.W.R. at p. 95.

[54] The Trade Union Act, 1944, s. 4(1).

Trade Unions and the Right of Employees to organize in Trade Unions of their own choosing for the Purpose of BargainingCollectively with their Employers". It is sought to accomplish this object in a variety of ways. These include the provisions of section 3 of the Act, which endows employees with the right to organize and join trade unions and to bargain through representatives of their own choosing. For the purpose of securing the process of collective bargaining, section 5 gives the Labour Relations Board power (a) to ascertain the appropriate unit of employees for purposes of collective bargaining; (b) to determine the trade union that employees desire should represent them in collective bargaining procedures; and (c) to require employers to bargain collectively and in good faith.

For the purpose of assuring employees the right to choose their bargaining representatives freely and without interference, section 8(1) of the Act enjoins certain conduct on the part of employers and employers' agents, such conduct being termed an "unfair labour practice". These practices included (a) interference, restraint or coercion of any employee in the exercise of his rights under the Act; (b) discrimination or interference in the formation or administration of a labour organization; (c) failure or refusal to bargain collectively with a trade union representing a majority of the employees of the employer, so designated by the Board; (d) refusal to deal with grievances during working hours; (e) discrimination in the hiring, tenure or terms of employment, or the use of intimidation or coercion of any kind "with a view to encouraging or discouraging membership in or activity in or for a labour organization or participation of any kind in any proceeding" under the Act; (f) imposition of conditions requiring an employee to abstain from joining or assisting a trade union; (g) interference in the selection by employees of a trade union; (h) maintenance of any system of industrial espionage or the employment of spies; (i) threats to shut down or move a plant in the course of a labour dispute; and (j) the declaration of a lockout or any change in terms or conditions of work while an application is pending before the Board, or a matter is pending before a board of conciliation under the Act. Unfair labour practices on the part of employees or persons acting on behalf of a labour organization are defined by section 8(2), these including coercion or intimidation of any kind with a view to encouraging or discouraging membership in or activity in or for a labour organization, or counselling participation in a strike

to commence while an application is pending before the Labour Relations Board or a board of conciliation.

In addition to those powers already described, the Board is granted authority by paragraph (d) of section 5 to require any person to refrain from violations of the Act or from engaging in any unfair labour practice. By paragraph (e), which was the provision impeached in the Privy Council, the Board is empowered to require an employer to reinstate an employee discharged contrary to the provisions of the Act, and to pay to him the monetary loss suffered by reason of such discharge. The Board may also order the disestablishment of a company-dominated labour organization, and is free to rescind or amend its orders or decisions.[55] Thus the Board constituted under the Saskatchewan legislation, as under the labour relations laws of other jurisdictions, has three classes of function. First, it is required to regulate the basis upon which collective employer-employee relations are to be premised by determining appropriate units of employees and by certifying agencies to carry on collective bargaining on behalf of the parties concerned.[56] Secondly, the Board carries on preventive functions designed to restrain undesirable labour practices.[57] And, thirdly, it carries on positive functions for the execution of specific policies enunciated by the Act.[58] All these functions are directed, however, not to the mere adjustment of the rights of the individual parties before the Board *inter se*. On the contrary, they are designed to achieve a specific legislative policy having public rather than private implications and significance. The private employer-employee relationship may have given rise to the problems to which the legislation seeks a solution, but the solution itself is not based upon that relationship. Instead, it proceeds from the necessity of maintaining industrial peace which is viewed as a matter of public rather than private concern.

Although the Labour Relations Board is required to make all orders and decisions concerning matters within the scope of the Act, these are filed in the office of the Registrar of the Court of King's Bench and, pursuant to section 9, they become enforceable as judgments or orders of that court, on the general principle of homologation. The Board is free to determine its own procedures[59] subject to an adherence to the principles of

[55] *Ibid.*, s. 5(f) and (g).
[56] *Ibid.*, s. 5(a), (b) and (c).
[57] *Ibid.*, s. 5(d).
[58] *Ibid.*, s. 5(e).
[59] *Ibid.*, ss. 13, 14, 14a.

"natural justice". No appeal may be taken from the orders or decisions of the Board and, although judicial review of its decisions by way of the prerogative writs and otherwise is nominally excluded,[60] a considerable number of orders and decisions of the Board have been so reviewed,[61] of which the appeal to the Judicial Committee was one.

The Act also deals with the status of trade unions and, by providing that a trade union shall not be deemed to be unlawful by reason only that one or more of its objects are in restraint of trade, the law of the United Kingdom as enunciated in part by the Trade Union Act, 1871,[62] was introduced in Saskatchewan. Similarly, the Trade Union Act[63] provides that an act done by two or more members of a trade union, if done in contemplation or furtherance of a trade dispute, shall not be actionable unless the act would be actionable if done without any agreement or combination, thus introducing provisions similar to section 1 of the Trade Disputes Act, 1906[64] (amending the Conspiracy and Protection of Property Act, 1875) of the United Kingdom.[65] As in the case of the Trade Union Act, 1871, the Saskatchewan Trade Union Act provides that a trade union shall not be made a party to any action in any court of law.[66] Similarly, collective bargaining agreements may not be made the subject of an action in any court.[67]

Special statutory terms are provided for collective bargaining agreements, these being the voluntary revocable check-off for trade union dues,[68] a one-year duration period for collective bargaining agreements[69] and a provision requiring trade union members to maintain their membership in the appropriate trade union, and requiring all new employees to become members within thirty days after the commencement of their employment.[70]

The provisions of the Act thus fall within two broad categories. The first class relates to the functions of the Labour Relations Board in determining the trade union representing a majority of employees in any appropriate unit and in guaranteeing freedom of association in trade unions by preventing unfair

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[60] *Ibid.*, s. 15.
[61] See footnote 91, *infra*.
[62] 34 & 35 Vict., c. 31.
[63] The Trade Union Act, 1944, s. 19.
[64] 6 Edw. VII, c. 46.
[65] The Trade Union Act, 1944, s. 20.
[66] *Ibid.*, s. 21.
[67] *Ibid.*, s. 22.
[68] *Ibid.*, s. 23.
[69] *Ibid.*, s. 24.
[70] *Ibid.*, s. 25.

labour practices by employers and employees. These provisions are modelled upon the National Labour Relations Act, 1935, of the United States[71] and are similar to the National Wartime Labour Relations Regulations, P.C. 1003, of Canada[72] and its successor, the Industrial Relations and Disputes Investigation Act, 1948, which have similar objects. The second class of provisions relates to the status of trade unions under the law and, in this respect, the Trade Union Act applies the law which has been in force in the United Kingdom for a considerable number of years.[72A]

In this particular case, applications were filed with the Labour Relations Board by the United Steelworkers of America, Local 3493, alleging that the John East Iron Works, Limited, had discharged from its employment six of its employees because they were members of and/or active in a trade union, and it was urged that the discharge of each constituted an unfair labour practice within the meaning of section 8(1)(e) of the Trade Union Act. The trade union requested the Labour Relations Board to make an order in respect of each of the employees pursuant to clause (e) of section 5 of the Act, requiring the company to reinstate each in his employment and to pay to each the monetary loss suffered by reason of his discharge.

The Labour Relations Board received evidence adduced by the trade union and the company, considered written representations and heard counsel for the parties, and finally ordered the company to reinstate five of the employees and to pay to each the sum of $200.80, being the monetary loss suffered by reason of the dismissal. Certified copies of the orders were filed in the office of the Registrar of the Court of King's Bench and reasons for the orders were written by the Chairman on behalf of the Board and delivered to the parties. Soon after, the company moved in the Court of Appeal for an order that writs of certiorari issue quashing the orders of the Board, and a judgment of the court delivered by Martin C.J.S. so ordered.

The learned Chief Justice was of opinion that the Labour Relations Board is primarily an administrative body and that, to that extent, its constitution was within provincial powers. He then stated that the courts referred to in section 96 of the British North America Act, and particularly the Saskatchewan Court of King's Bench, "have always had jurisdiction in

[71] 1935 U.S. Statutes at Large, c. 372.
[72] Dated February 17th, 1944.
[72A] Sections 16 and 17 deal with conciliation proceedings which are outside the scope of the present inquiry.

connection with the enforcement of contracts of hiring and awarding damages for the breaches thereof". His Lordship then equated the remedy under paragraph (e) of section 5 to the making of an order for specific performance of a contract of personal service and the awarding of damages for such breach, and he held that the Legislature, by enacting paragraph (e) of section 5 and empowering the Labour Relations Board to require an employer to reinstate an employee and to pay the employee his monetary loss, conferred upon the Board judicial functions which are exercised by the courts, the judges of which could only be appointed by the Governor General under section 96 of the British North America Act. Paragraph (e) of section 5 was therefore *ultra vires*.

III

In reversing the Saskatchewan Court of Appeal, the Judicial Committee[73] swept the shibboleth of the "judicial function" from the interpretation of section 96 of the British North America Act. The solution to the question of whether the provincial board has been validly constituted "is not to be found by answering the question whether in certain of its functions [it] exercises judicial power", said Lord Simonds. "It may do so and yet have constitutional validity." Notwithstanding earlier doubts, he said, two propositions must be regarded as authoritative:

> (1) that it is not only Courts which are designated 'superior', or 'district' or 'county' Courts that are within the ambit of [sections 96, 97, 98, 99 and 100 of the British North America Act]; and
>
> (2) that not all tribunals which exercise judicial functions are within their ambit.

The Judicial Committee first proposed a double question for determination in cases involving section 96:

> (1) does the board exercise judicial power? and
>
> (2) if so, is the board, in the exercise of that power a tribunal analogous to a superior, county or district court?

But although the learned Law Lords asked themselves this double question, they found that it was unnecessary to answer the first portion of it since they came to the conclusion that, in any event, the Board in this case was not a superior, county or district court, or a court analogous thereto. The proper course to follow in making the required determinations, they stated,

[73] Consisting of Lords Porter, Simonds, Oaksey, Morton of Henryton and MacDermott, Lord Simonds delivering the judgment of the Board.

is to examine the "constitution and functions" of the tribunal in question. If it is not a superior, county or district court, or a court analogous thereto, there is an end of the matter: it is not necessary to determine at any stage whether the authority exercised by the tribunal is "judicial" or otherwise.

It is not surprising that even the learned Law Lords should have chosen to avoid an incursion into the wilderness of the conflicting decisions on the question of "judicial functions",[74] however useful that might have been. Instead, they were content to refer to the "broad features" of judicial power described in *Huddart, Parker & Co. Proprietary, Ltd.* v. *Moorehead*[75] and approved by the Judicial Committee in *Shell Company of Australia, Ltd.* v. *Federal Commissioner of Taxation.*[76] These principles were enunciated negatively, however, and they were therefore of limited value in decisively testing the administrative or judicial character of any function. In the *Labour Relations Board* case the Judicial Committee indicates some of the difficulties inherent in making such a determination even by the application of positive tests, saying:

> there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, [and] any combination of such features will fail to establish a judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertain facts but by consideration of policy also.

To facilitate the determination necessary to a proper application of section 96, Lord Simonds prescribes six tests for the determination of whether the provincially-appointed board is a superior, county or district court, or a tribunal analogous thereto.

First, does the tribunal decide an issue between parties to a suit, with whom alone it rests to initiate or defend or compromise the proceedings?

If such an issue, and nothing more is decided, the proceeding may be regarded as analogous to that of one of the courts named in section 96. If other issues are involved, such as relate to matters of general policy of wider application, the process is not likely to be regarded as analogous to that of a court. Under the Trade Union Act, any trade union, employer, employers' association or any person directly concerned, may

[74] See J. Finkelman, Separation of Powers: A Study in Administrative Law (1936), 1 Univ. Tor. Law Journ. 313, especially pp. 321 *et seq.*
[75] (1909), 8 C.L.R. 330, at p. 357.
[76] [1931] A.C. 275.

apply to the Board for certain relief. In the case considered by the Judicial Committee, a trade union had applied for the reinstatement of the employees who were discharged for engaging in trade union activities. The obvious distinction between this procedure and curial procedures, as the Judicial Committee indicated, is that "while the order relates solely to the relief to be given to an individual, yet the controversy may be raised by others without his assent and, it may be, against his will, for the solution of some far-reaching industrial conflict". This type of procedure was regarded as "indeed remote from those which at the time of Confederation occupied the Superior or District or County Courts of Upper Canada", and could not be said to constitute an infringement of section 96. The aspect from which the remedy is to be considered is therefore a significant test of the impeached function.

Secondly, does the tribunal interpret contracts and enforce contractual rights?

If contractual obligations constitute the subject-matter of the tribunal's adjudications, its functions may be regarded as analogous to those of a superior, county or district court. But in the *Labour Relations Board* case contractual rights and obligations could be enforced only outside the forum prescribed by the legislation. The contract of employment might justify reinstatement and payment of monetary loss in case of dismissal for trade union activity, or it might not. The Act, as Lord Simonds indicated, was not concerned with contractual relationships in any aspect. Rather, he said, these sanctions which the Board may impose constitute a "means by which labour practices regarded as unfair are frustrated and the policy of collective bargaining as a road to industrial peace is secured".[77] Reinforcing the opinion of Duff C.J.C. on the effect of an approach to a problem which differs from that traditionally taken by the courts,[78] Lord Simonds stated:

> It is in the light of this new conception of industrial relations that the question to be determined by the Board must be viewed, and, even if the issue so raised can be regarded as a justiciable one, it finds no analogy in those issues which were familiar to the courts of 1867.

Since the Trade Union Act, like other Canadian collective bargaining legislation, was modelled upon the American National

[77] Commenting upon the decision of the Saskatchewan Court of Appeal, the editors of the Dominion Law Reports observed: "It is a permissible contention that the sanction of sec. 5(e) is not of substantive significance in itself but as a vindication of the unfair practices listed elsewhere in the Act", [1948] 1 D.L.R. 652, at p. 653.

[78] In *Reference re The Adoption Act, supra*, at p. 419.

Labour Relations Act,[79] it is interesting to note that a similar view was expressed by the Supreme Court of the United States. In the leading case of *National Labour Relations Board* v. *Jones and Laughlin Steel Corporation*,[80] Chief Justice Hughes not only recognized collective bargaining as "an essential condition of industrial peace"[81] but also stated that under the American Act the proceeding for securing this end, far from being an ordinary suit at law, was a statutory proceeding unknown to the common law. "Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement", he said.[82]

Thirdly, is it desirable that the subject-matter in question should be adjudicated upon only by members of the bar appointed by the Governor General and holding office during good behaviour in accordance with sections 96 to 100 of the British North America Act?

This constitutes not only a new test for the interpretation of section 96, but an unorthodox though highly practical principle for the interpretation of a written constitution. Courts have generally taken the view that the result of any statutory interpretation to which they might give expression is a matter of indifference to the judiciary even though "an absurdity or manifest injustice" should result from an adherence to the literal meaning of words used.[83] Theoretically, the wisdom of a judicial result is regarded as a matter for the legislature to consider and judge if it thinks proper. The consequences of any particular interpretation are of concern to the courts only when a statutory provision is capable of more than one meaning in which case certain established presumptions are raised and applied.[84] Although the "desirability" of a particular interpretation may be implied in the result, it is not ordinarily a criterion to which the judiciary gives expression. The development of the constitution of a growing nation, however, may require precisely such an approach to the statute which created it.[85] In any event, it is a new departure for a judge to state, as Lord Simonds has, that

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[79] *Supra.*
[80] (1937), 301 U.S. 1.
[81] *Ibid.*, at p. 42.
[82] *Ibid.*, at pp. 48-49.
[83] See *Abley* v. *Dale* (1851), 20 L.J.C.P. 233, *per* Jervis C.J. at p. 235; Craies on Statute Law (4th ed.), pp. 85 *et seq.*
[84] See Maxwell on Interpretation of Statutes (9th ed.), pp. 85 *et seq.*
[85] See W. P. M. Kennedy, The British North America Act: Past and Future (1937), 15 Can. Bar Rev. 495; Vincent C. MacDonald, The Constitution in a Changing World (1948), 26 Can. Bar Rev. 21, at p. 24.

> It is legitimate to ask whether, if trade unions had in 1867 been recognized by law, if collective bargaining had then been the accepted postulate of industrial peace, if, in a word, the economic and social outlook had been the same in 1867 as it became in 1944, it would not have been expedient to establish just such a specialized tribunal as is provided by section 4 of the Act. It is as good a test as another of 'analogy' to ask whether the subject matter of the assumed justiciable issue makes it desirable that the judges should have the same qualifications as those which distinguish judges of superior or other Courts.

Although Lord Simonds prefaced his "desirability test" by a reference to the legislative intent as it would have existed in 1867 had social and economic conditions then coincided with conditions as they exist in Canada to-day, it can not be seriously suggested that the learned Law Lord was simply re-phrasing the first and most fundamental rule of interpretation that a statute is to be expounded "according to the intent of them that made it".[86] The test is a test based upon the facts as they exist, not at the time that the statute was enacted, but rather at the time that the statute is being interpreted. Thus, Lord Simonds states the reasons why the Judicial Committee believes it desirable that disputes arising out of labour relations should be resolved by a body that is not a court within the meaning of section 96:

> For wide experience has shown that, though an independent president of the tribunal may in certain cases be advisable, it is essential that its other members should bring an experience and knowledge acquired extra-judicially to the solution of their problems.

The test is an empirical one, based upon conditions as they exist from time to time, and, if requiring some precedent, it can best be found in Lord Sankey's "growing tree doctrine" to which expression was given in the *Persons* case.[87]

Fourthly, has the Board power to appeal in its own name from judgments affecting its orders and decisions?

A finding to the effect that a provincially-constituted board is primarily administrative in nature is not in itself sufficient to justify the exercise of all of the judicial functions with which it might be charged. This was the view of the Judicial Committee in *Toronto* v. *York Township*,[88] and it was reiterated in the *Labour*

[86] Maxwell, *op. cit.*, p. 1 and footnote (b). Whatever intentions existed in the minds of the framers of the British North America Act, these can not reasonably be imputed to the Imperial Parliament which enacted it. Furthermore, it is scarcely realistic to postulate a set of circumstances of which the framers of the constitution could not possibly be aware and upon such a fiction to found a series of constructive intentions that should form the basis of the jurisprudence of constitutional interpretation.

[87] *Edward, Henrietta Muir et al.* v. *Attorney General for Canada*, [1930] A.C. 124.

[88] *Supra.*

Relations Board case. However, for the purpose of determining analogies between courts encompassed by section 96 and tribunals whose jurisdiction may be impeached, Lord Simonds suggests a further test of the status of the tribunal. Courts have never enjoyed the right to appeal from judgments in which they participated or which affected their jurisdiction. It is generally otherwise, however, with administrative tribunals. The Labour Relations Board was given express statutory authority to appeal in its own name from the judgments or orders of any court affecting its own orders or decisions.[89] Upon this right the Judicial Committee founded one of the distinctions between a tribunal, the members of which may be appointed by the Province, and a court within the meaning of section 96. Since, apart altogether from express statutory enactment, it was held by the Supreme Court of Canada that this right to appeal was inherent in the constitution and authority of the Board,[90] and since the subsection referred to by the Privy Council was never, in fact, proclaimed, the right of appeal is undoubtedly one of which other administrative tribunals might avail themselves. It is doubtful whether, in these circumstances, this will constitute a very satisfactory test of the existence of a court within the meaning of section 96.

Fifthly, the abolition of judicial review of its decisions does not constitute a board a "superior" court within the meaning of section 96.

The Trade Union Act purports to prohibit appeals from decisions of the Board and to rule out all judicial review by means of the prerogative writs and otherwise, by a clause, the incorporation of which has become standard procedure in many jurisdictions.[91] This has never meant that decisions of the Board could not be reviewed where questions of jurisdiction were in issue, for it is well-established that in such circumstances the superior courts enjoy an inherent authority to restrain the unauthorized acts of inferior tribunals. The Judicial Committee has pointed out, however, that a provision purporting to remove a tribunal's decisions from the scope of ordinary judicial review

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[89] The Trade Union Act, 1944, s. 10(3), added by 1947 Sask., c. 102, s. 5.

[90] *Labour Relations Board* v. *Dominion Fire Brick and Clay Products, Ltd.*, [1947] S.C.R. 336.

[91] S. 15: "There shall be no appeal from an order or decision of the board under this Act, and the board shall have full power to determine any question of fact necessary to its jurisdiction, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari*, *mandamus*, prohibition, injunction or other proceeding whatsoever."

does not have the effect of raising that tribunal to the status of a superior court. The legislative intent is of paramount importance even in the jurisdictional sphere, for according to Lord Simonds,

> the same considerations which make it expedient to set up a specialized tribunal may make it inexpedient that that tribunal's decisions should be reviewed by an ordinary court.

By this statement, however, the Judicial Committee did not propose to detract from the views it expressed in the leading cases of *Colonial Bank of Australia* v. *Willan*[92] and *Rex* v. *Nat Bell Liquors, Ltd.*,[93] Lord Simonds specifically stating that such an argument would not avail if a tribunal "purported to exercise a jurisdiction wider than that specifically entrusted to it by the Act".

Sixthly, does the jurisdiction conferred by the statute broadly conform to the type of jurisdiction exercised by the superior, county or districts courts in 1867?

This last test enunciated by Lord Simonds is by far the most valuable of the six which he propounds in his judgment. It is a test based upon a historical approach to the interpretation of the constitution, and it is one that has the advantage of being capable of proof with a reasonable degree of certainty. If the subject-matter dealt with by the tribunal whose jurisdiction is questioned is of a nature broadly conforming to that exercised by superior, county or district courts in 1867, then it is beyond the authority of provincially-appointed administrators. If, however, it is a new jurisdiction that has been created, the Province is competent to invest its own appointees with authority to deal with it. The importance of this view lies in the enlarged scope it makes possible for the growth of provincial administrative tribunals. The new functions and increased responsibilities that governments are required to assume will now find appropriate instruments for their discharge on the provincial level, as well as on the federal level.

In coming to this conclusion, the Judicial Committee vastly broadened the approach to the problem taken by Duff C.J.C. in *Reference re the Adoption Act*.[94] As Lord Simonds indicated, the learned Chief Justice had posed the following question:

> Does the jurisdiction conferred upon magistrates under these statutes broadly conform to a type of jurisdiction generally exercisable by courts

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[92] (1874), L.R. 5 P.C. 417.
[93] [1922] 2 A.C. 128.
[94] *Supra.*

of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of section 96?

Although the answer he gave to this question had enabled Duff C.J.C., in 1938, to sanction the enlarged functions and the new approach to domestic relations envisaged in the statutes before him, it had lodged the growing point for new administrative tribunals almost exclusively in the Dominion Parliament. The scope for the growth of inferior tribunals exercising judicial functions in the provinces, which had been stunted by the interpretation of *Martineau's* case[95] and in *Toronto* v. *York Township*,[96] was not enlarged. It remained untouched.

But Lord Simonds went farther and made specific reference to these two decisions as well. In so doing, he confirmed the views of Duff C.J.C. upon *Martineau* v. *City of Montreal* and *Toronto* v. *York Township*. Concerning *Martineau's* case, Lord Simonds stated that it could not form "the basis for the proposition that it is incompetent for provincial legislatures to legislate for the appointment of any officer of any provincial court exercising other than ministerial functions". Since, on its facts, the case related neither to a court nor to a tribunal of a nature different from those existing in 1867, it could have no bearing upon provincial boards exercising new functions unknown at the time of Confederation.

Likewise, Lord Simonds indicated the inapplicability of *Toronto* v. *York Township* to a case in which a court is directly faced with the problem of determining whether a given judicial function can be exercised by a provincial appointee. It is suggested that in that case Lord Atkin assumed that *any* tribunal exercising judicial power was *ipso facto* a court within the meaning of section 96. Since its *ratio decidendi* dealt only with administrative functions, its value as an authority was never great. In view of the Judicial Committee's decision in the *Labour Relations Board* case it will be vastly reduced.

The infusion of flexibility into the interpretation of section 96 is the result of the Judicial Committee's recent decision in *Labour Relations Board of Saskatchewan* v. *John East Iron Works, Ltd.* It has clarified some uncertainties and resolved a number of inconsistencies in the interpretation of this section. Its result will doubtless be to raise, in some measure, the status of the inevitably increasing number of provincially devised administrative tribunals and to enable them to meet more effectively economic and social problems which in 1867 could not be foreseen.

[95] *Supra.*
[96] *Supra.*