Certiorari to Labour Boards: The Apparent Futility of Privative Clauses

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I

Less than a decade has passed since compulsory collective bargaining legislation was introduced into Canada.[1] During this period such legislation has become part of the law of Canada[2] and of each of its ten provinces.[3] The presuppositions of this legislation in promotion of industrial peace were grounded on unhappy experiences in labour relations (especially in relation to problems of union recognition) and on the faith that a great deal of existing industrial strife would be dissolved by a legislative solution making compulsory negotiation the necessary consequence of a prior determination of a trade union's representative character. The problems involved in the administration of this policy induced general reliance on a bi-partisan board, headed by an independent chairman, as the agency best suited to make it work. This choice of a non-curial tribunal, composed of persons representing labour and management thinking, was fortified in the case of Canada[4] and of eight of the provinces[5] by the introduction of privative

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[1] The first effective statute was the Collective Bargaining Act, 1943 (Ont.), c. 4, which confided administration to the Supreme Court of Ontario. It was repealed the following year when labour relations in Canada were brought under federal wartime control.

[2] Industrial Relations and Disputes Investigation Act, 1948 (Can.), c. 54.

[3] Alberta Labour Act, 1947 (Alta.), c. 8, as amended, Part V; Industrial Conciliation and Arbitration Act, R.S.B.C., 1948, c. 155; Manitoba Labor Relations Act, 1948 (Man.), c. 27, as amended; Labour Relations Act, 1949 (N.B.), c. 20, as amended; Labour Relations Act, 1950 (Nfld.), c. 15, as amended; Trade Union Act, 1947 (N.S.), c. 3; Labour Relations Act, R.S.O., 1950, c. 194; Trade Union Act, R.S.P.E.I., 1951, c. 164; Labour Relations Act, R.S.Q., 1941, c. 162A, as amended; Trade Union Act, 1944 (Sask. 2nd sess.), c. 69, as amended.

[4] Dominion Act, *supra*, footnote 2, s. 61(1)(2).

[5] B.C. Act, s. 58; Man. Act, s. 59(1)(2); N.B. Act, s. 55(1)(2); Nfld. Act, s. 61(1)(2); N.S. Act, s. 58; Ont. Act, ss. 68 and 69; Que. Act, s. 41a; Sask. Act, s. 15.

clauses which, in varying terms, purported to exclude review of board determinations by the courts. The purpose of this article is to examine the extent to which the provincial courts have "flouted" this expression of a legislative policy.

The privative clause most commonly used is the one in the Canadian Act and in the Acts of British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia and Ontario. The Canadian provision, which was the model for the comparable provisions in the other provinces, reads as follows:

> 61. (1) If in any proceeding before the Board a question arises under this Act as to whether
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> (a) a person is an employer or employee;
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> (b) an organization or association is an employers' organization or a trade union;
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> (c) in any case a collective agreement has been entered into and the terms thereof and the persons who are parties to or are bound by the collective agreement or on whose behalf the collective agreement was entered into;
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> (d) a collective agreement is by its terms in full force and effect;
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> (e) any party to collective bargaining has failed to comply with paragraph (a) of section fourteen or with paragraph (a) of section fifteen of this Act;
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> (f) a group of employees is a unit appropriate for collective bargaining;
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> (g) an employee belongs to a craft or group exercising technical skills; or
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> (h) a person is a member in good standing of a trade union;
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> the Board shall decide the question and its decision shall be final and conclusive for all the purposes of this Act.[6]

Ontario has reinforced this privative provision (section 68 of its Labour Relations Act) by a further clause which states:[7]

> 69. 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.

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[6] The words "under this Act" at the beginning of s. 61(1) and the words "for all the purposes of this Act" at the end of this subsection in the Dominion Act do not appear in the Ontario statute but they do appear in the Acts of British Columbia, Manitoba, New Brunswick and Newfoundland. In Nova Scotia, only the words "under this Act" appear. The inclusion of such words was considered to modify the effect of the privative clause in *Re Lunenberg Sea Products Ltd., Re Zwicker*, [1947] 3 D.L.R. 195.

[7] This clause was introduced into Ontario's labour legislation in weaker form in 1944 (Ont.), c. 29, s. 11. It was amended in 1948 (Ont.), c. 51, s. 5, and assumed its present form in 1950 (Ont.), c. 34, s. 69.

In Quebec, section 41a of its Labour Relations Act stipulates that "no writ of quo warranto, of mandamus, of certiorari, of prohibition, or injunction may be issued against the Board, or against any of its members, on account of a decision, a procedure or any act whatsoever relating to the exercise of their functions".[8] And in Saskatchewan there is a comparable provision, section 15 of its Trade Union Act, which recites: "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 proceedings whatsoever".

The privative clause, in assorted forms, has for long been a legislative stand-by to protect administrative agencies against court interference with their essentially discretionary powers, whether they be in the area of so-called judicial function or in the area of legislative function.[9] With few exceptions in Anglo-Canadian experience, the courts have found it expedient to exercise the same supervisory rôle over these administrative agencies as they would in the absence of any privative clause.[10] While the range of review might differ in different areas, the assertion of a right of review has been fairly consistent. A notable illustration is in board administration of provincial workmen's compensation legislation. Here, despite a strong privative clause, it has been held that the courts may properly review any question going to initial jurisdiction, as, for example, whether a person is an employee.[11] A soli-

[8] Enacted by 1951 (Que.), c. 36.

[9] The literature on the subject is fairly extensive. It is enough to refer to a short and excellent summary by H. Sutherland in (1952), 30 Can. Bar Rev. 69. See also Schwartz, comment (1950), 28 Can. Bar Rev. 673. Australian experience is referred to in a comment by Anderson (1952), 30 Can. Bar Rev. 933.

[10] In the United States there has, comparatively, been less resort to privative clauses. The position in that country may be summarized by the following excerpts from Davis, Administrative Law (1951), who says (p. 832): "Under the Supreme Court decisions statutory provisions making action 'final' sometimes mean that the action is final and sometimes mean that the action is judicially reviewable to whatever extent the courts see fit to review". And again (at p. 839): "Because courts may so easily interpret away provisions making administrative action 'final' or 'final and conclusive', Congress is increasingly resorting to language explicitly withholding power to review". The author gives instances where courts have respected this language but he says, giving an illustration, that "a court with a strong enough will to correct what it believes to be injustice can usually contrive a way around even a statutory withdrawal of the court's jurisdiction".

[11] *Re Workmen's Compensation Act and C.P.R.*, [1950] 2 D.L.R. 630 (Man.); noted by Schwartz in (1950), 28 Can. Bar Rev. 673. The privative clause in this case reads as follows: "The board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority or discretion is conferred upon the board, and the action or decision

tary deviation from the norm is afforded by *Rex ex rel. Sewell* v. *Morrell* where it was held that the decision of a mobilization board, acting under mobilization regulations during the last war, was protected from review under a privative clause, "even where it is being alleged that the board acted without jurisdiction".[12] It is worth noticing that the judge who decided this case took the opportunity in a subsequent case, involving administrative action under wartime rental regulations, to assert a right of judicial review despite a privative enactment only slightly less stringent than the one in the earlier case.[13] The *Morrell* case was not mentioned.

There is no point in threshing through the numerous cases involving privative clauses in order to line up the grounds of decision. To do this is to accept the very assumption of the superior courts, namely, that privative clauses cannot oust superior court review. It is preferable to examine the problem in broader perspective.

II

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. In so far as such review is based on the historic supervisory authority of superior courts through the use of the prerogative writs of certiorari or mandamus, or their modern equivalents, it must bow to the higher authority of a legislature to withdraw this function from them. The question would then become whether the legis-

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of the board thereon shall be final and conclusive and shall not be open to question or review in any court, and no proceedings by or before the board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise into any court". This clause is common in provincial compensation statutes: see Workmen's Compensation Act, R.S.O., 1950, c. 430, s. 70(1). Cf. *Bathurst* v. *Workmen's Compensation Board*, [1928] 1 D.L.R. 114, where, despite a statutory right of appeal, the court refused to review a board finding that a certain person was not within the Act. Under the Act this issue was declared to be a question of fact upon which the board's decision was final and conclusive.

[12] [1944] 3 D.L.R. 710 (Ont.). In this case Mr. Justice Roach paid "regard to the objects intended to be attained by the regulations". The privative clause was in the following words: "No proceeding authorized or pending before a Board and no decision of a Board shall, by means of an injunction, prohibition, mandamus, certiorari, habeas corpus or other process, issuing out of court, be enjoined, restrained, stayed, removed, or subjected to review or consideration on any ground whether arising out of alleged absence of jurisdiction in a Board, nullity, defect or irregularity of the proceedings or any other cause whatsoever, nor shall any such proceedings or decision be questioned, reviewed or reconsidered in any Court".

[13] *Re Brown and Brock*, [1945] O.R. 554. In fact, the court in this case ultimately upheld the challenged decision on the ground that the matter was "administrative" rather than "judicial".

lature has used apt words to effect this result. Since this question comes before the courts in connection with their general interpretative function, they are in a position to ignore (that is, interpret) the legislative direction by simply refusing to give up their supervisory authority. The labour board cases to be passed in review in this article afford ample basis for the conclusion that no form of words designed to oust judicial review will succeed in doing so against the contrary wishes of a superior court judge. This is, concededly, a strong statement which has all the appearance of an apologia for the legislature's poverty in the use of words.[14] But it stems from a review of the labour board cases, in none of which has the court indicated that a properly drafted statute will foreclose its intervention. The question is not whether on review, superficial or intensive, the court will uphold the board decision. Rather it is whether the court will abstain from attempting any review.

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 that judicial review rests on any higher ground than that of being implicit in statutory interpretation. In this connection the term "jurisdiction" has become the convenient umbrella under which the provincial courts have chosen to justify their continual assertions of a reviewing power. Buttressed by security of tenure not enjoyed by administrative boards, and surrounded by a tradition of impartiality, which is strong enough to make people accept from judges clichés and social and economic doctrine they would not accept from politicians, members of our superior courts are inhibited in their conduct only by their own sense of self-restraint; and, of course, by the threat of appeal to other judges in the same hierarchy if a right of appeal exists.

[14] It may be observed that in none of the labour board statutes has the legislature specifically foreclosed judicial review on matters of "jurisdiction". *Quaere* whether the use of this word (as in the mobilization regulations in the *Morrell* case) would oust review? Perhaps the more relevant inquiry is whether the government has not consciously refrained from using the word in framing the legislation. Cf., however, s. 15 of the Saskatchewan Trade Union Act.

Where it does not, only self-denial controls a high court judge. Removal for misbehaviour, preserved in section 99 of the British North America Act, in conformity with the Act of Settlement, means in fact a guarantee of independence.[15]

We would not, of course, have it otherwise. It does not follow, however, that the sacred privilege of making mistakes, conferred on superior court judges, must be denied to any other tribunal with whose opinions these judges disagree. Certainly it must not be denied when the legislature clearly (or as clearly as it can) indicates that it will assume the responsibility of checking board misbehaviour and will relieve the courts from that self-imposed duty. The courts usually say, however, that the legislature has not intended to give its administrative boards a free hand, despite the enactment of privative clauses. It may be, of course, that a government which sees to the inclusion of a privative clause in board legislation does so in the hope, or even certainty, that the courts will relieve it of a responsibility it is not eager to assume. But surely we must hold the government and the legislature to the objective manifestation of their policies. If we are to have judicial review, let it be as an open avowal of its desirability. By circumventing the privative clause, courts needlessly and gratuitously involve themselves in issues of policy. It may be urged, with justification, that all judicial work exhibits such involvement; but evasion of privative clauses through specious interpretation and unsupported assumptions is a trespass on the policy functions of another agency. Such trespass has, in the past, evoked criticism where the statutory agency was not protected by privative clauses.[16] In the face of such enactments, 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.

III

For the purposes of this discussion it is unnecessary to take detailed issue with judicial review of board decisions under statutes which do not contain privative clauses. In such instances there is plausible ground for court supervision on matters of "jurisdiction".

[15] Section 99 of the B.N.A. Act provides: "The Judges of the Superior Courts shall hold office during good behaviour but shall be removable by the Governor General on address of the Senate and House of Commons".

[16] *E.g.*, Landis, Administrative Agencies and the Courts (1938), 47 Yale L. J. 519; comment (1942), 20 Can. Bar Rev. 464; Scott, Administrative Law: 1923-1947 (1948), 26 Can. Bar Rev. 268.

Proponents and opponents of judicial review here have joined battle on alleged exaggerated notions of what falls within the term "jurisdiction", a term which has been aptly called "a verbal coat of too many colours".[17] But what plausible ground can there be for interference in the face of a privative clause? No provincial court has given any answer or has even faced a question which fairly screams for attention in the labour cases involving privative clauses. The question is this: In what situations will a court abstain from exercising a reviewing power in the face of a privative clause where it would have reviewed in the absence of a privative clause? Or, to put the matter another way, does a privative clause narrow the scope of the reviewing power which courts would exercise without it? The labour cases in the provincial courts indicate that privative clauses have had no apparent effect on the courts' reviewing power. The same conceptions of jurisdiction are invoked. Privative clauses have, in truth, been read out of the statutes. The Supreme Court of Canada has as yet had no occasion to consider the matter. But it has had some experience with immigration and deportation cases involving legislation containing a privative clause, as in the Immigration Act, which gives finality to deportation proceedings or orders when "had, made or given under the authority and in accordance with the provisions of this Act". This qualification of finality has been acted upon by the Supreme Court as giving it a reviewing power in respect of any order made "in disregard of some substantive condition laid down by the Act", but it has disclaimed any right to review findings of fact.[18] The privative clauses in Canadian labour legislation are not as loose or as inviting to judicial review as is the immigration enactment, but interpretation of the phrase "under this Act" can be, as it has been, made the avenue for review at least as extensive (and in some cases more so) as that indicated in the immigration cases.[19]

IV

To the end of 1952, there have been some twenty cases reported in which provincial courts were asked to review labour board orders.[20] In only one case was there any definite expression of the

[17] *Per* Frankfurter J. in *U.S.* v. *L.A. Tucker Truck Lines Inc.* (1952), 73 Sup. Ct. 67, at p. 70.

[18] See *Samejima* v. *The King*, [1932] S.C.R. 640, *per* Duff J. at p. 641; *De Marigny* v. *Langlais*, [1948] S.C.R. 155, at p. 159. See the discussion by Hancock, Discharge of Deportees on Habeas Corpus (1936), 14 Can. Bar Rev. 116.

[19] *Supra*, footnote 6.

[20] Twenty-two cases were canvassed for the purposes of this article, and I believe that they represent substantially all the decisions available on the

opinion that the court had no reviewing power in the face of a privative clause; and even in this case, a Quebec appellate court decision, only one of the judges took this position, which was grounded in part on the view (not taken in any of the courts in the common law provinces) that the labour board was an administrative or executive agency and not a judicial or quasi-judicial body.[21] In one of the most celebrated of the cases, *Re Toronto Newspaper Guild and Globe Printing Co.*,[22] the Ontario Court of Appeal did not even bother to mention the privative clause in its judgment, an omission which might almost be considered as a challenge to the legislature when note is taken of the fact that the provincial Attorney-General appeared in person on the appeal. In only five of the reported cases did the courts uphold board orders after review.[23] Almost half of the reported cases are from Saskatchewan, and in every case the courts of that province found some ground for upsetting the orders of the provincial labour board. Some of these Saskatchewan decisions are, when taken on their own terms, extraordinary exhibitions of finding petty pretexts for frustrating labour board action.[24] The impression that they convey is that the Saskatchewan courts were engaged in a bitter battle on social and economic policy in which they were

subject. Of these cases, nine are from Saskatchewan, five from British Columbia, three from Nova Scotia, two from Ontario, one from Manitoba, one from New Brunswick and one from Quebec. Most of the cases involved certiorari; a few involved mandamus and prohibition.

[21] *Quebec Labour Relations Board* v. *Catholic Teachers Association of Montreal*, [1951] K.B. 752, *per* St. Jacques J. at p. 768.

[22] [1952] 2 D.L.R. 302, aff'g [1951] 3 D.L.R. 162.

[23] *Canadian Seamen's Union* v. *Canada Labour Relations Board*, [1951] 2 D.L.R. 356 (Ont.); *Rex* v. *Labour Relations Board*, [1951] 4 D.L.R. 227 (N.S.); *Union of Bakery & Confectionery Workers* v. *Labour Relations Board*, [1949] 4 D.L.R. 484 (B.C.); *Quebec Labour Relations Board* v. *Catholic Teachers Association of Montreal*, [1951] K.B. 752; *Re International Union of Operating Engineers and Manitoba Labor Board*, [1952] 4 D.L.R. 397 (Man.). In another case, board action was in the result undisturbed but the case did not involve consideration of the merits: see *Re The King and Labour Relations Board*, [1949] 4 D.L.R. 734 (B.C.).

In *Re F. W. Woolworth Co. and Labour Relations Board*, [1948] 4 D.L.R. 872 (B.C.), the privative clause did not come into play because the main issue before the court on a writ of prohibition was as to the retroactivity of amending legislation and an order of prohibition was granted on a court finding against retroactivity. In *MacKay and MacKay* v. *International Association of Machinists*, [1946] 3 D.L.R. 38 (Sask.), the case turned on the propriety of making a trade union party to certiorari proceedings arising out of an attack on a labour board order against an employer in respect of an unfair labour practice. The court affirmed dismissal of a preliminary objection taken by the union. In *Labour Relations Board* v. *John East Iron Works*, [1948] 1 D.L.R. 652 (Sask.), the court upset a board order on constitutional grounds but its decision in this respect was reversed on appeal to the Privy Council: [1948] 4 D.L.R. 673.

[24] *E.g.*, *Labour Relations Board* v. *Speers and Regina Undertakers Employees' Federal Union*, [1948] 1 D.L.R. 340; *Regina Grey Nuns Hospital Employees' Association* v. *Labour Relations Board*, [1950] 4 D.L.R. 775.

determined to have the last word. There is no such atmosphere apparent in the cases from other provinces. The courts in these provinces seem to have acted as they did simply in obedience to their view of the reach of statutory interpretation and of the necessity of requiring boards to conform to curial standards of behaviour.

What have been the grounds upon which the courts have interfered with labour board orders? An examination of the cases discloses that the courts treat certiorari to labour boards as if they were sitting on appeal from the verdict of a jury. They will uphold board orders if there is some evidence (in the view of the courts) to support the orders, but not if, in their opinion, there is no such evidence.[25] Beyond this concession, the field of interference is fairly open. In the most recent interference, that of the British Columbia Court of Appeal in the *Canada Safeway Ltd.* case, Mr. Justice O'Halloran even qualified the weight of evidence concession by taking, as a ground for quashing a board order, the proposition that it was "in the teeth of the evidence".[26] Does this mean anything less than that board orders will be upheld only if the courts themselves would have made them? Why have a labour board?

The question of evidence aside, other grounds of interference are subsumed under the general head of "jurisdiction", as a sort of comforting conceptualism which in its designation carries its own condemnation of labour board action. "Jurisdiction" is not regarded as simply going to the question whether the labour board can properly entertain the proceeding. And it also goes beyond any jurisdictional fact matters, such as whether certain persons are "employees" or "employers" within the meaning of the labour relations statute.[27] In Saskatchewan and in Ontario it includes

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[25] Cf. *Re Sisters of Charity, Providence Hospital and Labour Relations Board*, [1951] 3 D.L.R. 735, aff'g [1951] 1 D.L.R. 502 (Sask.); *Canada Safeway Ltd.* v. *Labour Relations Board*, [1953] 1 D.L.R. 48 (B.C.).

[26] [1953] 1 D.L.R. 48, at pp. 62, 63. In *Canadian Transport (U.K.) Ltd.* v. *Alsbury*, (1952) 7 W.W.R. (N.S.) 49, at p. 73 (B.C.) (a case dealing with contempt proceedings for disobedience to a labour injunction) Sidney Smith J. A. said: "The idea that the sufficiency of evidence has any relation to jurisdiction is entirely novel and against principle. That would be so even if we were dealing with an inferior court."

[27] Cf. *Re Lunenberg Sea Products Ltd., Re Zwicker*, [1947] 3 D.L.R. 195 (N.S.); *Rex* v. *Labour Relations Board*, [1951] 4 D.L.R. 227 (N.S.); *Bruton* v. *Regina City Policemen's Association*, [1945] 3 D.L.R. 437 (Sask.); *Dominion Fire Brick & Clay Products* v. *Labour Relations Board*, [1946] 4 D.L.R. 130 (Sask.); appeal quashed, [1946] 4 D.L.R. 574, but this decision was reversed, [1947] 3 D.L.R. 1 (Can.); *Canada Safeway Ltd.* case, *supra*. In *Re Canadian Fish Handlers' Union*, [1952] 2 D.L.R. 621 (N.B.), a board order was quashed (despite a privative enactment covering the very matter) partly on the ground that the applicant for certification was not a trade union.

rulings on evidence.[28] It has been held to include a failure of a labour board to hold a proper hearing[29] and a failure to allow the prescribed time for filing a written reply to a certification application, although opportunity was given to make representations at a hearing.[30] It has been declared to cover use by a labour board of its executive officer to make a necessary inquiry in connection with a certification application, notwithstanding that the officer was available for and subjected to cross-examination at a hearing.[31] According to a judge in one of the Saskatchewan cases, there is a jurisdictional defect if a hearing is held in camera;[32] and, according to another Saskatchewan case, failure explicitly to mention or to apply the principle of mitigation in a reinstatement with back pay order is also fatal to jurisdiction.[33] Another Saskatchewan contribution to the meaning of "jurisdiction" is a decision invalidating a cease and desist order to an employer because notice of the application was not given by the certified trade union to a rival union or to persons not members of the certified union.[34] In addition to the foregoing specific matters, there has been reliance on bias of the labour board, or even of one member,[35] and reliance, too, on such generalized and elusive concepts

[28] *Globe Printing Co.* case, *supra*, footnote 22; *Sisters of Charity* case, *supra*, footnote 25.

[29] *Capital Cab Ltd.* v. *C.B.R.E.*, [1950] 1 D.L.R. 184 (Sask.); *Re Local No. 4281, U.S.W.A. and Labour Relations Board*, [1951] 2 D.L.R. 580 (B.C.).

[30] *Re Canadian Fish Handlers' Union*, [1952] 2 D.L.R. 621 (N.B.). Perhaps the statement in the text is too strong. Two representatives of the employer appeared at a hearing convened by the labour board before expiry of the prescribed time for reply to a certification application. At this hearing the board determined that the applicant was entitled to make the application. No witnesses were called. The employer's spokesman did not ask for a postponement. The court commented as follows (at p. 630): "Not having counsel with him Mr. Carroll cannot be presumed to have known his rights. No witnesses were called and Mr. Carroll had no opportunity to present evidence, he not having had time to consult counsel." Subsequent to this hearing the board ordered a vote in which the applicant obtained a decisive verdict in its favour as against an inside union. There was some evidence of improper influence by the applicant through administration of an oath on the Bible to employees who attended a meeting on June 12th. The vote was taken on July 25th. The court held that the board was within its powers in deciding that the vote should stand despite the oath incident, although it would have been more proper to order another vote. The certification order was quashed on other grounds.

[31] *Speers* case, *supra*, footnote 24.

[32] *Bruton* case, *supra*, footnote 27, per Gordon J. A.

[33] *John East Iron Works* v. *Labour Relations Board*, [1949] 3 D.L.R. 51 (Sask.); leave to appeal refused, [1949] 3 D.L.R. 488; [1949] 3 D.L.R. 851. The Saskatchewan Court of Appeal thus had the final say in this case despite the prior successful appeal to the Privy Council: see footnote 23.

[34] *Regina Grey Nuns' Hospital Employees' Association* v. *Labour Relations Board*, [1950] 4 D.L.R. 775. This ruling was based on a board regulation which the court construed as requiring notice to be given to the rival organization and to employees (members of the rival) in respect of whom an unfair labour practice charge was made against the employer.

[35] *Capital Cab Ltd.* case, *supra*, footnote 29; *Bruton* case, *supra*, footnote 27.

as "natural justice" and the "essentials of justice", used more or less as catch-alls to cover various procedural matters.[36]

All these grounds for invalidating labour board orders involve application of court standards, and it appears that the term "jurisdiction" is simply a compendious expression covering the canons of curial behaviour, including matters of evidence and procedure. This being established, it is only necessary for the courts to say that privative clauses do not oust review on matters of jurisdiction. By this simple semantic device labour board action is wide open to reversal.

The earliest of the labour board cases is *Bruton* v. *Regina City Policemen's Association,* where Martin C. J. S. finessed the privative clause of the Saskatchewan Trade Union Act, 1944, in the following words:[37]

> In Canada it has been repeatedly held that an express statutory abolition of certiorari does not oust the power of the Court to issue the writ or to quash a conviction if Justices have acted without jurisdiction, for in such a case the inferior Court has not brought itself within the terms of the statute taking away certiorari; even express words do not take away the supervising power of a superior Court when there is want of jurisdiction in the inferior Court. . . .
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> There is ample authority to the effect that the Court will issue the writ to a body exercising judicial functions though the body cannot be described as being in any ordinary sense a Court. . . . It is essential however that the tribunal should be one which exercises judicial functions and which has the power to impose legal duties and obligations on the parties before it, similar to those which are usually decreed by Courts of Justice. In my opinion the Labour Relations Board is a body which is empowered by the *Trade Union Act* to exercise certain judicial functions in that it has power to determine questions affecting the rights of parties before it; and there can be no doubt that in making the order in question the Board exercised a judicial function.

Any doubt that might have existed over the range of the term "jurisdiction" as used in the foregoing passage was dissipated in later cases. Thus in *Re Labour Relations Board (Nova Scotia),*[38] MacDonald J., speaking for the provincial appellate court, appreciated the distinction between initial jurisdiction to entertain and decide an application and an error of law occurring in the course of proceedings. Yet the latter was equally a matter going to jurisdiction for the purpose of giving the court supervisory authority on certiorari. The error of law in this Nova Scotia case lay, according to the court, in the labour board's claim of discretionary power to refuse to certify a trade union by reason only of

[36] *Re Canadian Fish Handlers' Union, supra,* footnote 30.
[37] [1945] 3 D.L.R. 437, at p. 447.
[38] [1952] 3 D.L.R. 42 (N.S.).

the domination of its policies by a communist official. According to the court, the statutory language "the Board may certify" did not, in the general context of the statute, give it a discretion to refuse certification to a trade union which had satisfied the express requirements of the enactment; and even if there was a discretion, it did not extend to the ground taken by the board.[39] It is beside the point to applaud the "rightness" or "wrongness" of the board's or the court's attitude.[40] Each agency expressed a policy, however it may have been camouflaged by words. It appears from the court's judgment that the board's mistake was in failing to express its policy in a proper formula. What it should have done was to make the finding which the Canada Labour Relations Board made in a comparable case, namely, that the so-called trade union was not a "trade union" within the statute. This finding was upheld as sufficient to bar certification in *Canadian Seamen's Union* v. *Canada Labour Relations Board and Branch Lines Ltd.*, where the court found in a privative clause additional support for upholding the labour board's ruling.[41] What these cases teach is that if a labour board is to escape policy interferences by the courts it should use judicial formulas.

This, however, is not foolproof counsel because it ignores differences of opinion on jurisdictional facts. The commonest issue here has been whether persons in respect of whom certification is sought are "employees" under the particular statute. *Re Lunenberg Sea Products Ltd., Re Zwicker* is a striking example in this connection.[42] There the court, despite a privative clause touching the very matter in question, concluded that the labour board was wrong in finding that certain fishermen were employees (instead of being in a joint adventure with shipowners), and because of this "wrong" conclusion, the board had exercised a jurisdiction it did not have. No doubt for some purposes the "joint adventure" finding would be quite understandable; but for collective bargaining purposes it was equally reasonable to find that the fishermen were employees. The recent *Canada Safeway Ltd.* case shows how far judicial interference on jurisdictional fact can carry.[43] There the labour board had certified a trade union for a certain unit of employees, of whom the largest number were alleged to be employed in a "con-

[39] Cf. *Re International Union of Operating Engineers and Manitoba Labor Board*, [1952] 4 D.L.R. 397, where the court conceded the wide discretion of the board in connection with certification.

[40] The "communist" aspect of the case is discussed by Cohen (1952), 30 Can. Bar Rev. 408.

[41] [1951] 2 D.L.R. 356 (Ont.).

[42] [1947] 3 D.L.R. 195 (N.S.).

[43] [1953] 1 D.L.R. 48.

fidential capacity", and thus excluded from the scope of the statute.[44] The British Columbia Court of Appeal disagreed with the board's finding that the particular employees were not employed in a confidential capacity, and moved from this to the further conclusion that, these persons now being outside the statute, the board had not properly considered the appropriateness of the reduced bargaining unit, with the consequence that its certification order could not stand: all this in the face of a privative clause purporting to make final and conclusive the board's determination whether a person is an employee or whether a particular unit is appropriate.

More portentous than the actual result was the declaration of Sloan C.J.B.C. that a privative clause cannot rule out judicial review where there is error in law on a collateral issue and a decision on that issue is a condition of the labour board's "exercise of jurisdiction" (meaning thereby, it appears, authority to entertain the proceeding in question). "Error in law" as related to the board's view of "confidential capacity" in this case meant simply a difference between the board and the court as to the proper test to be applied to a phrase which was not defined; and it seemed to cover, also, want of evidence to support a finding based on the court's test. In view of the powers conferred on the labour board by the applicable statute and the design of the privative clause to confirm the board's exclusive exercise of such powers, it is ironical in the extreme to have Sloan C.J.B.C. say that "in this present case the Board erroneously arrogated to itself jurisdiction to certify a particular unit as appropriate for collective bargaining.[45] And it is only running around in circles to say, as O'Halloran J.A. did (in relation to the privative clause), that "a decision of the Board is final and conclusive up to the point it may be reviewed by certiorari but it cannot be quashed if on such review the Board is found to have acted judicially within the express statutory powers conferred on it".[46] However inappropriate it may be to argue from one type of case to an entirely different one, it is worth noticing that in a recent "contempt of court" appeal arising out of a labour dispute, O'Halloran J.A. remarked

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[44] It may be noted that the phrase "confidential capacity" is defined in the Ontario Labour Relations Act, R.S.O., 1950, c. 194, s. 1(3)(b), and not left at large as in British Columbia. The definition is in the following terms: "confidential capacity in matters relating to labour relations".

[45] [1953] 1 D.L.R. 48, at p. 58. As to affirmation of the board's power in determining an appropriate bargaining unit (reinforced by reference to the privative enactment), see *Re International Union of Operating Engineers*, [1952] 4 D.L.R. 397.

[46] *Ibid.*, at p. 60.

that "statutory limitation of a superior court reduces its general jurisdiction in that respect analogously to the jurisdictional position to which an inferior court is always restricted".[47]

Whatever may be said about judicial review in the labour cases of findings related to board authority to entertain proceedings brought before them, there is less excuse for review (and consequent quashing) of board orders on grounds of alleged defects in procedure and rulings on evidence. The *Globe Printing Co.* case is the prime example in this connection.[48] There, the court quashed a certification order because the labour board, in determining whether the applicant union had majority membership support of the employees affected, refused to consider alleged resignations from membership. The court regarded this as admissible evidence, and proceeded from this conclusion to charge the board with a failure to make a necessary inquiry (that is, whether there was a majority membership) essential to certification. It was only a short step from this point to find a want of jurisdiction justifying review despite the strongest privative clause in all Canadian labour legislation. It is not clear from the labour cases whether the courts will be disposed to distinguish between allegedly wrongful rejection of evidence by a labour board as in the *Globe Printing Co.* case, and wrongful admission of evidence. A Saskatchewan case, *Re Sisters of Charity, Providence Hospital and Labour Relations Board,* appears to obliterate any such distinction by the suggestion that material errors as to the laws of evidence will afford ground for quashing a labour board order.[49] It carries the matter of evidence even further by stating that although the applicable statute gives the board discretion to receive such "evidence" as it deems proper (whether admissible in a court or not), nonetheless what is put before the board as evidence must have some probative force. This addition to the burdens heaped on labour boards seems, however, to be merely an alternative expression of the proposition that there is a jurisdictional defect when there is no evidence to support board action.

Beyond matters of evidence, there have been cases, already referred to, in which the courts have intruded their views of procedural regularity as grounds for quashing labour board orders in the face of privative enactments. However, these enactments do

[47] *Canadian Transport (U.K.) Ltd.* v. *Alsbury,* (1952) 7 W.W.R. (N.S.) 49, at p. 62 (B.C.)

[48] [1952] 2 D.L.R. 302, aff'g [1951] 3 D.L.R. 162. The particular matter out of which this case arose is now covered by s. 72(1) of the Labour Relations Act, R.S.O., 1950, c. 194, which protects membership records from disclosure to anyone but the labour board save with the board's consent.

[49] [1951] 3 D.L.R. 735.

not expressly cover the procedure by which the labour boards operate, and it is a plausible argument that judicial review is open in this area. That, at any rate, appears to have been the opinion of the court in *Capital Cab Ltd.* v. *C.B.R.E.* where, in quashing a certification order partly for want of a proper hearing, it remarked: "It may be that the whole board relied too much on [the privative section] of the Act. That section is very deceitful. It has holes in it that are not noticeable on a superficial examination."[50] This view is, in my submission, a vulnerable one. It is equally arguable that by protecting from review the operative act of a labour board (that is, its decision on the matter covered by the privative enactment or its decision on any matter if the enactment is broader in scope) the legislature has also protected the methods and means used by the board in arriving at its decision. If it is for the board to determine, without liability to review, a specified matter or matters, it would seem to be implicit in this grant of power that the board's determination cannot be upset merely because a court may disapprove of the means by which the board arrived at the decision. The cases already referred to, which have quashed board orders for procedural irregularities, are surely cases where the courts have subordinated the merits to forms and formalisms under which they themselves operate. When the cases are examined, the enormity of board failure, for example, to give a hearing, turns out to be merely a failure to give the kind of hearing a court itself is accustomed to giving.

V

The privative clause may be regarded, so far as it reaches, as an expression of legislative policy that the legislature will supervise or correct board misbehaviour or that the board must be regarded as a superior court in the sense of not being accountable to any other superior court for its decisions. It may be asked whether we are prepared to risk the full consequences of this estimate. Suppose (and let us disregard the absurdity) that a labour board, or any other administrative agency protected by a privative clause, decides, when a person appears before it, to decree his or her divorce or to condemn the person to jail or to be hanged. Should there not be recourse to a superior court? The answer, of course, is that if a labour or other board were to do anything so absurd, legislative and governmental control is sufficient to obviate reliance on a superior court. Where the matter relates to an act of the board

[50] [1950] 1 D.L.R. 184, at p. 203.

in the area of its function, the privative clause gives it the same privilege of rendering "bad" decisions as is exercised by superior courts.

The battle about judicial review is, in part, a battle about names. It is well to recall that under the Ontario Collective Bargaining Act of 1943 the administration of the statute was confided to the Supreme Court of Ontario without right of appeal. Superior court judges, immune from review, handed down decisions which in some cases were no less vulnerable than those of the labour board which is now the administering agency in Ontario.[51] It could hardly be said that the judges (with one or two exceptions) were as well versed in the matters which come before them under the 1943 Act as is the Ontario Labour Relations Board. Yet their decisions had to be accepted without question because (1) no right of appeal was given; (2) certiorari does not lie to question a decision of a superior court; and (3) *res judicata* prevented re-litigation of any matter covered by or involved in the decisions. It is obvious, then, that if the members of the labour boards were appointed superior court judges (and I do not have to be reminded about the qualifications stipulated in the B.N.A. Act[52]), any issue of judicial review would become moot. On the Dominion level, where the B.N.A. Act stipulations do not govern, the members of the Canada Labour Relations Board might be appointed judges with superior court status and in this case, too, any issue of judicial review would become moot. Of course, it may be said that the suggestion is impractical. But it is put forward not as a serious recommendation for such appointments, but merely to illustrate that a good deal of the wordiness about judicial review in the certiorari cases might be avoided if the judges were to say "there, but for the grace of a federal appointment, go I". Let it be added that it is not convincing to say that we need some check on administrative board action. The argument has great temptation in relation to many judicial decisions which are not appealable. If we suffer the latter, we can equally suffer the former, especially where the legislature has expressed its view to that effect.

At bottom, judicial review persists and is likely to persist (unless the Supreme Court of Canada brings it to a halt) simply because the courts have been with us for a very long time. They are trusted friends in whose company we feel comfortable and for whose protection we are willing to forgive a good deal. The tradi-

[51] See, Laskin, Collective Bargaining in Ontario: A New Legislative Approach (1943), 21 Can. Bar Rev. 684, which discusses the experience under the 1943 Act.

[52] B.N.A. Act, s. 97.

tion of judicial independence in act as well as in law has given the courts a position from which they look down, almost as of course, on mere gownless and tabless appointees at pleasure. They no longer feel called upon to examine the origin and early application of their supervisory jurisdiction. It is enough today to call it "inherent", with the expectation that the mere assertion will also pass for the reason.

It cannot be denied, of course, that the legislature has "acquiesced" in judicial assertions of reviewing power in the face of privative clauses. Statutes with such clauses have been re-enacted or have been allowed to stand unchanged in the full knowledge of judicial decisions which do not admit to exclusion of reviewing power. It is, hence, easy to say that this is proof that the legislature does not intend to oust judicial review despite the enactment of words which indicate that it does. But perhaps it only indicates the legislature's refusal to engage in open warfare with the courts. Perhaps, too, the legislature is satisfied to let the courts bear the brunt of any criticism flowing from interference with labour board administration. It is no mean consideration that in the political scheme of things the present privative enactments may be as far as the legislature can safely go in reconciling opposing interests contending for liberal or restricted review. The result is, in any event, that we should raise judicial supremacy to a high place on our list of political principles.

This is by no means a counsel of despair. In constitutional matters involving the distribution of legislative power, judicial supremacy is an accepted fact.[53] Accommodation to an enlarged sphere of this dominance presents no serious difficulties. The number of labour board cases inviting curial review constitute but an infinitesimal percentage of the total disposed of by the boards. 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 arises.[54] It is worth repeating that, if judicial review is desirable, it should be openly conceded and openly established. Some of the cases that have come before the courts suggest that the chief concern is not a vindication of any high legal or moral principle but simply a resistance to the legis-

[53] See Rostow, The Democratic Character of Judicial Review (1952), 66 Harv. L. Rev. 193.

[54] One might speculate whether the legislature could reclaim its primacy if it showed the same persistence and ingenuity in framing privative clauses as the courts have shown in evading them. *Quaere*, whether a clause for bidding the issue of any process or the filing or service of any papers involving judicial review would be effective?

lative policy of compulsory collective bargaining, coupled with an attempt to use the courts as an instrument of such resistance. Any serious reading of the numerous labour board cases reported across Canada would establish that the boards are not mere inert pawns of labour unions (or of employers) and that, operating as they do in a controversial and not fully charted field, they take their administrative duties seriously. This is evident in the court cases in which unions have sought to challenge board action.[55] Courts may well hesitate, therefore, before permitting the use of their standards of performance to measure the adequacy of labour board behaviour.

The Managerial Revolution

In the free world, the belief that employment must be secured and better conditions created can be counted as one of the new imperatives in our thinking. Certainly, the techniques of maintaining high and steady employment had to be laid bare before the policy could be made a fact; and Lord Keynes's fruitful discovery of the limited measure of state intervention which can probably be relied upon to secure stable conditions has helped to blur the old dogmatic division between absolute state control and absolute laissez faire. In this sense, full-employment policies are an integral part of contemporary thought about society. Yet they are probably not the most significant. After all, a totalitarian society also is totally employed.

The most significant change is surely in the question of the worker's status. He must have work, he must have bread, he must have leisure, but all those can be secured under tyranny. The real problem is how, in an industrial order, to give him the status of a free and responsible man. From the so-called Right—in other words, from the capitalist order of America—has come the revolution in worker-manager relations of the last decade, a revolution incidentally almost ignored in Europe until the Marshall Aid authorities began to make it known. The belief that the plant itself can be a genuinely human community and that the worker can share in what Peter Drucker calls 'the management attitude' is perhaps only at the beginning of its influence; but the interest in profit-sharing, in the association of the worker by bonuses and incentive schemes with increases in productivity, in the possibilities of joint consultation and in the general effort to make the ordinary citizen a shareholder in business enterprise—all this can no longer be dismissed as outside the main stream of American industrial practice. (Barbara Ward, The Illusion of Power, The Atlantic, December 1952)

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[55] Cf. *Re International Union of Operating Engineers and Manitoba Labour Board*, [1952] 4 D.L.R. 397; *Re Labour Relations Board* (N.S.), [1952] 3 D.L.R. 42.