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Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alleys Case

BORA LASKIN*

Toronto

It is the consequence of the majority judgment of the Supreme Court of Canada in *Toronto v. Olympia Edward Recreation Club Ltd.*¹ that a provincially or municipally appointed tribunal cannot constitutionally be vested with authority to determine assessability or liability of property or persons to municipal taxation. Of course, the Constitution—the British North America Act—nowhere spells this out. Why a long-established system of municipal tax assessment should be suddenly fractured can only be understood against the judicially-nourished luxuriance of section 96.² In terms an appointing power (“The Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick”), it has become a barrier to freedom of provincial adjudicative and administrative organization, although it does not involve any issue of legislative power as between

*Bora Laskin, M.A., LL.B., LL.M., Professor of Law, University of Toronto.

¹ [1955] S.C.R. 454, [1955] 3 D.L.R. 641.

² The case law is admirably treated by Willis, Section 96 of the British North America Act (1940), 18 Can. Bar Rev. 517. A later examination of the problem is provided by Shumiatcher, Section 96 of the British North America Act Re-examined (1949), 27 Can. Bar Rev. 131.

Parliament and the provincial legislatures. It has introduced a peculiar variant of the doctrine of separation of powers which binds the provinces but not the Dominion.³ And it has given rise to an arid conceptualism in which the state of the statute book as of 1867 has some mystic significance.⁴

The Supreme Court divided five to four in the *Olympia* case, but the division was partly on a matter of statutory construction, and it was by reason thereof that the minority of four found the opportunity both to maintain the general integrity of the judicial exposition of section 96 and to save the system of assessment administration. Valiant as this stand was in the face of the majority's rigidity, it does not provide a satisfactory administrative result. The majority, regrettably in my view, found no need to re-examine section 96 of the B.N.A. Act. Stress was laid on the provincial assessment act under review rather than on the constitutional provision which it infringed. The majority appeared to have no doubt of the scope and application of section 96 in the particular situation. Its confidence in this respect was based on earlier decisions of the Privy Council as well as on a decision of the Supreme Court itself.⁵ Again, the majority showed scant concern for the efficacy of the municipal assessment system but simply laid it on a procrustean bed. The different approaches of majority and minority deserve to be examined because of the civic importance of

³ See Willis, Administrative Law and the British North America Act (1939), 53 Harv. L. Rev. 251. In *Re Hamilton and North Western Ry. Co.* (1876), 39 U.C.Q.B. 93, at p. 112, there is a statement by Harrison C. J. that the B.N.A. Act provided for the separation of powers, and he enjoined observance of the doctrine. While quite inaccurate, it is interesting as a view expressed so soon after Confederation.

⁴ While the date of Confederation was a relevant consideration in *Ganong v. Bailey* (1877), 17 N.B.R. 324, one of the earliest cases on section 96, the date was related to institutional and not functional considerations. See also *In re Small Debts Act* (1896), 5 B.C.R. 246; and for a very early case, *Regina v. Reno and Anderson* (1868), 4 P.R. 281. The 1867 date as relevant to function appears to have come into the cases through Sir John Thompson's report (as Minister of Justice) on the validity of Quebec legislation on district magistrates' courts (see Hodgins, Dominion and Provincial Legislation, 1867-1895, pp. 354 ff.) and reached its summit in *Toronto v. York*, *infra*. In the *Adoption Act* reference, *infra*, footnote 5, Duff C. J. referred to the argument "that provincial legislation is repugnant to section 96 if in any particular the jurisdiction of one of these courts of summary jurisdiction existing at the date of Confederation is increased". He answered by saying: "That, in my view, is quite inadmissible in principle as it is incompatible with practice and authority since Confederation with the exception of one or two cases in very recent years . . ." ([1938] S.C.R. 398, at p. 415).

⁵ *Toronto v. York*, [1938] A.C. 415, [1938] 1 D.L.R. 593; *Bennett & White (Calgary) Ltd. v. Sugar City*, [1951] A.C. 786, [1951] 4 D.L.R. 129, rev'g. [1950] S.C.R. 450, [1950] 3 D.L.R. 81; *Toronto Ry. Co. v. Toronto*, [1904] A.C. 809; *Reference re Adoption Act*, [1938] S.C.R. 398, [1938] 3 D.L.R. 497.

the issue before the court and because of the rather extravagant position accorded to section 96.

II

Section 96 has been viewed by the courts without the perspective that is provided by a comparison of its effect on the provinces and its inapplicability to the Dominion. They could not have been oblivious to the results of such a comparison. For the problems raised by section 96 arise only where substantive provincial legislative power is conceded but administration is called into question. Yet, in the case of valid Dominion assertions of substantive legislative power, there can be no questioning on constitutional grounds of the prescribed methods or agencies of administration.⁶ It is not only that the Dominion may establish and invest statutory (or administrative) bodies with powers which the provinces cannot, apparently, confer on agencies of their own creation in the exercise of otherwise valid substantive legislative authority, but the Dominion may even confer on provincially appointed tribunals duties of adjudication of a kind which the province (although acting otherwise within its legislative authority) cannot confer on them. Provincially-appointed magistrates exercise a criminal jurisdiction under the Dominion Criminal Code which is much more the hallmark of a superior court, within the judicial gloss on section 96, than the civil jurisdiction to determine assessability stripped from courts of revision and from the Ontario Municipal Board in the *Olympia* case. The Dominion has established an income tax appeal board which (subject to rights of appeal that may or may not be exercised) deals (perhaps finally) with assessability.⁷ The *Olympia* and earlier cases would deny to a province the power to establish a similar provincial board to administer provincial income tax legislation. One may properly doubt whether Ontario, for example, could empower a succession duty appeal board to act intermediately between the succession duty department and the courts to which appeals would lie.⁸

⁶ In *Re Vancini* (1904), 34 S.C.R. 621, the Supreme Court stated that the Dominion Parliament in matters within its sphere can impose duties upon any subjects of the Dominion, whether they be officials of provincial courts, other officials or private citizens.

⁷ See Income Tax Act, R.S.C., 1952, c. 148, ss. 86, 92. Under the latter section the Income Tax Appeal Board has power, *inter alia*, to vacate an assessment.

⁸ *Quære* as to the validity of the present procedure in succession duty assessment and review under the Succession Duty Act, R.S.O., 1950, c. 378, s. 32. It seems that the treasurer makes at least a preliminary decision on assessability under the act even though by a notice of dissatisfaction

It is unnecessary to multiply examples. Suffice it to say that the same considerations which dictate the desirability of court administration of provincial legislation operate in respect of Dominion legislation. If, as the Privy Council asserted, section 96 is one of the "principal pillars in the temple of justice"⁹ and is "at the root of the means adopted by the framers of the [B. N. A. Act] to secure the impartiality and independence of the Provincial judiciary",¹⁰ must we come to the conclusion that these attributes were considered necessary only in the administration of provincial legislation but not of Dominion legislation? It is an easy answer that the constitution does not have to be logical. But is it not the courts that have produced the illogicality by failing to address themselves to the position of Dominion adjudicating agencies before transmuting section 96 into a limitation on provincial assignments of function? A more relevant inquiry is to ask where is the connection between the independence of the provincial judiciary and the exercise of deciding powers. Why must certain kinds of jurisdiction arising out of valid provincial legislation necessarily be reposed in federally-appointed members of provincial superior, county or district courts?

The links in the chain of reasoning which resulted in the judicial rewriting of section 96 were rather tortuously wrought. Provincial courts of the kind mentioned in section 96 were in existence before Confederation and were by the B. N. A. Act continued after it with their existing jurisdiction intact, although subject to change in accordance with the distribution of legislative power.¹¹ The appointment of a member to a section 96 court was not only an institutional but a functional assignment, and this identification reacted on the appointing power itself. Why the Governor-General's appointing power should be marked by an exclusive association with functions deriving from valid provincial legislation for which neither he nor the Parliament of Canada had any responsibility is indeed one of the paradoxes of Canadian constitutional interpretation.¹² Had the association not been exclusive,

a taxpayer may initiate review which will take him into the Supreme Court. But he must first pay according to the treasurer's decision on his liability.

⁹ *Toronto v. York*, [1938] A.C. 415, at p. 426.

¹⁰ *Martineau & Sons Ltd. v. Montreal*, [1932] A.C. 113, at p. 120.

¹¹ B.N.A. Act, s. 129.

¹² One may similarly doubt whether the Dominion has any real interest to justify intervention in section 96 cases by the Attorney-General of Canada. Of course he has a statutory right to appear, but why should he? And, above all, why should he urge the unconstitutionality of provincial assignment of functions to provincial boards? The federal appointing power as such is not in issue in such cases, but only the exercise of statu-

an accommodation could easily have been reached with provincial authority under section 92(4) to establish provincial offices and appoint provincial officers. Instead, the functional aspect dominated the institutional one, and support for this view of section 96 was attributed to the succeeding sections 97 to 100 of the B. N. A. Act. Institutionally, the application of section 96 was simple. Premising an existing provincial superior, county or district court, it was clearly out of the question for the competent provincial authority to appoint anyone to it. But, on the theory of "a rose by any other name", functional considerations became paramount when the province purported to confer jurisdiction on a non-curial provincial agency. Then the question became whether such jurisdiction carried the stamp of a superior, county or district court, in which case the provincially appointed tribunal could not exercise it.

What is baffling in this development is how it could be supported by sections 97, 98, 99 and 100.¹³ It is not an unreasonable reading of the "judicature" sections of the B. N. A. Act that section 96 was far from being the pivotal provision to which the others were subordinate. Rather, it appears that section 96 was a projection of section 100 or, at least, to be read in conjunction with it. If the Parliament of Canada was to fix and provide the salaries of provincial judges, it might properly appoint them. This is emphasized by the exclusion of judges of the Courts of Probate in Nova Scotia and New Brunswick both from the appointing power under section 96 and from the salary provisions of section 100. Far more important from an historical standpoint is the fact that in the Quebec Resolutions of 1864 appointment and payment were prescribed in the same clause, as follows: "The general Government shall appoint and pay the judges of the Superior Courts in each province, and of the County Courts in Upper Canada, and Parliament shall fix their salaries". Similar treatment of the matter appears in the London (Westminster Palace Hotel) Resolutions of 1866, save that the district and county courts of each province were included instead of only the county courts

tory authority in matters which themselves are competent to the province. In the *Olympia* case, the Dominion Attorney-General filed a brief and supported the attack on the provincial Assessment Act.

¹³ These, respectively, provide for selection of section 96 judges from the respective bars of the confederating common-law provinces; for selection of Quebec judges from the Quebec bar; for tenure during good behaviour for superior court judges only, subject to removal on joint address of the two federal Houses of Parliament; and for fixing and payment of salaries of all section 96 judges by the Parliament of Canada.

of Upper Canada. The separation of the provisions for appointment and for payment as they appeared in the B. N. A. Act was, so far as there is any evidence at all, the draftsman's work.¹⁴ Indeed, in the first rough draft of the B. N. A. bill, there was a notation to leave the resolutions on judges of the provincial courts to "colonial legislation" unless there was some special reason for incorporating them into the proposed imperial statute.¹⁵ In the third draft, provision was made for their salaries only, and it was in the fourth draft that appointment was also confided to federal authority.¹⁶

The Confederation Debates yield nothing that could be construed as envisaging that the appointing power in respect of judges of provincial courts involved any association of function. The only ideas on the matter expressed in the debates favourable to federal appointment were that (1) federal appointment would ensure a choice of better appointees since the candidates would likely be in the central Parliament;¹⁷ (2) it would remove the matter from local pressures;¹⁸ (3) it would save money for the provinces;¹⁹ and (4) it would secure independence of the provincial judiciary.²⁰ Views in opposition to federal appointing were also expressed, as, for example, that it was a bad thing to have provincial judges serve two masters as would be the case when the provinces assign their functions while the Dominion appoints and pays them.²¹ The reply to this was that it was part of the scheme for national unity and, since federal control alone was provided, there was no question of serving two masters.²² However, other voices urged that appointment of provincial court judges should be by the provinces;²³ that there was danger to Lower Canada in leaving appointment to the general government;²⁴ and, if done, it would mean that the courts of justice of Lower Canada would be under the control of the general government.²⁵ One additional

¹⁴ See Pope, *Confederation Documents* (1895). The scanty notes of the Quebec Conference discussions disclose that Mowat stated that "we must . . . provide that the Judges should be appointed and paid by the general government", and Sir John A. Macdonald made a motion to that effect (at pp. 81-82).

¹⁵ *Ibid.*, at p. 157.

¹⁶ *Ibid.*, at pp. 169, 192 and 209.

¹⁷ Confederation Debates, p. 387 (Solicitor General H. L. Langevin).

¹⁸ *Ibid.*

¹⁹ *Ibid.*, at p. 388.

²⁰ *Ibid.*, at p. 447 (Mr. L. Burwell).

²¹ *Ibid.*, at p. 508 (Mr. C. Dunkin).

²² *Ibid.*, at p. 522 (Mr. J. Cauchon).

²³ *Ibid.*, at p. 623 (Mr. J. Dufresne).

²⁴ *Ibid.*, at p. 692 (Mr. A. A. Dorion).

²⁵ *Ibid.*, at p. 860 (Mr. J. B. E. Dorion).

point should be made. The Confederation Debates indicate doubts whether a general appellate court for Canada would ever be set up and the vesting of appointment of the provincial court judges in federal hands was regarded as likely to contribute to a more uniform administration of justice.²⁶

Historical records have, of course, but a limited value in constitutional interpretation (especially as we move farther from them in time), and this is so even where they speak clearly. Nothing in contemporary materials establishes that the federal appointing power under the British North America Act, 1867, meant anything more than what it formally involved. Shortly after the passing of the B. N. A. Act, however, and for a considerable time thereafter, the Dominion Attorneys-General took a strong stand against provincial enlargement of the jurisdiction of inferior magistrates' or justices' courts on the ground that the presiding officers, who were provincial appointees, would thus become superior or county court judges.²⁷ It was in memoranda by these federal ministers that the issue of function was raised against the provinces despite the exclusive power confided in them under section 92(14) in relation to provincial administration of justice, including the constitution, maintenance and organization of provincial courts. There was ground for the challenge because the B. N. A. Act did in fact set up a distinction among classes of courts by reason of the terms of section 96. It did not, however, have to follow that inferior courts manned by provincial appointees must be forever frozen in their jurisdiction as of Confederation. Indeed, Chief Justice Duff was at pains to scotch the notion in his judgment in *Reference re Adoption Act*.²⁸ Moreover, the distinction in the B. N. A. Act was one respecting courts in their institutional character, and however difficult it might be in a given case to distinguish between an inferior and a superior court otherwise than by reference to jurisdiction, the difficulty is far from the same where the distinction to be made is between a court and an administrative agency not organized by the province in the same way as a court. It may, of course, be urged that, to appreciate the difference between administrative agency and court, some criteria of each are necessary. But this much can be said at this time. If there is warrant for construing section 96 in terms of function, surely this cannot be done to the exclusion of advertence to in-

²⁶ *Ibid.*, at p. 508 (Mr. C. Dunkin); cf. at p. 575 (Mr. J. Cauchon).

²⁷ Hodgins, *Dominion and Provincial Legislation, 1867-1895*, pp. 260, 345, 354.

²⁸ [1938] S.C.R. 398, at p. 418.

stitutional form.²⁹ It is fully consonant with the terms of section 96 that, if the province chooses to establish adjudicating agencies non-curial in form and organization, there is no warrant for striking down their jurisdiction on the ground that they are charged with functions which might have been or which had been discharged by courts. The terms of the B. N. A. Act and such history as there is do not support the thesis (which much of the case-law so far upholds) that function is the dominating feature of the federal appointing power.

III

The cases under section 96 are divisible roughly into two main classifications. There is, first, the line of cases of which *Reference re Adoption Act* is the culminating authority, dealing with the extension of the jurisdiction of inferior courts such as magistrates' courts or juvenile or family courts. There is, secondly, the line of cases, more germane to the present discussion, dealing with the conferring of jurisdiction on non-curial agencies. The leading authorities here are *Toronto v. York* and *Labour Relations Board (Sask.) v. John East Iron Works Ltd.*³⁰ The development of two distinct lines of decisions has taken place with the lines sometimes crossing each other so far as applicable authorities or dicta are concerned. The attempt, early in the "board" line of cases, to distinguish between "judicial" and "administrative" authority or to identify "judicial" power—an approach evident even in *Toronto v. York*—gave way in the *John East* case to a more workable approach, the basis of which was influenced by the judgment in *Reference re Adoption Act*. In the *John East* case, the Privy Council called for an examination of the "constitution and functions" of a tribunal whose activities were challenged under section 96.³¹ Beyond this it laid down two main propositions and elaborated certain subsidiary considerations to which it is necessary to refer.

The main propositions were these: (1) it is not only courts which are designated "superior" or "district" or "county" courts that are within the ambit of sections 96 to 100 of the B. N. A. Act; and (2) not all tribunals which exercise judicial power are within that ambit. These propositions, laid down in the context

²⁹ *Toronto v. York*, *supra*, footnote 5, must be contrasted in this respect with *Labour Relations Bd. (Sask.) v. John East Iron Works Ltd.*, [1949] A.C. 134, [1948] 4 D.L.R. 673.

³⁰ *Ibid.*

³¹ The case is fully discussed by Shumiatcher, footnote 2, *supra*.

of a case concerning powers vested in a labour relations board, were clearly intended to be applicable to any administrative agencies established by a province. As generalized propositions, their chief contribution to understanding of the problem posed by section 96 was in the second statement. In saying that the exercise of judicial power is not necessarily a mark of a section 96 court, the Privy Council joined hands with Chief Justice Duff, who in the *Adoption Act* reference had similarly refused to be dominated by any such abstraction as "judicial power". However, how does one come to a particular conclusion whether section 96 is offended in the activity or behaviour of a provincial tribunal? It is on this point that the *John East* case assumes considerable significance when juxtaposed with the Supreme Court's views in the *Olympia* case.

Before discussing this point it must be noted and, indeed, emphasized that there was no discussion at all of the *John East* case by any member of the Supreme Court in the *Olympia* case, and only one of the judges—Chief Justice Kerwin—made a reference to it. On the other hand, there was considerable discussion and reference to *Toronto v. York* and to *Quance v. Ivey*,³² the latter being a judgment of the Ontario Court of Appeal on a point similar to that raised in the *Olympia* case which, from one point of view, was really an appeal to determine the correctness of *Quance v. Ivey*. In *Quance v. Ivey* itself the main judgment was delivered by Robertson C. J. O., who ignored the *John East* case completely in favour of *Toronto v. York*. True enough, *Toronto v. York* and *Quance v. Ivey* were both concerned with the Ontario Municipal Board, but it is a fact that the *John East* case qualified *Toronto v. York* considerably. Hogg J. A., who also wrote in *Quance v. Ivey*, was clearly troubled by this and, in referring to the *John East* case, he overcame his qualms about *Toronto v. York* by pointing out that it had not been overruled by the *John East* case, and hence, presumably, could continue to apply as an authority on the Ontario Municipal Board.³³ The studied or unstudied neglect of the *John East* case both in *Quance v. Ivey* and in the *Olympia* case is a rather interesting commentary on how design or accident determines the law.

³² [1950] O.R. 397, [1950] 3 D.L.R. 656. *Quance v. Ivey* was followed in later Ontario cases: see *Re Township of Cornwall Assessments*, [1955] 1 D.L.R. 547; and in other provinces: see *Re B. C. Telephone Assessment* (1954), 13 W. W. R. (N.S.) 347; but it was also distinguished: see *London Ry. Commission v. Port Stanley*, [1954] 3 D.L.R. 475, discussed at footnote 74, *infra*.

³³ [1950] 3 D.L.R. 656, at p. 679.

The critical test for the application of section 96 laid down in the *John East* case was a double one. Does the board or tribunal exercise judicial power? If so, is it in that exercise a tribunal analogous to a superior, district or county court?³⁴ Of course, if the answer to the first part of the test is in the negative, that concludes the issue in favour of the provincial board. It may be taken, however, that, whatever be the meaning or elements of "judicial power" for section 96 purposes (and on this the Privy Council could give no final answer in the *John East* case), the *Olympia* case did involve the exercise of such a power so that the important issue was whether in that exercise the Ontario Municipal Board was a tribunal analogous to a superior, district or county court. On this issue one may properly ask whether the tribunal is to be judged in relation only to the particular power which is challenged or whether it is to be viewed from the standpoint of its general organization and functioning. If it be judged in terms only of the particular power (already adjudged for the purposes of argument to be a "judicial power"), then little if anything remains of the second branch of the double test. The Privy Council in the *John East* case gave clear recognition to this because in applying the second branch of the double test to the Saskatchewan Labour Relations Board, it stated:³⁵

... the elements in its constitution and functions which at least make it doubtful whether it is in the strict sense a Court exercising judicial power at all appear to lead conclusively to the opinion that it is not a Superior, District or County Court or a Court analogous thereto.

It is then the constitution and functions of the tribunal as a whole that must be considered. Moreover, it was relevant also (said the Privy Council in the *John East* case) to consider the challenged judicial "function" in relation to the tribunal's other duties.³⁶ These propositions have an important bearing on the *Olympia* case and, were it not for a further sentence in the *John East* case which is at variance with what has just been paraphrased from it, one could make the flat assertion that the *Olympia* case, as well as *Quance v. Ivey*, were wrongly decided if only because *Toronto v. York* was overruled. The sentence is as follows: "It is not impossible, as the case of *Toronto v. York* . . . illustrates, for a body to be validly established for administrative purposes and yet to be unconstitutionally clothed with a judicial power".³⁷ Are

³⁴ [1948] 4 D.L.R. 673, at pp. 676-677.

³⁵ *Ibid.*, at p. 680.

³⁶ *Ibid.*, at p. 682.

³⁷ *Ibid.*

we to regard this as anything more than the traditional course of the Privy Council to seek to reconcile all its Canadian constitutional decisions?³⁸ It is submitted not, and this for a very good reason. The Privy Council in the *John East* case, having made this token bow to *Toronto v. York*, went on later in its judgment to comment on *Toronto v. York* in a way which made it singularly inappropriate for the Ontario Court of Appeal in *Quance v. Ivey*, and certainly for the Supreme Court in the *Olympia* case, to come to a conclusion without an exhaustive consideration of the *John East* case and of the meaning of section 96. This is the comment:³⁹

In *Toronto v. York* it was decided that the Ontario Municipal Board was primarily an administrative body but that certain sections of the Act by which it was established purported to clothe it with the functions of a Court and to vest in it judicial powers and that *pro tanto*, since its members were not appointed by the Governor-General, the Act was invalid. But it is clear that in that case the question did not arise for argument, as it arises in the case under appeal, whether, upon the assumption that judicial power was vested in the Board, the Board was thereby brought within the ambit of s. 96. It is true that at an early stage in the judgment delivered by Lord Atkin the question was asked 'Is, then, the Municipal Board of Ontario a Superior Court, or a tribunal analogous thereto?' But it seems to have been assumed by their Lordships that if the power vested in it was judicial, it was such a tribunal, for (as Duff C. J. C. pointed out in the case cited) it is obvious that their Lordships did not consider, because presumably there was no occasion to do so, the distinction between the Courts that come within the intendment of s. 96 of the B. N. A. Act and other Courts and tribunals.

If (as the Privy Council states) the decision in *Toronto v. York* was based on the belief that it was enough to show that a judicial power was being exercised and that it was unnecessary to consider whether, apart from this, the tribunal in question was within section 96, how can *Toronto v. York* stand with the *John East* case? As a matter of dry professional lawyering no less than as a matter of more original constitutional interpretation, *Quance v. Ivey* and the *Olympia* case leave a good deal to be desired.

IV

The facts and issues in the *Olympia* case may now be stated and examined. Respondent was assessed in the ordinary way for municipal realty tax, and it invoked the statutory procedure for challenging the assessment. The scheme of assessment review in Ont-

³⁸ Cf. *A.G. Ont. v. Canada Temperance Federation*, [1946] A.C. 193.

³⁹ [1948] 4 D.L.R. 673, at p. 684.

ario provides for an appeal from assessment to a court of revision; for a further appeal to the County Court judge; for a further appeal to the Ontario Municipal Board; and finally for an appeal to the Ontario Court of Appeal.⁴⁰ These are all, of course, statutory appeals originating respectively in 1850 and 1853 so far as concerns the court of revision and county judge,⁴¹ and in 1906 so far as concerns the Ontario Municipal Board (then known as the Ontario Railway and Municipal Board) and the Court of Appeal.⁴² Respondent's complaint on its appeal was that bowling alleys in its building should not have been included as part of the realty. The court of revision upheld the complaint and reduced the assessment by the value of the alleys. The municipality appealed to the county judge without success and a further appeal to the Ontario Municipal Board failed on the ground that because of *Quance v. Ivey* the board had no jurisdiction to determine assessability. The municipality carried the case to the Ontario Court of Appeal, which took the position that not only did the court of revision, the county judge and Ontario Municipal Board lack jurisdiction to determine liability to assessment, but the Ontario Court of Appeal itself had no jurisdiction to entertain an appeal on such a matter, and this despite sections 80 and 83 of the Assessment Act, which in express terms purported to give the right of appeal.⁴³

The five judges of the Supreme Court of Canada constituting the majority in the *Olympia* case were at least agreed on dismissal of the appeal from the Ontario Court of Appeal because the latter had rightly decided that the Ontario Municipal Board lacked jurisdiction. Mr. Justice Estey (with whom Fauteux J. agreed) went further:⁴⁴

It is clear that a County Court Judge sitting in appeal under the Assessment Act, is not acting by virtue of his appointment under s. 96 of the B. N. A. Act, but rather as a person selected and designated by the Legislature in the Assessment Act. The same is true of the members of the Court of Appeal, and, therefore, sitting in appeal under the Assessment Act, they possess only such appellate jurisdiction as the provincial Legislature may competently vest in them.

It must be obvious that Estey J. is referring not to legislative competence in relation to a matter coming within section 92 of the B. N. A. Act (because assessment for municipal taxation is

⁴⁰ Assessment Act, R.S.O., 1950, c. 24, ss. 66, 72, 80 and 83.

⁴¹ 1850 (Can.), c. 67; 1853 (Can.), c. 182.

⁴² 1906 (Ont.), c. 31, s. 51.

⁴³ [1954] 1 D.L.R. 368, [1954] O.R. 14, aff'g [1953] O.W.N. 149.

⁴⁴ [1955] 3 D.L.R. 641, at p. 659.

undoubtedly for the province exclusively)⁴⁵ but rather to section 96, as he indicates more clearly later in his judgment. The implications of his comment are important. What it does is to threaten every exercise of appellate jurisdiction by a superior, district or county court on matters of legal liability which do not originate in the court, but originate in a non-curial provincial statutory body. Of course, his view is merely the logical extension of a denial of jurisdiction to the statutory body because of section 96, and it drives home the fact that the provinces may be unable to use their appellate courts unless they vest original jurisdiction in designated matters in their section 96 courts of original jurisdiction.

Mr. Justice Estey asserted that his comment followed from *Toronto Ry. Co. v. Toronto*,⁴⁶ a judgment of the Privy Council on which Chief Justice Kerwin also relied in his short judgment as one of the majority. Both the *Toronto* case and the later Supreme Court and Privy Council decisions in *Bennett & White (Calgary) Ltd. v. Sugar City*⁴⁷ came in for considerable discussion in the *Olympia* case, although neither was concerned with any constitutional issue under section 96. Both the majority and the minority of the Supreme Court in the *Olympia* case purported, nevertheless, to ascribe constitutional significance to these two cases. The *Toronto* case cannot be considered as anything more than a decision on the construction of the Assessment Act then in force. The relevant provision of the act giving an appeal to the court of revision has remained unchanged since its introduction and currently is section 66 of the Assessment Act, reading as follows:⁴⁸

At the time or times appointed, the court shall meet and try all complaints in regard to persons wrongly placed upon or omitted from the roll, or assessed at too high or too low a sum.

The taxpayer in the *Toronto* case, after exhausting the scheme of assessment review, including resort to the Court of Appeal, brought a declaratory action to establish an alleged exemption from assessment. In answering the contention that the matter was concluded by the Court of Appeal's confirmation of the assessment, the Privy Council held that the statutory authority in assessment review did not cover questions of liability to assessment. The language of the legislation was quite capable of supporting this construction. However, in 1910, a number of years after the

⁴⁵ See *Halifax v. Estate of Fairbanks*, [1928] A.C. 117.

⁴⁶ *Supra*, footnote 5.

⁴⁷ *Supra*, footnote 5.

⁴⁸ R.S.O., 1950, c. 24.

Toronto case, the Ontario legislature expressed itself clearly in the following terms:⁴⁹

It is hereby declared that the Court of Revision, the County Judge, the Ontario Railway and Municipal Board, a Judge or Judges of the Court of Appeal have, and always have had . . . jurisdiction to determine not only the amount of any assessment but also all questions as to whether any persons or things are or were assessable or are or were legally assessed or exempted from assessment. . . .

This amendment has come down into the current Assessment Act as section 83.

It was the conclusion of Chief Justice Kerwin and Mr. Justice Estey, and indeed of Robertson C. J. O. in *Quance v. Ivey*, that because the construction of the Assessment Act in the *Toronto* case established that questions of assessability were not confided to the assessment review tribunals at Confederation, they could not be so confided thereafter. This is a startling conclusion even if it is the case that the construction taken in the *Toronto* case was the one uniformly adopted by the courts before that decision.⁵⁰ Why the leap to the conclusion that, because the statute did not give the power to the court of revision at Confederation, section 96 operated to prevent its conferment later? When the matter is reduced to its essence, it is clear that the conclusion is based on reasoning in *Toronto v. York* which was discredited in the *John East* case.

The *Sugar City* case carried even further constitutional significance in the *Olympia* judgments, and it provided the basis on which the minority in *Olympia* proceeded. This was because the Alberta Assessment Act which was involved in the *Sugar City* case contained a provision similar to the present Ontario section 83, but without providing an appeal from the Alberta Assessment Commission to the courts. Unlike the situation in the *Toronto* case, there was a specific statutory provision respecting determination of assessability. But, as in the *Toronto* case, one of the questions in *Sugar City* was whether resort to the court to question the illegality of an assessment was precluded because of a prior adverse determination by the assessment tribunals. In the Supreme Court of Canada in the *Sugar City* case, Kerwin J., as he then was, answered the question affirmatively with the qualification that "nothing is said as to the power of the Legislature to confer such a power upon the Commission".⁵¹ Rand J., who spoke for the

⁴⁹ 1910 (Ont.), c. 88, s. 19.

⁵⁰ Earlier authorities taking the same view are referred to in *Quance v. Ivey* as well as in the *Olympia* case.

⁵¹ [1950] S.C.R. 450, at p. 457.

other members of the Supreme Court, took a different view, not strictly as a matter of constitutional power but as a matter of strict construction, in holding that the particular provision of the Alberta statute meant that the question of assessability was determinable only in relation to the administrative function of assessment and not in the sense of finally determining the taxpayer's obligation, this being a jurisdictional determination of the application of the statute which is not ordinarily withdrawn from the courts. He concluded his judgment as follows:⁵²

It may be, given property within the Province, that the Legislature might declare the scope of the exemption should be as interpreted by the assessment tribunal: that would be to vest a sub-legislative taxing authority in the Commission. But in this case the Legislature has not done so. Or the Legislature might purport to set up special provincial Courts to interpret judicially legislative provisions affecting civil rights. If it were clear that that was the effect of the statute in this case, then the serious question of *ultra vires* would be presented. But where the legislative language is capable, as here, of being given rational meaning within undoubted provincial authority, and any other view would raise doubts and anomalies within the statute, the Legislature's intention to go beyond that authority and within a questionable field should not be inferred.

This view of Mr. Justice Rand on the point under discussion prevailed in the Privy Council,⁵³ and it was the basis on which the minority of four judges in the *Olympia* case (including Rand J.) were able both to affirm the appellant municipality's right to have the Ontario Municipal Board entertain its appeal and yet to maintain a strict view of section 96 as a limitation on provincial authority to vest jurisdiction in provincial tribunals. In fine, the reservation which Mr. Justice Rand made in the *Sugar City* case on the issue of *ultra vires* in the passage just quoted was taken up by the minority, which established a dichotomy in the application of section 96 as follows: it was proper for the province to vest questions of law like assessability in administrative tribunals in the performance of their task of assessment, this being clearly not a curial function, but it was not proper to allow those tribunals to determine such questions in any ultimate (or conclusive) jurisdictional sense so as to foreclose taxpayers who dispute the applicability of the assessment legislation.

One obvious weakness of the minority position in the *Olympia* case was seized upon by the majority, which pointed out how footling it is to take assessability through the assessment review

⁵² *Ibid.*, at p. 469.

⁵³ [1951] A.C. 786, [1951] 4 D.L.R. 129.

procedure when this had no binding effect on ultimate liability, in that a taxpayer could take the question up afresh in the courts. This persuaded the majority that there was no constitutional significance in the distinction taken by the minority and that, if it was improper to vest jurisdiction in provincial tribunals to determine a matter of assessability conclusively, it was equally improper to vest it in them for any purpose. The half-way house of the minority did not in any way persuade the majority that perhaps the difficulty lay not in the conferring of such jurisdiction on provincial boards but in the strength of the courts' predisposition in favour of their own jurisdiction, a predisposition which they have raised to the level of a constitutional principle.

What is now a constitutional principle began life as a canon of judicial behaviour that very clear words must be found in a statute to justify the ousting of the jurisdiction of the courts.⁵⁴ This was **in line with an understandable** determination to give the citizenry **a forum for the adjudication** of their claims. It expressed itself in **cases where previously** protected interests were purportedly abrogated in denial of jurisdiction to any sort of tribunal.⁵⁵ But, above all, it found expression in cases where either non-curial tribunals were substituted for the courts or where resort to the courts in review of the decisions of such tribunals was purportedly foreclosed.⁵⁶ Where one kind of court was substituted for another, the soul-searching was not so close.⁵⁷ Keeping the matter in the courts was the important thing; it was undesirable to suffer law-making or adjudication by private groups or by non-curial statutory bodies.⁵⁸ Basically, the same concept underlies curial treatment of contract clauses for private arbitration of contract claims and privative clauses of statutes foreclosing judicial review of administrative decisions.⁵⁹ Section 96 gave the courts the opportunity

⁵⁴ For a recent illustration, see *Stephens v. Richmond Hill*, [1955] O.W.N. 778.

⁵⁵ In *Board v. Board*, [1919] A.C. 956, Lord Haldane said (at p. 962): "... a well-known rule makes it plain that the language [of a statute] ought to be interpreted as not excluding the jurisdiction. If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of Justice."

⁵⁶ See Laskin, *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses* (1952), 30 Can. Bar Rev. 986.

⁵⁷ See *Nanaimo Community Hotel v. Board of Referees*, [1945] 3 D.L.R. 225.

⁵⁸ For a comparable legislative situation in the United States, see Note, *The State Courts and Delegation of Public Authority to Private Groups* (1954), 67 Harv. L. Rev. 1398.

⁵⁹ Cf. *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 S.C.R. 18, [1953] 3 D.L.R. 561; *Doleman & Sons v. Ossett Corp.*, [1912] 3 K.B. 257.

to give a more final answer to attempted ouster of jurisdiction than what could be given in a merely constructional sense.

It was in a purely constructional sense that the Privy Council spoke in the *Sugar City* case because it stated that section 53 of the Alberta Assessment Act, which vested "assessability" jurisdiction in the Assessment Commission, "is not unambiguous. No doubt it could have the meaning for which the respondents contend: but it can also mean that the Commission has jurisdiction to determine the matters mentioned in so far as it is necessary for it to determine these matters in order to carry out its statutory duty to determine whether the assessment roll should be amended, but only for that purpose."⁶⁰ This expressed preference for preserving the jurisdiction of the courts left open the question whether a provincial legislature could do what the Privy Council found it had not done. What is interesting is that when the majority in the *Olympia* case faced the constitutional question left open in the *Sugar City* case it refused to take the "out" indicated in that case and adopted by its brethren in the minority, but rather receded from it by denying the constitutionality of what the Privy Council had said was constructionally open.

The duality in the minority's judgment to which the majority objected is no more impractical than the void created by the majority's judgment. For the effect of that judgment is that not only is the Ontario Municipal Board unable to decide assessability but equally the decision of the court of revision reducing the taxpayer's assessment must be regarded as meaningless. The municipality can presumably ignore the reduction and assess at the higher figure. Equally, it is arguable that the taxpayer can ignore the assessment, because if the court of revision cannot determine assessability neither can the assessor in the first place. The whole process of assessment becomes stultified in its inception, unless resort is had (as undoubtedly it will be) to the proposition that if the taxpayer pays without protest or fails to act in furtherance of a protest he will have chosen to abide by the result. This is hardly a commendable method of assessment administration. For it raises, in addition, the question whether the taxpayer should not bring a declaratory action when assessment inquiries have been initiated instead of waiting until the notice of assessment has been served. More than this, it leaves unsettled the question of assessability until the time has expired for the taking of curial action by the taxpayer or until he is sued by the municipality. He

⁶⁰ [1951] A.C. 786, at p. 811.

need not move in response to the assessment; he need not (if he is going to challenge his assessability) pay any attention to the statutory procedures for assessment review. He can wait to be sued. It will be of no avail to the municipality to invoke any statutory provision which makes the assessment roll binding on the taxpayer. If the legislation is incompetent to confide "assessability" jurisdiction in the assessment review tribunals, it is also incompetent to bind the taxpayer when he fails to avail himself of the provisions for review.

This bifurcation of assessment administration—the concession that questions of quantum or of valuation basis may be determined by the assessment review tribunals but that assessability may not be—does not seriously commend itself as a necessary constitutional result when its basis is the flimsy one that assessability was not within the jurisdiction of assessment review tribunals at Confederation. What lies behind the thinking that the condition of the statute book as of 1867 controls administration in the latter half of the twentieth century?

V

It is a trite observation today that the "1867 statute-book" test is a straitjacket on adaptability and innovation in governmental administration to meet the problems thrown up by the social pressures of an evolving society. Since it is eminently clear that the B. N. A. Act has not been rigidified as of 1867 in respects of grants of legislative power,⁶¹ is there any justification for the 1867 deep-freeze applied in the *Olympia* case and in *Quance v. Ivey* in the interpretation of section 96? The "1867 statute-book" test has been used in relation to administrative tribunals as well as in relation to attempted enlargement of the functions of inferior courts, as is evident from the Privy Council's decision in *Martineau & Sons Ltd. v. Montreal*.⁶² This was convenient where, as there, the historical facts showed that at Confederation a challenged function was not exercised by superior courts but by some other body. However, the mere fact that a particular power was not reposed in non-curial agencies in 1867 carries with it no necessary con-

⁶¹ This is not true of all heads of legislative power, for example, s. 132 (the treaty power) and s. 92(2) (direct taxation). It is, however, true of s. 91 (21) (bankruptcy and insolvency); s. 91 (27) (criminal law) and s. 101 (federal appellate court); s. 92(13) (property and civil rights in the province); and s. 92(9) (provincial licensing), to mention some of the more prominent illustrations.

⁶² [1932] A.C. 113.

clusion that it would be improper so to repose it after 1867. *Toronto v. York* took, of course, a contrary view. But, with Duff C. J.'s judgment in *Reference re Adoption Act*, the "judicial function" concept as an absolute was watered down, and such emphasis as there was on conditions in 1867 was related to the kind and character of inferior courts which were then known. So far as functions were concerned, Chief Justice Duff rejected the suggestion that they were fixed as of 1867.⁶³ Why then did this notion persist in the administrative tribunal cases? It may be suggested that it could come in through resort to it to help determine whether the particular provincial tribunal was a superior court or a court analogous thereto. A reference to function is understandably as relevant here as a reference to constitution. Thus, in the *John East* case, the Privy Council examined the functions of the labour relations board with a view to determining whether it was analogous to a superior court. But even here it modified the 1867 limitation by inquiring whether if, in 1867, the social and economic outlook had been the same as it became when the legislation before it was enacted, it would not have been expedient to establish such a specialized tribunal as the Saskatchewan Labour Relations Board.⁶⁴ It is a fair conclusion from *Reference re Adoption Act* and the *John East* case that it is not determinative of the application of section 96 that a particular function was curial in 1867. That gives only a half answer. The other more important half depends on the question whether the tribunal is a superior court or analogous thereto; and just as "one swallow doesn't make a summer", so the exercise of an alleged "superior court" function does not turn a provincial tribunal into a section 96 court. Yet it is the half answer that was taken for the whole in *Quance v. Ivey* and the *Olympia* case, because the consideration of function was not related to the central question whether the Ontario Municipal Board was in the exercise thereof a superior court or a court analogous thereto. On the contrary, there was a reaffirmation of *Toronto v. York* with emphasis added that the function in question had been curial before and after 1867. If the emphasis had any meaning, it could be only that the length of time that the function was so reserved marked it forever for court handling.

There are two alternative possibilities open on section 96, each of them opposed to the result reached in the *Olympia* case (whether by the majority or the minority) and, in my respectful submission, each a solution that admits of at least as much support in the case

⁶³ *Supra*, footnote 28.

⁶⁴ [1949] A.C. 134, at pp. 150-151.

law as well as on principle as can be found for the *Olympia* judgments. The first of these is that section 96 is satisfied if there is a section 96 court in the legislative picture to determine finally the issues brought in the first place before a provincial administrative tribunal. The minority in the *Olympia* case were concerned to establish that the question of assessability was not, under the statute, subject to final determination by the Ontario Municipal Board. Since an appeal on a question of law was provided to the Court of Appeal—surely a section 96 court—why was it not proper to hold that, because of the appeal, final determination rested with a section 96 court? So far as the majority in the *Olympia* case are concerned, the previous discussion in this article has pointed out that a question of law like assessability is not alone the hallmark of a superior court. So long as the provincial legislature enables the question to go to a section 96 court for conclusive determination, what objection can there be? The advantages are two-fold. We would get the administration of assessment matters through an organized system of review, thus satisfying the “administrative” side, and, secondly, we would have the ultimate decision of a federally-appointed panel of section 96 judges. Of course, exhaustion of administrative remedies would be obligatory, and *res judicata* would operate (subject to any further appeal to the Supreme Court of Canada) against any collateral proceedings by declaratory action or otherwise.⁶⁵ On the alternative suggested, it would be necessary for the province to maintain an appeal provision to satisfy the constitutional dictate. It would have the further value of rendering superfluous any resort to prerogative writs like certiorari or mandamus. Failure of any taxpayer or municipality to exhaust the review procedure would leave them in the position of being bound by the results so far as they may have gone but without being able (as the *Olympia* decision now enables them) to ignore the procedure in favour of an attack through superior courts of original jurisdiction.

The obvious objection to this alternative is that it selects merely the first branch of the *John East* double test as the only

⁶⁵ It is only the so-called superior courts whose proceedings (by their own declaration) are immune from collateral attack. It may be that legislation could achieve the same position for inferior tribunals, but the assessment cases reviewed here show that the legislation would have to run the gauntlet of superior court interpretation and, in Canada, must face up to s. 96. For a recent illustration of the “superior court” principle and its application as between a provincial and a federal (Exchequer) court, see *Keystone Shingles and Lumber Co. v. Royal Plate Glass and General Ins. Co. of Canada*, [1955] 4 D.L.R. 53.

relevant one, and ignores the very terms of section 96, which speak of appointments to certain kinds of *courts*. This objection provides the key to the second alternative, which is to assess the provincial tribunal by the criteria signifying a superior court. This is the task that was essayed in the *John East* case and that should have been undertaken in *Quance v. Ivey* and in the *Olympia* case.

In approaching this task in respect of the Ontario Municipal Board there is a preliminary matter to consider, arising out of the fact that this board is almost a "government in miniature" by reason of the multifarious statutory duties assigned to it.⁶⁶ Generally, a provincial administrative tribunal is constituted to act under a specific statute or under a series of statutes which confer related functions. If one were to assess the Ontario Municipal Board on the totality of its statutory duties, there is no question but that it is not a section 96 court. A literal reading of the *John East* case indicates, however, that the evaluation should be made in the light of the particular jurisdiction of the board that is in question, and here this means its functions in assessment matters. One might reasonably extend the scope of evaluation by appraising the board according to its duties in the field of municipal administration of which assessment is a part. On such an extended appraisal there could again be no doubt but that the board is not a section 96 court. If the examination be confined to assessment alone, it will avail for courts of revision as well as for the Ontario Municipal Board. What conclusions do such an examination yield?

Ten years before *Quance v. Ivey* a problem similar to what was involved there came before the Nova Scotia Supreme Court *en banc* in *Dartmouth v. R. C. Episcopal Corp. of Halifax*.⁶⁷ The case began as an action by a municipality to recover taxes levied on defendant's school houses, and a defence to the action was that the school houses were exempt. It appears that no appeal was taken against the assessment, although statutory provision was made for an appeal to a board of revision, an assessment appeal court and ultimately to the county court. In view of the decision in the *Sugar City* case it would now be arguable that the Nova Scotia assessment legislation could not be construed to confer on the assessment tribunals power to determine conclusively defendant's claim to exemption; and, in view of the *Olympia* case

⁶⁶ As Willis pointed out in his article, *supra*, footnote 2, it is necessary to measure a province-wide board only against superior courts since county and district courts have but a limited territorial jurisdiction.

⁶⁷ [1940] 2 D.L.R. 309.

majority judgment, no such power could be conferred. Yet the majority of the court, faced with the question whether exemption could be determined by assessment review tribunals, answered in the affirmative in the following terms:⁶⁸

It was suggested that neither the assessors nor the Tax Appeal Court had power to decide upon the defendant's exemption from assessment because the declaration and enforcement of legal rights are by the B. N. A. Act, s. 96, exclusively within the jurisdiction of the Superior Courts of law; and that the Legislature could not give an inferior tribunal the right to determine defendant's exemption. This objection would apply equally to the Assessment Appeal Court of towns, and further, since no appeal was taken, is irrelevant so far as the Court is concerned. If its effect were as defendant contends, it would frustrate the whole system of assessment. The fact is that assessors are administrative officers and the Tax Appeal Court an administrative tribunal administering the Assessment Act and not a Court exercising judicial power.

There is no such refinement of the problem of section 96 evident here as there is in the *Olympia* case (in the minority views) and in the *John East* case. While the view of the Nova Scotia court is clear enough in its result, it is yet important to note that the court found at the same time that some of the property was exempt and gave relief accordingly. Is there then a contradiction in the court's position on section 96 between what it said and what it did?

The answer to this is—not necessarily so. In the case of labour relations boards, which are now conceded to be outside section 96, their orders are still reviewable by certiorari and mandamus.⁶⁹ Whether a declaratory action can be brought to secure in anticipation a decision on a point that would fall to a labour relations board to determine in pending proceedings is another question which should be (and has been) answered in the negative.⁷⁰ In assessment matters, it appears that the determinations of assessment tribunals on questions of exemption or assessability (where there is no appeal provided to section 96 courts) are as reviewable on certiorari as are labour relations board orders.⁷¹ This may also be true even if an appeal is provided only to a county court, which has no jurisdiction to entertain proceedings by prerogative writs. Municipal tax assessment provides, however, a further avenue for possible review through defence to an action for recovery of

⁶⁸ *Ibid.*, at p. 319.

⁶⁹ *Supra*, footnote 56.

⁷⁰ See *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board*, [1951] O.R. 562, [1951] 4 D.L.R. 47.

⁷¹ Cf. *Mindamar Metals Corp. Ltd. v. Richmond County*, [1954] 4 D.L.R. 769, aff'd [1955] 2 D.L.R. 183.

taxes. Unless the assessment statute expressly confides exemption and assessability matters to the assessment review tribunals, it is arguable that these matters are as open to collateral attack in a tax recovery action as by certiorari to quash the assessment. Even where the statute is express, the same attack may be open as it apparently is in so far as resort to certiorari is concerned. In short, although the Nova Scotia court did not specifically advert to the question under discussion, there is, in my view, no inconsistency in holding that assessment tribunals are not section 96 courts, even though they pass on questions of assessability and exemption, and yet admitting that superior courts may have a reviewing authority on decisions made on such questions.

To return to the question whether the Ontario Municipal Board is a section 96 court in its assessment jurisdiction, the answer is clearly "no" if consideration be given only to its constitution or to its constitution and procedure. It may be said that it is begging the question to ask whether it would not be appropriate to vest assessability jurisdiction in the board. Yet this question suggests the more critical question whether the provincial legislature is entitled to withdraw certain functions from a superior court and vest them as they are in one of its own tribunals. In the workmen's compensation board and labour relations board cases, the courts did not have to face this problem squarely because the relevant legislation had destroyed existing rights and liabilities and created new ones of a kind not theretofore handled by superior courts. To some extent this was true even in the "inferior court" problem that confronted the Supreme Court in *Reference re Adoption Act*. On principle and as a matter of legislative power, the provincial legislature is undoubtedly entitled to contract as well as enlarge court jurisdiction.⁷² The contraction may result from a policy decision that it would be wiser to repose

⁷² This follows from the mere existence of legislative power, but it is subject to qualification where the contraction is coupled with an assignment of the jurisdiction in violation of section 96: *McLean Gold Mines Ltd. v. A.-G. Ont.*, [1924] 1 D.L.R. 10. The paradoxical position seems to be that while a provincial legislature may withdraw claims or disputes from all adjudication (at least by destroying or withdrawing legal recognition of the claims or rights in question), yet if it purported to substitute board for court administration it may be constitutionally unable to do so. The distinction between statutory destruction of the "right" or "obligation" and withdrawal of existing process for its enforcement has a strange application in reverse in Canadian constitutional litigation on provincial legislative authority in relation to civil rights outside the province; here the province can deal with the process in the province but not with the "right" itself: see *Ottawa Valley Power Co. v. H. E. P. C.*, [1937] O.R. 265.

a particular issue of liability in a tribunal that would also be charged with supervision of related matters in the same field rather than splitting the field between courts and tribunals.

On this view, if it is proper to invest administrative tribunals with jurisdiction to determine quantum in assessment matters, and even to refund taxes already paid, why is it not proper to confide in them questions of original assessability so that all assessment issues may be resolved through the one process? Will any one really be convinced by the distinction made recently by Laidlaw J.A. in *Hamilton v. Firestone Tire and Rubber Co.*, where, speaking of the power conferred on courts of revision in Ontario in 1944 to refund taxes paid, he said:⁷³

The function committed to the court of revision is the administration of a new power to relieve from an existing liability and the exercise of that power does not involve the adjudication of any pre-existing absolute right.

The "rights" in both cases, that is, in respect of assessability or exemption and in respect of refunding of paid taxes, are purely statutory, and it is mechanistic to find a constitutional distinction in the fact that the refunding power is (as a matter of construction) discretionary or that it was one never exercised by superior courts in 1867. Indeed, the addition of such a power to the catalogue of functions assigned to courts of revision and to the Ontario Municipal Board only serves to emphasize the artificiality of the split in assessment functions produced by *Quance v. Ivey* and the *Olympia* case.

The artificiality is compounded when the courts, as in *London Railway Commission v. Port Stanley*,⁷⁴ a companion case to the *Firestone* case, uphold the statutory power of courts of revision and the Ontario Municipal Board to order a refund of taxes already paid where the claim for a refund is based on a contention that the property has become exempt. The Ontario Court of Appeal recognized in the *Port Stanley* case that in order to give the statutory relief the tribunals in question would have to determine the question of exemption, but it referred to this as "incidental". So is the question "incidental" in respect of original liability. The Court of Appeal conceded that a question of law is involved in either case, but it asserted that exemption in relation to original

⁷³ [1954] 3 D.L.R. 685. Laidlaw J. A. gave as an additional reason for supporting the power the fact that at confederation courts of revision had power to remit or reduce taxes due and the conferring of a power to refund taxes paid was a valid extension of the pre-confederation power.

⁷⁴ [1954] 3 D.L.R. 475.

tax liability is a matter of "judicial power" while exemption in respect of a refund entitlement is not. In my view, the same reasoning that dictated *Quance v. Ivey* could apply to the *Port Stanley* case, and we are left only with a distinction based on the state of the statute book in 1867 and the previous course of court decision on original assessability and exemption. Any distinction of substance is mere illusion.

Essentially, what is being urged here is that assessment must be considered in all its ramifications in determining whether it should be administered by section 96 courts or by provincial administrative tribunals. If the duties connected with assessment be taken as a whole, there could be no justification for suggesting that they are properly "section 96" duties rather than duties open for assignment to a provincially appointed tribunal. In the making up of an assessment roll, determination of assessability of a person or of exemption of some piece of property is part and parcel of the routine of the task, and of no greater significance than questions of valuation or of classification. To put labels of "judicial power" or "question of law" on assessability or exemption, and labels of "administrative power" or "question of fact" on valuation or classification may well serve the necessities of a limited statutory right of appeal or of permissible resort to prerogative writs. But to move from this to a constitutional prohibition is a needless artificiality. In my view, the form of administration, whether by section 96 court or by board, is simply a policy question for the provincial legislature. Nothing in section 96 compels any other conclusion or dictates any such constitutional division of function as is indicated in the majority and minority opinions in the *Olympia* case. Assessment is so intimately connected with municipal government that, even apart from the authorities, one finds it difficult to associate exclusive superior court jurisdiction with any phase of the matter, be it assessability or exemption therefrom. That the association should be given a constitutional protection is stranger still, especially when it means that original consideration must come from a section 96 court as opposed to simply an opportunity for review by appeal (or by prerogative writ), which is open on the legislation as it stands. Beyond this, the *John East* case supports the view that the totality of the assessment function should be measured against the compulsion of section 96, and not a mere fragment.