COMMENTS
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LABOUR RELATIONS—CERTIFICATION—CONSTITUTIONAL LAW—ROLE OF CANADIAN COURTS IN SUPERVISING EXERCISE OF POWER DELEGATED BY PROVINCIAL LEGISLATURES TO LABOUR RELATIONS BOARDS AND SIMILAR TRIBUNALS.—The decision of the Supreme Court of Canada in *Metropolitan Life Insurance Company* v. *International Union of Operating Engineers, Local 796*,[1] provides a good context for viewing the role of Canadian courts in supervising the exercise of power delegated by provincial legislatures to labour relations boards and similar tribunals. The decision reversed the order of the trial judge[2] and of a unanimous court of appeal,[3] was condemned in the provincial legislature as "legal gobbledygook of the worst kind",[4] was criticized in the press,[5] and is certain to be highly controversial among lawyers.

Judges generally have reasons for making the decisions they make, but often they do not fully articulate those reasons. Sometimes the judicial instinct follows some residue of an historically-based value which may or may not have been adapted to changed circumstances. But when this instinct is powerful enough to induce judges knowingly to invoke public wrath they ought not to be condemned out of hand. Rather, we should seek a full understanding of the factors conditioning such decisions in order to assess their merit.

My purpose is to show the constitutional foundation on which the *Metropolitan Life* case rests, so that the decision of the Supreme Court can be viewed in historical as well as contemporary context.

First, the facts of the case. The Ontario Labour Relations Board had certified the respondent union as bargaining agent of a unit of employees in the appellant company's operations. In doing so, the board had found it unnecessary to take a vote among the employees because it was satisfied that more than fifty-five per

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[1] [1970] S.C.R. 425.
[2] (1968), 68 D.L.R. (2d) 109, per Fraser J. (Ont. H.C.).
[3] (1969), 2 D.L.R. (3d) 652, per McLennan, Evans and Laskin JJ.A.
[4] Harold Greer, Labour and the Courts, Montreal Star, Feb. 7th, 1970 under the caption "Unions Inflamed".
[5] *Ibid.*

cent of them were members of the union. Had this not been the case, a representation vote was mandatory under section 7 of the Act.[6] In deciding whether an employee was a member of the union, the board viewed the following conditions as determinative: application for and acceptance of membership by the employee, accordance of full rights and privileges by the union, and absence in the union's constitution of an express prohibition of the employee being admitted to membership.

In this last condition the board ran afoul of the law, in the view of the Supreme Court of Canada for, as the trial judge found, the employees in question were not operating engineers and were not eligible for membership under the union constitution. The trial judge, however, noted that the board had an established policy in such matters, then found that while the board erred in law in deciding such employees could be members under the constitution, the error could not be reviewed because of the privative clauses contained in sections 79 and 80 of the Act.[7] The Ontario Court of Appeal affirmed, Laskin J.A. stating that the question was one that the legislature had conferred exclusively on the board and which was therefore immune from judicial review by virtue of the privative enactments.[8]

The question that seems to have bothered the Supreme Court of Canada is whether a privative clause can serve to convert the particular terms of reference given the board by the legislature into a *carte blanche*, enabling the board to ignore the words of the Act and to substitute policies it deems desirable for those prescribed in the Act. That is, does our constitution require that authority be delegated in particular terms by a legislature and that the subordinate body operate only within the authority conferred? If it does, how can that constitutional requirement be met

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[6] Labour Relations Act, R.S.O., 1960, c. 202, as am.

[7] *Ibid.*:

79(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

80. 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 waranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

[8] *Supra*, footnote 3.

if judges take privative clauses at face value in all circumstances?

Seen in this perspective, the case is not primarily one concerning judicial interference with the labour relations policies of a legislature and with the activities of the agency through which it seeks to implement those policies. Rather, it is a matter of defining the role of the courts in maintaining a division between the legislative and administrative branches of government, without which it may be questionable whether the rule of law can be maintained.

The British North America Act[9] allocates plenary powers to the legislatures. The *Hodge* case[10] decided that the power to delegate is inherent in those plenary powers. However, if we should reach the point where the delegated bodies are in fact exercising plenary powers, then the system of checks and balances that has grown up around the parliamentary system loses efficacy. The chequered career of judicial review in Canada suggests that *Metropolitan Life* is part of a pattern of decisions in which the courts have tried to find a balance between protection of these basic institutional arrangements and respect for legitimate schemes of social engineering in which provincial legislatures have tried to evolve new institutions and practices.

The starting point of this process was, of course, the decision of the Judicial Committee of the Privy Council in *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.*,[11] where it was held that the Labour Relations Board established by the Saskatchewan Trade Union Act[12] was sufficiently different in function and constitution from the tribunals contemplated by the words "Superior, district and county courts" in section 96 of the British North America Act that the provinces may not only create it but may appoint its personnel.[13]

Two features of this decision should be noted carefully. First, the Privy Council recognized that the board, while not a section 96 court, was nevertheless required to apply legal principles as well as policy considerations.[14] Second, the Privy Council contemplated judicial supervision of the jurisdiction of such boards, not-

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[9] (1867), 30 & 31 Vict., c. 3 (U.K.).

[10] *Hodge* v. *The Queen* (1884), 9 App. Cas. 117.

[11] [1948] 4 D.L.R. 673.

[12] S.S., 1944 (2nd sess.), c. 69.

[13] Provincial competence to make laws in relation to labour relations, apart from the appointment of personnel to apply those laws, was first established in *Toronto Electric Commissions* v. *Snider*, [1925] A.C. 396 (P.C.).

[14] *Supra*, footnote 11, per Lord Simonds, at p. 680:

"Nor do [their Lordships] doubt . . . that there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained fact but by considerations of policy also."

withstanding privative enactments.[15]

I will try to show that the theory implicit in the *John East Iron Works Ltd.* case and followed in subsequent Canadian jurisprudence is that sections 96-100 of the British North America Act impose a constitutional requirement that certain kinds of questions—*legal* questions—be subject to ultimate determination, either by appeal or review, by courts of law manned by an independent judiciary; that provincial labour relations boards with their mixed functions (applying both legal principles and administrative policy in single decisions) could be given judicial blessing only by abandoning institutional separation as the technique for enforcing the policy of sections 96-100;[16] and that the technique of judicial review of jurisdiction was to be adopted as the means of ensuring that these boards maintain a minimum level of conformity to established law and do not simply substitute policy considerations for legal principles *in determining questions of law*.[17]

Unfortunately, the decision offers no guidance as to how one determines which matters a legislature intends a board to decide according to legal principles and which it intends a board to decide according to policy considerations or other non-legal criteria. The mere enactment of a privative clause cannot be taken as authorizing a board to ignore legal principles when deciding questions of law, because this would allow a provincial legislature to alter the basic institutional arrangements and allocation of functions established by the British North America Act. There is a line of cases that clearly establishes that no legislature in Canada can interfere with the constitutional duty of the courts to decide finally disputes concerning the distribution of the legislative powers made by the British North America Act.[18] In another application of the same general prohibition against altering the institutional arrangements

[15] *Ibid.*, at p. 683:

"Nor must its immunity from *certiorari* or other proceedings be pressed too far. It does not fall to their Lordships upon the present appeal to determine the scope of [the privative] provision but it seems clear that it would not avail the tribunal if it purported to exercise a jurisdiction wider than that specifically entrusted to it by the Act."

[16] The best illustration of this technique is *Toronto* v. *York*, [1938] A.C. 415, where the board held that the Ontario Municipal Board, being an administrative body whose members were not appointed in accordance with sections 96, 99 and 100 of the B.N.A. Act, 1867, was not validly constituted to receive judicial authority. It is significant that Lord Atkin referred not just to section 96, but to sections 96, 99 and 100 of the B.N.A. Act, which he described as "three principal pillars in the temple of justice", at p. 426. It is also important to note that, unlike the situation in *John East*, the alleged judicial authority was found to be severable from the Municipal Board's administrative authority.

[17] The rationale of this interpretation of sections 96-100 is developed in Lederman, The Independence of the Judiciary (1956), 34 Can. Bar Rev. 769, 1139.

[18] *Ottawa Valley Power Co.* v. *H.E.P.C.*, [1937] O.R. 265; *Beauharnois Light, Heat and Power Co.* v. *H.E.P.C.*, [1937] O.R. 796; *B.C. Power Corp. Ltd.* v. *B.C. Electric Co. Ltd. et al.*, [1962] S.C.R. 642.

created by the British North America Act, the Ontario Court of Appeal in *Regina* v. *Ontario Labour Relations Board, Ex parte Ontario Food Terminal Board*,[19] held that a pure question of law (in that case, whether a board created by statute was a Crown agency) cannot be finally and conclusively determined by a provincial labour relations board.[19A] This is a function reserved by section 96 to certain courts, and while the initial determination must necessarily be made by the board under the mixed functions rationale of *John East Iron Works Ltd.*,[20] any attempt by the legislature to prevent, by privative enactment, ultimate recourse to a section 96 court on the pure question of law would run afoul of the purpose underlying sections 96-100 and therefore would be invalid.

It is submitted that this decision is a sound application of the interpretation given section 96 in the *John East Iron Works Ltd.* case when that judgment is viewed as a whole, as constitutional decisions must be viewed, rather than in fragmented snippets. I hold to this position even though I am aware that Chief Justice McRuer, in *Regina* v. *Ontario Labour Relations Board, Ex parte Taylor*,[21] expressed puzzlement at the suggestion made in the *Ontario Food Terminal Board* case[22] that section 96 guarantees access to the courts on a pure question of law. McRuer C.J. stated in *Ex parte Taylor* that the question of Crown agency in the earlier case was a collateral matter and therefore one subject to judicial review in spite of the privative clause. Thus, he concluded that the comments based on section 96 in the earlier case were *obiter*. With respect, the learned judge read his own analysis back into the earlier case. There is nothing of collateral facts in the analysis of Laidlaw J.A. in the *Ontario Food Terminal Board* decision. Rather, he based his analysis directly on section 96, whereas the collateral matters approach is a device through which the rationale of section 96 is applied to administrative decision in a manner that is not only indirect but confusing to the point where neither judges nor lawyers can give a clear account of the law of judicial review in Canada.

I will try to demonstrate that our courts, in failing to pick up the line of analysis offered by the Ontario Court of Appeal in the *Ontario Food Terminal Board* case, missed a chance to base our law of judicial review on a much clearer foundation. However, it still may not be too late.

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[19] (1963), 38 D.L.R. (2d) 530, Laidlaw J.A. speaking for the unanimous court, Gibson and Kelly JJ.A. being the other members of the court.

[19A] In fact, the court asserted that the board was not competent to decide this question at all, even initially, but must refer it to a court of law. I suggest that this goes too far the other way.

[20] *Supra*, footnote 11.

[21] (1964), 41 D.L.R. (2d) 456, at p. 461 (Ont. H.C.).

[22] *Supra*, footnote 19.

The chief reason for this failure, which is seen clearly in the judgment of Chief Justice McRuer in the *Ex parte Taylor* case, is a lumping together of labour relations boards and workmen's compensation boards and applying the same analysis to judicial review of decisions of both. In *Farrell* v. *Workmen's Compensation Board*[23] the Supreme Court of Canada had rejected the notion that section 96 prevented a provincial legislature from barring judicial review of a decision of the board on a question of law. Therefore, reasoned the learned judge, such review can also be barred in relation to a decision of a labour relations board on a question of law.

This ignores important historical and functional differences between these two kinds of tribunals. Workmen's compensation boards were established because of a belief that the application of established legal principles in courts of law had failed to provide justice for injured workmen.[24] In the place of the law of tort or delict was substituted a scheme of insurance administered by a board according to statutory criteria, and when such boards faced constitutional challenge on a section 96 basis, in *A.-G. Quebec* v. *Slanec and Grimstead*,[25] the challenge was rejected on the ground that this area of decision had been moved from a judicial framework to an administrative framework. It was a clear shift in ground rules, and there is nothing of the *John East Iron Works Ltd.* analysis suggesting that the Workmen's Compensation Board reached its decisions by applying a mixture of legal principles and policy considerations. Once the board has jurisdiction, as *Farrell* makes clear, it is not answerable to a section 96 court because it is entitled under its enabling legislation to establish its own criteria for decision.

It is not, within its jurisdiction, deciding questions of law. The British Columbia Workmen's Compensation Act[26] in issue in the *Farrell* case, conferred, by section 76, "exclusive jurisdiction to inquire into, hear and determine all matters of law and questions of fact" arising under the compensation code. The Act went on, in section 78, to provide that:

> The decision of the Board shall be upon the real merits and justice of the case, and it shall not be bound to follow strict legal precedent.

The current British Columbia statute[27] continues this exclusion of strict law in section 82:

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[23] [1962] S.C.R. 48, 31 D.L.R. (2d) 177.

[24] This theme is seen in *A.-G. Quebec* v. *Slanec and Grimstead*, [1933] 2 D.L.R. 289 (C.A.), below, and in comprehensive studies of workmen's compensation law in Canada, *e.g.* The Report of the Royal Commission in the matter of the Workmen's Compensation Act (Ontario) (1967), p. xviii.

[25] *Ibid.*

[26] R.S.B.C., 1948, c. 370.

[27] B.C., 1968, c. 59. Similar provisions are found in the Ontario Workmen's Compensation Act, R.S.O., 1960, c. 437, s. 72 (4) and Quebec Workmen's Compensation Act, R.S.Q., 1964, c. 159, s. 59 (4).

> The Board is not bound to follow legal precedent; its decision shall be given according to the merits and justice of the case and, where there is doubt on any issue and the disputed possibilities are evenly balanced, the issue shall be resolved in accordance with that possibility which is favourable to the workman.

That is, once the board has jurisdiction, it is meaningless to speak of legal error because it is applying a *scheme* of compensation that has, with judicial approval,[28] been substituted for the scheme of delictual principles that courts of law apply in such situations. Once the Supreme Court decided in *Farrell* that this substitution does not violate section 96 (which the trial judge thought it did),[29] the courts are faced with a board that cannot err in law within its jurisdiction because it is not required to apply strict law. Thus, apart from real questions of jurisdiction (as opposed to convoluted questions of jurisdiction, of which we will see examples shortly) the decisions of a workmen's compensation board are of no concern to a court of law.

The history and functions of labour relations boards are quite different. They did not grow from a desire to remove a whole area of decision from the judicial framework but rather to provide tribunals where legal principle and labour relations expertise could be fused for the effective processing of matters whose resolution involves elements of both. This need was explicitly recognized in the *John East Iron Works Ltd.* case.[30] But to go the next step and allow provincial legislatures to bar judicial review of labour relations boards' decisions is to remove the requirement that they apply legal principles to questions of law, for then such boards can, with impunity, decide questions of law in any way they see fit, without regard to the law. This goes beyond what the Privy Council authorized in *John East Iron Works Ltd.* They said, in effect, that the rigid view of section 96 must yield to the reality of mixed functions, but they did not say that legal principles could be ousted from this field of decision, as was the case with workmen's compensation boards. And if the constitutional rationale of sections 96-100 continues to require that labour relations boards decide questions of law according to established legal principles, the question becomes one of how that requirement shall be enforced. Put another way, the reality of mixed functions[31] forced the courts to

[28] *A.-G. Quebec* v. *Slanec and Grimstead, supra*, footnote 24, above.
[29] (1960), 24 D.L.R. (2d) 272, per Manson J. (B.C.S.C.).
[30] *Supra*, footnote 11.
[31] This reality was well described by Rand J. in relation to the office of mining commissioner under the Ontario Mining Act, R.S.O., 1950, c. 236, in *Dupont* v. *Inglis*, [1958] S.C.R. 535, at p. 541: "The adjudications by the recorder and the commissioner are not to be treated in isolation; the special elements of experienced judgment and discretion are so bound up with those of any judicial and ministerial character that they make up an inseverable entirety of administration in the execution of the statute. To introduce into the regular courts with their more deliberate and formal procedures what has become summary routine in disputes of such detail

give a functional application to sections 96-100 rather than the former institutional application.

However, rather than adopting the direct approach of Laidlaw J.A. in the *Ontario Food Terminal Board* case and acknowledging that their review function is founded on sections 96-100, the Canadian courts have used a very elastic concept of jurisdiction and the collateral matters technique as vehicles for the underlying policy. The result is a virtual intellectual gymnasium where lawyers and judges can spend thousands of hours performing functions that serve concepts and doctrines, not human values.

A good illustration of the point being made here is the recent decision of the Supreme Court of Canada in *Noranda Mines Ltd.* v. *The Queen.*[32] The Labour Relations Board of Saskatchewan had rejected as premature an application for certification made by a union, for the stated reason that the number of employees in the proposed bargaining unit "did not constitute a substantial and representative segment of the working force to be employed in the future by Noranda". The Saskatchewan Court of Appeal[33] quashed the board's order and issued mandamus ordering the board to determine the application, taking the view that the board had no choice under the Trade Union Act[34] but to proceed to determine whether the necessary conditions for certification were met by the union. In other words, the Saskatchewan legislature had not authorized the board to rule such applications premature, so that in rejecting the application in this way the board had declined jurisdiction.

The decision of the Saskatchewan Court of Appeal was "correct" *if* one assumes that the Act created a *legal* right to certification in certain circumstances and that, in deciding whether one of those circumstances existed, namely, that the employees comprised a unit appropriate for purposes of collective bargaining, the board was not authorized by the Act to consider the timing of the application. So to state the position is to demonstrate the unsoundness of the decision of the Saskatchewan Court of Appeal, for anyone who is at all familiar with labour relations knows that timing is crucial. If this union had been certified and then a year later the unit had grown from 25 to 300-odd employees, as the employer estimated would be the case, a majority membership in a different union would have necessitated the rather unpleasant and unsettling experience of decertification of the first union. Thus, the appropriateness of the bargaining unit is clearly one of those ques-

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would create not only an anomalous feature of their jurisdiction but one of inconvenience both to their normal proceedings and to the expeditious accomplishment of the statute's purpose."

[32] (1970), 7 D.L.R. (3d) 1.

[33] (1969), 5 D.L.R. (3d) 173.

[34] R.S.S., 1965, c. 287.

tions that the legislature intends the board to decide through applying its labour relations expertise, not through a *legal* interpretation of provisions of the Act.

The Supreme Court of Canada clearly saw that this was the case, in reversing the Saskatchewan Court of Appeal, but in citing the *Farrell* case as authority for its decision it has continued the confusion of workmen's compensation boards, which are not required to apply strict law, and labour relations boards which, while protected from undue interference from courts, are nevertheless required to apply strict law to certain questions that come before them in the performance of mixed functions.

Martland J., speaking for a five-man court, stated that if the order in question is within the board's jurisdiction,

> . . . it is not open to review because of error, whether of law or fact.[35]

This is just not so. Time and time again our courts, including the Supreme Court of Canada, have quashed decisions for legal error notwithstanding a privative clause, by the simple device of characterizing the legal question erred on as collateral or jurisdictional. In *Noranda Mines Ltd.* the court should have said that the appropriateness of the bargaining unit is a question entrusted to the board, is a question the legislature intends should be determined on policy grounds rather than through legal interpretation of the statute, and is thus a question on which the courts have nothing to say, *irrespective of whether the Act contains a privative clause.* There was no need to accord blanket immunity from review by citing the *Farrell* case, for we know from experience that boards do sometimes face questions that are questions of law in the sense that the legislature expects them to be decided according to legal principles, and on these the courts do have something to say if the word "law" is to continue to have the meaning it has traditionally had under our constitution. But this will be the case, I suggest, only if the courts shift from characterizing questions as collateral or jurisdictional to a more direct application of sections 96-100. This they can do by asserting that if the expression "question of law" is to mean anything in administrative decision, then legislatures cannot constitutionally close off ultimate access to the courts on matters that come within that expression on a proper construction of a scheme of administrative decision established by statute.

To put this proposition in the form of a rhetorical question, how can a question be one of law when the person who decides it can, with impunity, decide it according to whatever criteria he chooses, and even contrary to law? This would be the effect of applying the blanket immunity from review, held in the *Farrell*

[35] *Supra*, footnote 32, at p. 5.

case to flow from a privative clause, to boards and other tribunals which, like labour relations boards, are recognized as having to determine questions of law within their jurisdictions.

A brief survey of some leading decisions on "collateral facts" and "jurisdictional facts" is required here to show that these techniques of review are nothing more than error of law in disguise, the disguise being prompted by the posting of a privative clause sentry at the door of administrative decision. Then I will try to show how the disguise can be shed in favour of a proper constitutional basis for the review function being performed.

It is well known that the "collateral matters" technique was first conceived by Mr. Justice Coleridge in the 1853 English case of *Bunbury* v. *Fuller*, in the following passage:[36]

> Now it is the general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up the subject-matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be, for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior Court.

Reading this passage, it is not difficult to see the origin of the confused mixing of the terms "jurisdictional", "collateral", and "preliminary" in our law of judicial review. They all serve to characterize a matter as relating to jurisdiction and thus subject to judicial application of the doctrine of *ultra vires*.

Perhaps the clearest illustration of the jurisdictional problem is found in *Re Lunenburg Sea Products Ltd.*[37] where the Nova Scotia Supreme Court (three judges) held that the Labour Relations Board had no jurisdiction to certify a union as bargaining agent of certain fishermen because the fishermen worked within a partnership arrangement, not an employer-employee relationship. Thus, when the court made its inquiry about jurisdiction it was asking about the scope Parliament intended its labour regulations to have, and it decided, as a matter of legal interpretation, that the regulations were not intended to apply to the situation in which these fishermen found themselves.

One can conceive of a legislature giving a labour board jurisdiction to decide *on policy grounds* what working groups shall be subject to labour relations legislation, but it is inconceivable under our constitution that such jurisdiction should not have some ultimate parameters defined by legal interpretation of the statute in question and imposed by way of judicial review. And it is sections

[36] (1853), 156 E.R. 47, at p. 60. This passage was cited and applied by Rinfret J., speaking for three out of five judges in the Supreme Court of Canada in *Re McEwen*, [1941] S.C.R. 542.

[37] [1947] 3 D.L.R. 195.

96-100 of the British North America Act and the institutional arrangements for which they stand that makes this inconceivable.

Suppose, as a wild example, that a labour relations board certified a union as bargaining agent of the members of the provincial legislature and named the Lieutenant Governor as the employer. In the face of a board discretion as to the scope of the Act's application, coupled with a tight privative clause, should the courts simply throw up their hands (and the constitution) and say that the only redress lies in the legislature? It is submitted that they would be abandoning their constitutional duty to do so, for reasons stated eloquently by Rand J. in his judgment in *Roncarelli* v. *Duplessis*:[38]

> Discretion necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

The Traders' Service Limited[39] case bears mention here because it is a case that had little to do with collateral matters which has nevertheless added to the confusion covering this area. The issue in the case was whether the British Columbia Labour Relations Board had violated the *audi alteram partem* principle of natural justice by failing to give notice to the employer of the true character of the application for certification being made in respect of some of its employees. The Supreme Court of Canada found in the board's favour on this issue, Judson J. referring to the employer's "feigned inability to understand what was going on".[40] However, the alleged failure to give notice arose from the fact that the board had not discriminated between Traders' Service Limited and Traders' Transport Service Limited, two distinct corporate entities operating from the same premises under common management.

The Supreme Court of Canada declined to quash the board's decision, *not* because the board is free to ignore the law of corporate personality but because the board had, on the facts, given adequate notice to the employer, who it had correctly identified as Traders' Service Limited. Error of law and natural justice are two clearly distinct bases of judicial review and should not be mixed.

It is unfortunate that the employer was thought by a majority in the Supreme Court to be trifling with the board on the question of natural justice. Otherwise the court might have been inclined to consider more seriously and separately the collateral matters issued in the case; that is, where persons are employees of com-

[38] [1959] S.C.R. 122, at p. 140.

[39] *Labour Relations Board* v. *Traders' Service Limited*, [1958] S.C.R. 672.

[40] *Ibid.*, at p. 677.

pany X as a matter of law, can the board, for policy reasons, certify a union to bargain on their behalf with company Y? Perhaps there is a prior question: did the legislature intend that employers should be free, through manipulation of the law of corporate personality, to impose limits on access to the certification and bargaining privileges which have been made available to employees by the legislature in the interest of industrial peace?

Even if the board is intended to be free to apply policy criteria in determining bargaining units and employer-employee relationships, there must be some limit on the violence that can be done to corporate and other law in the name of a pre-emptive scheme of labour relations. The *Traders' Service Limited* case was not a good one in which to test these limits because of the behaviour of the employer and the obvious fact that the niceties of separate corporate entities could be subordinated to the scheme of the labour relations statute without any real harm being done. But it would be unwise to assume that the court would not intervene in a case where a labour board subverted the law of corporate personality in a way that unduly violated the proper legal arrangements of an employer acting in good faith.

This the court could do by deciding that, on a proper construction of the statute, the legislature intends the board to apply the law, not policy considerations, to the question whether a person is an employee of company X or company Y, or to any other question involving corporate personality. If the board has either failed to regard the question as one of law or has misapplied the law to it, the court may quash the decision. And as already argued, any legislative attempt to preclude this constitutionally-based review function would be *ultra vires*. That is, it is the British North America Act, not a legislature, that must determine the extent to which administrative decision can be rendered immune from judicial review for legal error.

The *Parkhill Bedding and Furniture Ltd.* case[41] is perhaps the most interesting and best known Canadian case on the collateral matters technique, for there Freedman J.A. of the Manitoba Court of Appeal made an attempt to put some order into this area of the law. Moreover, the decision is perhaps the strongest assertion we have seen of a judicial responsibility to supervise the application of legal principles by provincial labour tribunals.

There a collective agreement was in force under a union certification when the employer went into bankruptcy. The Parkhill Company submitted a tender to the trustee in bankruptcy and acquired "by far the greater part of the physical assets of the bankrupt company, including its plant, equipment and stock, but not

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

its accounts receivable and goodwill."[42] Parkhill then hired some of the bankrupt company's former employees and began to operate the factory.

Parkhill took the position that the certification and collective agreement ended with the disappearance of the employer through bankruptcy, but the union claimed that continuation of these relationships with the new company was provided for by section 18(1) (c) of the Labour Relations Act,[43] which reads as follows:

> 18(1) A collective agreement entered into by a certified bargaining agent is, subject to and for the purposes of this Act, binding upon. . . .
>
> (c) any new employer to whom passes the ownership of the business of an employer who has entered into the agreement or on whose behalf the agreement has been entered into.

On an application by the union for a ruling that Parkhill was bound by the collective agreement, which the board had final and conclusive authority to determine under section 59 of the Act, the board ruled in the union's favour. Parkhill applied for an order of *certiorari* and Bastin J., after examining the board's order, stated that:

> The board based its order upon a finding that the business passed to a new employer and did not use the words of the statute "the ownership of the business". I must conclude that it did this advisedly because the facts before it did not justify a finding that the ownership of the business had passed. Obviously the sale in question was of assets and not the sale of a business. The Act is quite clear that a collective agreement is to be binding on a new employer only when the ownership of the business has passed to him. Since the board did not make a finding that the ownership of the business had passed, it was an error in law, evident on the face of the record, to order that the collective agreement entered into by Tryson should bind the applicant, Parkhill Bedding and Furniture Limited.[44]

What Bastin J. could not know was that the Supreme Court of Canada was about to state in *Farrell*[45] that privative clauses (including, probably, finality clauses) allow workmen's compensation boards to err in law as much as they like as long as they do it within their jurisdictions, and that this theory of blanket immunity would be applied to labour relations boards as well. However, Freedman J.A. anticipated this difficulty and saw that error in law alone was not enough; it had to be an error in law that could be characterized as jurisdictional. He said that before the board could decide whether Parkhill was bound by the agreement, it had to consider whether Parkhill was a new employer to whom had passed the ownership of the business, and this question he held

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[42] *Ibid.*, at p. 591.
[43] R.S.M., 1954, c. 132.
[44] (1960-61), 33 W.W.R. (N.S.) 176, at p. 178.
[45] *Supra*, footnote 23.

to be preliminary or collateral to the question the board had been asked to rule on—whether the agreement was binding on Parkhill. His reason for so holding was that this question involved an examination of legal principles and considerations that went beyond the simple confines of the statute under which the board operated.

It seems obvious that the expression "any new employer to whom passes the ownership of the business" indicates a legislative intent to make this question one of law, to be decided according to legal principles. If a legislature intends to make this question one of policy, then the appropriate terms of reference would be "any new employer who, in the board's opinion, ought to be bound by an agreement entered into by its predecessor". But the former legislative intent, once manifested, would be defeated if the courts failed to provide the supervisory sanctions necessary to fulfil that intent.

Suppose a provincial legislature, in the light of the *Parkhill* case, amended its labour relations legislation by providing that the board is to decide all questions within its jurisdiction according to such criteria as it deems appropriate and is not required to decide any such question according to law. We would then have to go back to *John East Iron Works Ltd.*[46] for a careful reading to see whether the lifting of the institutional barrier constructed on sections 96-100 was conditioned on a belief that questions of law that arise in this area were simply being shifted to a different kind of tribunal for determination *according to law*, or on the much broader proposition that they were being taken out of the law altogether, to be decided according to new kinds of criteria.

The *Jarvis* case[47] is a variation on the *Lunenburg Sea Products Ltd.* case.[48] The question was whether the scope of the Ontario Labour Relations Act[49] was broad enough to protect Mrs. Jarvis, an employee who exercised managerial functions, from dismissal for union activity. The board thought it did, on its interpretation of the Act, and ordered her re-instated. The trial judge denied *certiorari* but the Ontario Court of Appeal[50] quashed the board's order and this decision was affirmed by a six to three majority in the Supreme Court of Canada.[51]

The significant issue for administrative law was not whether Mrs. Jarvis was protected by the Act but who should decide this and according to what criteria. The Supreme Court took a rather absolute approach, saying, in effect, that the question before the board was whether it had jurisdiction in Mrs. Jarvis' case, that

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[46] *Supra*, footnote 11.
[47] *Jarvis* v. *Associated Medical Services Inc.*, [1964] S.C.R. 497.
[48] *Supra*, footnote 37.
[49] *Supra*, footnote 6.
[50] [1962] O.R. 1093.
[51] *Supra*, footnote 47.

this was a matter of legal interpretation of the Act, that there can be only one "right answer" to it, that the board must decide it "correctly" and the courts will quash an "incorrect" answer given by the board.

The credibility of this approach is somewhat undermined by the fact that the judges of our highest court disagreed, six to three, on the single, correct answer to the question of jurisdiction. Given this legal doubt as to the proper scope of the Act, one would expect a less absolute approach. For example, the court might have held that if the board's decision comes within the scope of the Act on a construction that it will properly bear in law, then the court should not interfere. Since three judges in the Supreme Court thought, as a matter of law, that the Act authorized what the board had done, this test is met and the board's decision ought not to have been quashed.

The suggestion here is that the function of the courts in policing the rule of law in administrative decision is to establish parameters of legal tolerance rather than superimposing legally "correct" answers. However, such an approach seems unlikely as long as the courts formulate their review function in the narrow, technical terms of jurisdiction and collateral matters, terms that condition judicial thinking in terms of "answers". If the courts were to view labour relations as a problem of accommodating law and policy, not as one of conflict between law and policy, they would then recognize that their function is to ensure that when boards make decisions that involve questions of law, *whether jurisdictional or not*, they make a decision that is legally acceptable not legally correct. This they can do only by recognizing that this responsibility flows from sections 96-100 of the British North America Act, as interpreted by judicial decision, and cannot be touched by provincial legislatures through privative clauses, for it has been in the tactical manoeuvering to sidestep privative clauses that the courts have become boxed into the narrow alley of jurisdiction with its disastrous dichotomy of correct and incorrect answers.

A shift of this order is perhaps no longer possible with respect to workmen's compensation boards, in view of the decision in the *Farrell* case. However, I suggest that such a shift *is* possible with respect to labour relations boards, for reasons already given, and the clarification of what the courts are and should be doing has become critical with the appearance of the Ontario Human Rights Commission,[52] a tribunal whose conciliatory framework makes it comparable to labour relations boards. Indeed, the future of this commission is now in question because of an attack on its legitimacy very similar to that made on the legitimacy of workmen's compensation boards in *Farrell*.

[52] Established by the Ontario Human Rights Code, S.O., 1961-62, c. 93.

In the *Bell* case[53] the Ontario Court of Appeal upheld the legitimacy and authority of the Commission, but the comments of Stewart J.[54] in his judgment ordering prohibition against a board of inquiry set up by the Commission raised some nagging doubts about the Commission's future. These doubts are not put to rest by the decision of the Supreme Court of Canada[55] reversing the Court of Appeal and restoring the order of prohibition granted by the trial judge. It will not be easy. The *Farrell* case cannot be applied to this new area because there has been no substitution of some new kind of statutory rights for existing rights. Rather, the legislature has created new statutory rights against discrimination and placed their protection into a conciliatory framework, with recourse to prosecution in courts of law as a last resort. It is unthinkable that those who operate the conciliation machinery should be free to err in law within their jurisdiction, because this could lead to the trampling under foot of important individual legal rights, as Stewart J. clearly saw. But it is also unthinkable that this Commission and its boards of inquiry should be subjected to the highly technical and confused review framework that the courts have constructed around labour relations boards. Fundamental human rights simply cannot be subjected to a decade or so of legal gamesmanship similar to that through which an accommodation was reached between the courts and labour relations boards.

The court must face squarely the question of how it can respect the will of the Ontario Legislature to use the conciliatory approach to protecting human rights, without abandoning its responsibility for the rule of law. The proposed shift in its approach to judicial review outlined above for labour relations boards would, I suggest, meet these two important requirements.

Indeed, in making such a shift our courts would simply be following the lead taken by the House of Lords in *Anisminic Ltd.* v. *Foreign Compensation Commission*,[56] where the Law Lords, by a majority of three to two, declared a decision of the Foreign Compensation Commission to be a nullity notwithstanding that section 4(4) of the Foreign Compensation Act, 1950[57] provided that:

> The determination by the commission of any application made to them under this Act shall not be called in question in any court of law.

How did the Lords get around this clear edict of the most supreme of all Parliaments in the British Commonwealth? The judgment of Lord Reid is perhaps most useful, because it offers

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[53] *Regina* v. *Tarnopolsky ex parte Bell* (1970), 11 D.L.R. (3d) 658.
[54] *Regina* v. *Tarnopolsky ex parte Bell* (1969), 2 D.L.R. (3d) 576.
[55] *Bell* v. *Ontario Human Rights Commission*, pronounced Feb. 1st, 1971, not yet reported, Martland J. gave reasons for the five judges in the majority, Abbott and Hall JJ. dissented.
[56] [1969] 2 A.C. 147.
[57] 14 Geo. 6, c. 12 (U.K.).

a legal vehicle through which courts can perform the broader, less technical review function being proposed here. He makes a distinction between *jurisdiction* and *powers* and goes on to hold that the courts must apply the doctrine of *ultra vires* in two distinct situations:

(1) where the Commission is without jurisdiction in relation to the matter, and
(2) where the Commission has properly entered on its jurisdiction but has exceeded the powers it has been authorized to exercise within that jurisdiction.

This distinction may at first appear to be one of words but it is not. Indeed, it is a critical distinction which lies behind the otherwise puzzling insistence of Canadian courts in continuing to use the collateral matters technique in apparent defiance of the legislative will. Moreover, the distinction makes it possible to understand what the courts were trying to do in otherwise mysterious cases like *Jarvis*,[58] *Metropolitan Life Insurance Company*[59] and *Parkhill Bedding and Furniture Ltd.*[60]

Thus in *Jarvis* the Labour Relations Board had jurisdiction to entertain a complaint of dismissal for union activity but the Supreme Court held that it was without power, or authority, to order the re-instatement of someone who did not come within the statutory definition of "employee" in the Act. In *Metropolitan Life Insurance Company* the board had jurisdiction to entertain a certification application but the court construed the Act as giving no power to certify a union in respect of employees who could not legally be members of the union. And in *Parkhill Bedding and Furniture Ltd.* there was clearly jurisdiction to hear and determine the application for an order that the new employer was bound by the collective agreement but the board had power to make such an order only if certain legal conditions existed (ownership of the business had passed), and the court held that those conditions did not exist.

In each case the court made a legal construction of the relevant statute in answering the question, and therein lay the fundamental error of assuming that the question is one to be decided exclusively according to legal principles. If one goes back to the *John East Iron Works Ltd.* case with its recognition of mixed functions, Lord Reid's distinction in *Anisminic Ltd.* between jurisdiction and powers creates fresh insight. Jurisdiction is properly a narrow, technical concept of the law whose determination involves exclusively the application of legal criteria to the words of a statute or other enabling document. Power is a broader term whose determination may properly involve the very mixed functions

[58] *Supra*, footnote 47.
[59] *Supra*, footnote 1.
[60] *Supra*, footnote 41.

in question, that is, both legal criteria and non-legal expertise. It is, therefore, misguided to take a "correct" or "incorrect" approach to the determination of what powers a board is authorized to exercise within its jurisdiction, as is done when the collateral matters technique is used. Here the courts, being competent to apply only legal criteria, can set only the parameters of legally acceptable construction of statutory powers. And in doing so, courts must seek from the statute as a whole as well as from the particular authorizing provisions some sense of how far the legislature intends that non-judicial judgment shall determine the scope of the statutory scheme and thus the powers conferred within it. If not at all, then a purely legal construction of the authorizing provisions will be appropriate. Otherwise, the court should apply the broad principles of constitutional law implicit in *John East Iron Works Ltd.* in defining the range within which the board is free to determine the scope of its own powers.

Note the absence of the technical jargon that surrounds jurisdiction, in the following passage from the judgment of Lord Wilberforce in *Anisminic Ltd.*:[61]

> Although, in theory perhaps, it may be possible for parliament to set up a tribunal which has full and autonomous powers to fix its own area of operation, that has, so far, not been done in this country. The question, what is the tribunal's proper area, is one which it has always been permissible to ask and to answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality, or unquestionability upon its decisions. These clauses in their nature can only relate to decisions given within the field of operation entrusted to the tribunal. They may, according to the width and emphasis of their formulation, help to ascertain the extent of that field, to narrow it or to enlarge it, but unless one is to deny the statutory origin of the tribunal and of its powers, they cannot preclude examination of that extent.

So the courts have a duty to perform this review function, whether they like it or not. It is imperative, therefore, that they do it soundly. This they can do, I submit, only if they adopt the distinction between *jurisdiction*, a legal question to be decided according to law exclusively, and *powers*, a question that may be one of mixed law and policy that can be *contained* within legal parameters but not *determined* according to law exclusively.

The legal latitude given a tribunal in determining its own powers should be related to the nature of the tribunal, the kind of scheme it is administering, and the particular words used in the statute from which the challenged powers are said to flow. The presence of legally-trained members on the tribunal will no doubt weigh with judges, as will the existence of a statutory right of appeal.

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[61] *Supra*, footnote 56, at p. 207.

Here the provincial legislatures could make a great contribution to the improvement of administrative law by requiring that all tribunals that are required to apply legal principles to any extent in the course of their proceedings have at least a legally-trained chairman, whatever other expertise he may have, and by providing systems of administrative appeal. The privative clause is to judges like a red flag before a bull, especially when it is thrown up around a tribunal that determines questions of law, and it forces judges to choose between standing back and allowing these tribunals to ignore or misconstrue relevant law as much as they please or stepping in through the narrow, technical review tool of jurisdiction. In a way, it is a real credit to our judges that they refused to be intimidated by privative clauses, but it is time we channeled their sense of judicial duty through a more rational concept of review.

When lawyers sit on these tribunals with mixed functions, the courts can relax a good deal more. And when administrative appeals are provided for, there tends to develop a body of principles governing the way decisions are made. This latter point was stated nicely by Lord Guest in his dissenting opinion in the Privy Council case of *United Engineering Workers' Union* v. *Devanayagam*,[62] in reference to labour tribunals established under the Ceylon Industrial Disputes Act, 1950:

> In the present case it is clear that appeals are allowed and the corollary is that there must be established a system of rules. It is true that the only requirement in the Act is that the orders of the tribunal must be such as appear to them just and equitable. But this imports a judicial discretion, albeit a very wide one. If an order was made arbitrarily, this would be, as Tambiah J. says, a good ground of appeal. Experience shows that out of a jurisdiction of this sort there grows a body of principles laying down how the discretion is to be exercised and thus uniformity is created in the administration of justice. In this fashion, as was said in *Moses* v. *Parker*, [1896] A.C. 245, there emerges inevitably a system of law.

Thus his Lordship suggests a middle ground between tribunals that apply law strictly and exclusively, as do courts, and tribunals that decide arbitrarily, without any discernible system or regularity in their ongoing processes of decision. It is this middle ground we should be heading into, and any legislative or judicial contribution to that end will be worthwhile. Ontario seems to be the only province moving toward a *system* of administrative law based on rational policies designed to achieve articulated goals. This, of course, assumes that the *Report* of the Royal Commission on Civil Rights in Ontario will be reflected in systematic legislative reform and revision.

However, until such time as the provincial legislatures rationa-

[62] [1968] A.C. 356, at p. 384.

lize their administrative law and create adequate assurances that the rule of law will be respected in the administrative process, courts of law will continue to provide an overriding assurance, through judicial review of particular administrative decisions. But they must clarify what it is they are doing, and why, if they are to avoid being criticized for unwarranted interference with the administrative process.

The *Bell* case offered an opportunity for clarification in the context of provincial human rights legislation, which in Ontario bears important similarity to labour relations legislation in its primary reliance on the process of conciliation as a means of resolving human conflict. The Ontario Human Rights Code 1961-62[63] prohibits discrimination in the renting of self-contained dwelling units, and Mr. Bell's main point was that his upstairs suite was not a self-contained dwelling unit, so that its disposition did not come within the purview of the Code. The Supreme Court gave effect to this objection by applying the broad concept of jurisdiction used in *Jarvis* and in *Metropolitan Life Insurance Company*, looking to the general law for the meaning of "self-contained dwelling unit" and finding that Mr. Bell's suite fell outside that meaning and therefore outside the purview of the Code.

Aside from subordinating the scheme of the Code to the general law, this decision could result in a crippling of the conciliatory framework of the Code by encouraging a systematic, technical attack on it by lawyers. Nor does this decision enhance public respect for the law, for in the eyes of a layman the lack of justification for such judicial interference with this important legislative scheme can be measured by the highly technical, and therefore incomprehensible, nature of the judicial explanation given.

The court might have asked why the legislature limited the application of the Code to self-contained dwelling units and whether it intended these words to be construed according to the general law (assuming there is any general law that is applicable) or whether it intended the Human Rights Commission and its boards of inquiry to develop a working definition of this term, within the context of the Code, as they handle the complaints that come before them.

The court adopted the former option without explaining its choice and without, apparently, recognizing the latter one as an alternative. This subjects the Ontario Human Rights Code to what might be called the elastic concept of jurisdiction—it can be made to fit almost any situation. Put at its best, the Commission and its boards of inquiry are now subject to judicial interference whenever, in applying the Code, they give a meaning to any words of the Code that a judge or a majority of judges on appeal would

[63] *Supra*, footnote 52.

not give to those words. Put at its worst, the Commission and its boards of inquiry are subject to judicial interference whenever they discharge their functions in a manner that offends a judicial sense of propriety. Statutory authorities are entitled to clearer guidelines than this and to greater freedom to apply their special experience along with the general law in deciding what meaning to give to particular words in the statutes whose application has been entrusted to them.

The alternative approach, mentioned above, would have the courts consider the possibility that the legislature did not intend the provisions of the Code to be given a strict legal interpretation according to the general law but rather a working application within the context of the Code itself *as understood by those who have been charged with its application.* This does not exclude the general law but simply makes it less absolute and exclusive as a criterion of interpretation, just as it modifies but does not eliminate the review function of the courts.

Pursuing this approach, which is built on the distinction between jurisdiction and powers, it is clear that the board of inquiry in the *Bell* case properly entered on its jurisdiction, the ministerial appointment having been made following complaint, failure of settlement and recommendation of the Commission. The question then becomes whether the board of inquiry has power to find that this is a "self-contained dwelling unit", and this depends on whether there is a single, "correct" definition of the term or whether the Code contemplates a range of legally-acceptable interpretations such that the premises in question could rationally be found to come within that range. In order to rule out the former alternative, one need refer only to section 10 of the Interpretation Act of Ontario:[64]

> Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of anything it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

An interpretation of "self-contained dwelling unit" that is responsive to the intent, meaning and spirit of the Act cannot be found in the general law because the Code is new and the question is one of first instance in this case. It follows that judges themselves have a range of possibilities open to them and are not tied to a single, "correct" interpretation, and from this flows the conclusion that the board of inquiry, *a fortiori*, should have the initial opportunity to explore this range of possibilities.

Then, if on an application to a court of law to review the

[64] R.S.O., 1960, c. 191.

board's decision, it can be shown that the board went beyond the range of legally permissible interpretations, judicial redress should lie. In the course of such subsequent review, the court would have to determine whether the legislature intends that an element of non-judicial experience shall enter this decision and, if so, whether and to what extent this factor affects the legal parameters that contain the permissible choices open to the board.

The *John East Iron Works* case did not lay to rest the so-called section 96 question. It simply shifted the application of an important constitutional value, that commits the legal system to an independent judiciary, from an institutional approach to a functional approach. This functional approach to judicial review ought to be explicitly developed in terms of its rational objective, which is to ensure that administrative tribunals observe that minimum level of compliance with legal principles indicated by a careful study of both the scheme and particular provisions of the authorizing statute.

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