

ADJUDICATOR, ADMINISTRATOR OR ADVOCATE? THE ROLE OF THE LABOUR BOARD IN JUDICIAL REVIEW PROCEEDINGS

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Generally, the courts have shown deference to the decisions of labour relations boards. A recent judicial trend, restricting the standing of labour relations boards in judicial review proceedings, threatens the process of informed and rational decision-making in the courts. This is especially true in relation to issues of natural justice. Statistical data suggest that the participation of inferior tribunals in judicial proceedings has a significant impact on courts' decisions. It is important to the administrative process for the boards to preserve their standing in judicial review proceedings, while always avoiding an unduly adversarial stance. Written reasons for a board's decisions cannot anticipate all grounds of review. To the extent that labour boards are allowed to explain their procedures to the courts, the courts will make decisions that are more informed and more responsive to the labour realities for which the boards are primarily responsible.

Les conseils des relations de travail jouissent en général du respect des tribunaux en matière d'évocation. Cependant la jurisprudence récente tend à limiter la participation de ces conseils dans les procédures en évocation, surtout lorsqu'une faute de justice naturelle est alléguée. Cette tendance pourrait miner le caractère éclairé des décisions des tribunaux et la qualité de leur raisonnement. La participation des conseils administratifs aux procédures judiciaires a une influence importante sur le dénouement des appels en évocation. Il incombe aux conseils de protéger leur statut devant les tribunaux, tout en évitant une position trop agressive à l'égard des parties. Les conseils ne peuvent pas toujours prévoir, dans les motifs de leurs décisions, tous les points qui pourraient susciter l'évocation. Les tribunaux, s'ils connaissent la procédure suivie par les conseils, seront mieux en mesure de rendre des décisions éclairées et sensibles aux réalités des relations industrielles dont les conseils demeurent, au premier rang, responsables.

Introduction

The role that labour boards play in judicial review proceedings has become particularly important in light of recent judicial pronouncements that appear to signal greater court involvement in the administrative process. If there was ever any hope that privative clauses fashioned by provincial legislatures could insulate labour boards from judicial scrutiny it may have all but vanished with the recent decision of the Supreme Court of Canada in

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Crevier v. Attorney-General for Quebec.¹ The most comprehensive privative clauses, and the best articulated arguments for their being no judicial role whatever in the interpretation and administration of the labour relations acts have not carried the day.²

The issue of the standing and role of labour boards in judicial review proceedings may become still more critical in light of the new Canadian Charter of Rights and Freedoms.³ As quasi-judicial tribunals bound to observe the requirements of "fundamental justice" enshrined in section 7 of the Charter,⁴ labour boards, like all quasi-judicial tribunals, may see their procedures and decisions scrutinized through a broader judicial lens than ever before.

The resolution of the emerging issue of the role which the inferior tribunals will have to play both in the process of traditional review, or through the application of the Charter, should not be seen in the simplistic terms of a conflict between boards and courts. The inferior tribunals and the courts are common players in a single legal process. That process will be better served to the extent that the boards and the judiciary recognize the need for rules of standing that will maximize the ability of the tribunals to put before the courts the realities, both factual and legal, procedural and substantive, of that specialized part of the law for which they are responsible. What is surprising, and should be a cause of growing concern, are signs that the courts are disposed to reduce and restrict the role which labour boards have traditionally played in judicial review proceedings. In light of a number of decisions of the Supreme Court of Canada and some courts in the provinces⁵ it is becoming especially important for both the

¹ [1981] 2 S.C.R. 220, (1981), 127 D.L.R. (3d) 1.

² P. Weiler, *The Administrative Tribunal: A View from the Inside* (1976), 26 U.T.L.J. 1983; H. Arthurs, *Rethinking Administrative Law: A Slightly Dicey Business* (1979), 17 O.H.L.J. 1.

³ Constitution Act, 1982; hereinafter referred to as the Charter.

⁴ Section 7 provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The role of inferior tribunals in constitutional challenges under section 24 of the Charter, will, moreover, be a critical part of the developing public law process. Present indications are that section 24 does not provide a separate procedure and that a Board, as the tribunal of first instance, must itself rule upon any constitutional challenge that arises in its proceedings, subject always to higher judicial review of its ruling. That would appear to be the approach that will best serve the judicial refinement of rights protected by the Charter: see *Third Dimension Manufacturing Ltd.* decision of the Ontario Labour Relations Board dated February 22, 1983, as yet unreported; and see also *Regina v. Siegel* (1982), 39 O.R. (2d) 337 (Ont. H.C.); *Re Nash* (1982), 16 A.C.W.S. (2d) 129 (Nfld. Prov. Ct.).

⁵ *Canada Labour Relations Board v. Transair Ltd.*, [1977] 1 S.C.R. 722, (1976), 67 D.L.R. (3d) 421; *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 683, (1978), 89 D.L.R. (3d) 161; *Re City of Dartmouth* (1976), 17 N.S.R. (2d) 425 (N.S.S.C., A.D.); *Re Workmen's Compensation Board of Nova Scotia and Treige* (1976), 72 D.L.R. (3d) 246 (N.S.S.C., A.D.).

courts and the labour relations boards in Canada to consider the role of the labour board in judicial review proceedings, and how that role can best serve the advancement of labour relations law and policy.

I. *Statistical Research*

To gain an insight into the role of labour boards in judicial review I have surveyed reported decisions dealing with applications for judicial review of labour board decisions across Canada. As a data base I drew initially on decisions released during the five year span from 1976 to 1980 as reported in five separate law reports.⁶ In 157 reported applications for judicial review 52 board decisions were quashed. In the reported cases, therefore, some two-thirds of the labour board decisions were upheld by the judiciary, while one-third were overturned.

Of the 157 reported applications, 93 involved private-sector labour relations boards such as the Ontario or British Columbia labour relations board. Public sector labour relations boards such as the Public Service Staff Relations Board did not enjoy the same success rate as their private-sector counterparts. In the reported cases only about 55% of the Public Service Staff Relations Board's decisions were upheld by the judiciary compared with more than 77% of the reported decisions involving the private-sector boards. Of the 21 reported judicial reviews of Canada Labour Relations Board decisions only four were quashed. The Ontario Labour Relations Board experienced similar success with 85% of its decisions being upheld by the courts in reported decisions.

Some provincial labour relations boards, though, were not particularly successful before the courts. Out of six reported judicial reviews of British Columbia Labour Relations Board decisions, for example, only three were upheld. Similarly, the courts quashed three out of five reported decisions of the Newfoundland Labour Relations Board which were taken on review. In these two instances, however, the small number of cases involved may reduce the significance of the results.

Does the participation of the labour board in the judicial review process affect the outcome? Proponents of board participation generally assume that a board presence in court will diminish the chances of being quashed. In the absence of representations from the labour tribunal focusing on the issue from its own perspective, the court is left with only the official record and the submissions of the adversaries to understand the subtleties and complexities of the labour law process. Notwithstanding extensive written reasons that may be contained in the decision under review, there is a substantial risk that without direct submissions from the labour board the tribunal's procedures may be misunderstood. It may be

⁶ The Dominion Law Reports, Western Weekly Reports, Atlantic Provinces Reports, Federal Court Reports and Supreme Court Reports.

more difficult for the court to appreciate how the issue before it fits into the overall scheme of the relevant labour legislation.

Preliminary statistics tend to give some credence to this view. Private-sector labour relations boards were represented by counsel at judicial review in at least 95% of the reported cases. They enjoyed an overall success rate of more than 77%. Public sector boards, on the other hand, participated in the court proceedings in reported cases with considerably less frequency—approximately 25% of the time—and their overall success rate was only 55%. The New Brunswick Public Service Employee Relations Board, for example, was represented in only two of its 32 reported judicial reviews between 1976 and 1980. Interestingly, those two cases were among the 17 decisions upheld by the courts. Similarly, in reported decisions the federal Public Service Staff Relations Board appears to have been represented less than one-third of the time, and only 40% of its decisions were upheld.

It must be immediately avowed that by generally accepted empirical standards this review of cases is fairly limited. It does not take into account such factors as the scope of the privative clause under which each board operates or whether counsel for the board took an active role in the proceedings. Another variable not considered is the makeup of the judicial panel. Moreover, the review is limited to the reported cases disclosed through a particular computer scan and does not isolate, for the public sector boards, decisions that are in essence the resolution of disputes arising under particular collective agreements that have little public policy significance and would therefore not normally justify board intervention. Nevertheless, these gross figures do suggest that there is some correspondence between the frequency and quality of board participation in review proceedings and the success rate of judicial review applications.

In an attempt to minimize the distortion inherent in reported cases the survey was extended to all decisions, reported and unreported, on judicial review of four major labour boards in Canada from 1976 to 1980 inclusive.⁷ During that period the statistics of the Ontario Labour Relations Board, which appears through counsel⁸ in all judicial review hearings, establish that it was reviewed⁹ thirty-five times. The Board was upheld in

⁷ The Ontario Labour Relations Board, Canada Labour Relations Board, British Columbia Labour Relations Board and the Public Service Staff Relations Board of Canada.

⁸ In 20 cases outside appellate counsel was used exclusively, in 7 cases the Board was represented by its in-house solicitor and in 8 cases it was represented by outside appellate counsel assisted by its own solicitor. The Ontario Board currently uses several experienced appeal advocates, chosen on a case by case basis depending on the issue involved; for example, counsel with greater background in the construction sector may be retained to represent the Board when the challenge is to the Board's jurisdiction in that area.

⁹ In this survey "reviewed" by the court means an application for judicial review disposed of by a decision of a court in the survey period. Applications withdrawn or pending are not counted. Where a case is appealed only the final judicial decision falling within the survey period is counted.

thirty-three decisions and quashed in two, for an effective success rate of 94.3%.

The Canada Labour Relations Board, which retains counsel in all cases on judicial review, had a comparable experience. The following table illustrates the outcomes of applications for judicial review:

Year	# of Jud. Rev.	Board Upheld	Board not Upheld	Outside Counsel	Inside Counsel
1976	3	2	1	3	0
1977	11	7	4	11	0
1978	16	15	1	16	0
1979	15	13	2	15	0
1980	6	5	1	6	0

In fifty-one appearances before the court the decisions of the Canada Board were stayed or quashed nine times, for an effective success rate of 82.49% over all cases. Virtually the same success rate (82.9%) was found for three other years for which statistics were provided (1975, 1981 and 1982). In the period 1975 to 1982 inclusive decisions of the Canada Board were quashed in 17.4% of cases processed on review. It is interesting to note that since the narrowing¹⁰ of the scope of judicial review of the Canada Board to the grounds of review in section 28(1)(a) of the Federal Court Act¹¹ there appears to have been little change in the results on judicial review. Despite the introduction of what one court has called an "airtight" privative clause,¹² the proportion of cases in which the Board has been stayed or overturned appears to have remained remarkably constant, with the average rate of decisions quashed in the four years 1979 to 1982 inclusive being 17.0% of cases heard.¹³

In the period 1976 to 1980 inclusive the British Columbia Labour Relations Board was judicially reviewed only eleven times. Five of its decisions were quashed. The significance of those figures, disclosing a Board success rate of only 54.5%, is negligible however, and can only be appreciated when weighed against that Board's overall caseload¹⁴ and the

¹⁰ An Act to Amend the Canada Labour Code. S.C. 1977-78, c. 27, s. 43.

¹¹ R.S.C. 1970, 2nd supp., c. 10.

¹² *Paul L'Anglais Inc. v. Canada Labour Relations Board* (1980), 122 D.L.R. (3d) 583 (Q.C.A.) at p. 587 (aff'd in a decision of the Supreme Court of Canada released February 8, 1983, as yet unreported).

¹³ At the date of writing the four cases in which the Canada Board was quashed in 1981 were on appeal to the Supreme Court of Canada. A reversal of those decisions, which amount to half the adverse court decisions in that period, could signal some change in the wake of the privative clause, although it will probably require several more years before there is sufficient experience upon which to adequately assess the impact of the privative clause.

¹⁴ By the B.C. Board's system of accounting it issued some 19,484 decisions in the five year period surveyed.

extraordinarily restrictive privative clause found in section 33 of the British Columbia Labour Code.¹⁵ The British Columbia Board was reviewed only 11 times while the Ontario Board and the Canada Board were reviewed 35 times and 51 times respectively in the same period. These figures tend to confirm that the British Columbia privative clause has been a strong disincentive to judicial review. The success rate on review may simply reflect that only those cases with a strong chance of success are pressed before the Court. Consequently the British Columbia experience is of somewhat limited value in considering the role of a labour board in judicial review proceedings. It may, of course, speak volumes to legal thinkers interested in ways of restricting the frequency of judicial review.

More significant comparisons can be drawn from the experience of the Public Service Staff Relations Board of Canada. In its fiscal years 1976-77 to 1979-80 inclusive 74 applications for judicial review were heard by the courts. Of these 49 were dismissed and 25 were granted. The Board success rate before the courts over that period was therefore 66.3%, as compared to 82.4% for the Canada Board and 94.3% for the Ontario Labour Relations Board. As noted above, a marked distinction between the Public Service Staff Relations Board and the other two boards is that in the great majority of cases it did not participate through counsel in the judicial review of its decisions.

The statistics provided by the Public Service Staff Relations Board can be broken down into three categories corresponding to the types of cases handled by the Board: applications and complaints, being cases that involve the application and interpretation of the Public Service Staff Relations Act;¹⁶ adjudication, being rights arbitration cases concerned with the interpretation and administration of collective agreements in the federal public sector; and interest arbitration cases, in which the terms of a collective agreement are established by the Board. The following table illustrates the outcomes of judicial review by reference to each of these three categories:

Public Service Staff Relations Board Decisions and Awards Subject to Judicial Review Fiscal Years 1976-77 to 1979-80					
	Dec. Issued	Appl. for Jud. Rev.	Granted	Dismissed	Withdrawn
Adjudication	750	68	15	32	21
Interest					
Arbitration	81	7	2	3	2
Applications and Complaints	185	26	8	14	4
	1016	101	25	49	27

¹⁵ R.S.B.C. 1979, c. 212.

¹⁶ R.S.C. 1970, c. P-35, as am.

The following conclusions can be drawn from the foregoing data:

1. Percentage of overall caseload taken on review.

Adjudication	68 out of 750 = 8.2%
Interest Arbitration	7 out of 81 = 8.6%
Applications & Complaints	26 out of 185 = 14.0%
2. Percentage of overall caseload ultimately disposed of by judicial outcome.

Adjudication	47 out of 750 = 6.2%
Interest Arbitration	5 out of 81 = 6.1%
Applications & Complaints	22 out of 185 = 11.8%
3. Success rate of the Board in cases disposed of by the Court.

Adjudication	32 out of 47 = 68.0%
Interest Arbitration	3 out of 5 = 60.0%
Applications & Complaints	14 out of 22 = 63.6%

The general practice of the Board is that, absent some clear jurisdictional challenge, it does not appear on applications for judicial review of (1) its decisions, including adjudications (awards relating to the interpretation and administration of particular collective agreements), (2) its interest arbitrations (awards resolving collective bargaining impasses) or (3) in cases involving the judicial review of its decisions in applications or complaints under the Public Service Staff Relations Act.

These statistical results may in large measure be attributable to the definition of "jurisdiction" which the Board has been forced to adopt. The Federal Court of Appeal narrowly construed "jurisdiction" in light of the decision in *Canada Labour Relations Board v. Transair Ltd.*¹⁷ On that basis the Board has been discouraged from participating in Court proceedings when the issue involves a procedure of the Board or an issue that can be otherwise characterized as involving natural justice or procedural fairness. In the result the Public Service Staff Relations Board has been less successful than other Boards in addressing the courts on matters of Board procedure. While the Canada Board appears before the same courts, its privative clause gives it the opportunity in virtually every case to speak to the court. In the course of its submission on the effect of the privative clause the Board has the opportunity to make the court aware of its procedures and the special needs that underlie the administration of its Act.

When it does appear, the Public Service Staff Relations Board differs from the three other Boards surveyed in that it does not retain counsel to represent it before the courts, but generally appears through its own legal staff. However, the facts do not support the conclusion that the Board's lower statistical results are attributable to the use of in-house counsel. On the contrary, in the four fiscal years surveyed there were only five cases in which the Board presented full oral argument to the court through its

¹⁷ *Supra*, footnote 5.

counsel. In these cases, all of which involved serious challenges to its jurisdiction, the Board was upheld four out of five times. The evidence would therefore suggest that when the Board is heard, it does well in court.

It is understandable that the Board should play little or no role in the judicial review of its adjudication and arbitration awards. Those decisions relate essentially to the terms of a particular collective agreement between two parties, and generally do not have any effect on the interpretation or administration of the Public Service Staff Relations Act,¹⁸ the public statute for which the Board is primarily responsible. While the Board's adjudication and interest arbitration awards are normally oriented to the private concerns of the parties, the board decisions relating to the interpretation of its own statute normally have a wider impact.

Of particular concern is the sheer frequency of judicial review of this latter type of decision. By way of comparison, during the survey period, of 7,701 cases heard by the Ontario Labour Relations Board that involved the interpretation and application of its Act only 35, or .4%, were taken to a judicial outcome. On the other hand 11.8% of comparable applications and complaints decided by the Public Service Staff Relations Board were taken to judicial review¹⁹ and one in three of those cases resulted in the Board being overturned. The most significant difference appears to be due to the narrow construction of *Transair* applied by the Federal Court of Appeal, which has led the Public Service Staff Relations Board either not to appear, or merely to file a written factum, or keep a watching brief when it does appear. In the period surveyed the Board was fully heard in only five of the seventy-nine cases disposed of by the courts. Given the precedential impact of the court decisions, serious questions arise about which body is really shaping labour relations policy in the federal public sector.

The lack of a privative clause may be a factor affecting the Public Service Staff Relations Board statistics.²⁰ Still, the preliminary figures on the consistency of judicial decisions in Canada Labour Relations Board cases before and after the adoption of that Board's privative provision in 1978 cast some doubt on the weight that can be ascribed to that factor. Apart from the case of an extraordinary privative clause like that in the British Columbia Labour Code,²¹ it may be unrealistic to assume that a privative clause, without the voice of an experienced advocate to argue its

¹⁸ *Supra*, footnote 16.

¹⁹ Collateral questions are also raised about the willingness to litigate of public sector employers and unions who may be less subject to direct cost accountability than their private sector counterparts.

²⁰ While a privative clause is found in section 100 of the Public Service Staff Relations Act, *supra*, footnote 16, its effect was nullified by the passage of the overriding provision of section 28 of the Federal Court Act, *supra*, footnote 11.

²¹ A clause whose validity, it should be noted, is seriously open to question in light of the decision of the Supreme Court of Canada in *Crevier v. Attorney-General for Quebec*, *supra*, footnote 1.

significance before the court, will have a substantial impact on judicial decisions. If it is accepted that Parliament truly intended the Public Service Staff Relations Board to be responsible for overseeing the Public Service Staff Relations Act,²² the spectre of that Board being quashed in better than one-third of the cases heard by the courts should be cause for concern. However, if a privative clause would have the effect of giving the Board a fuller opportunity to be heard by the Court, Parliament should for that reason alone adopt a privative provision for the Board.

II. *What Labour Boards Actually Do In Judicial Review Proceedings*

A number of practical considerations come to bear in the response of a labour board to the issue of its participation in judicial review proceedings. A recurring question is whether outside counsel should be retained. The practice of a number of major boards suggests that the use of eminent counsel to make submissions to the court on behalf of the board lends credence to the board's position and minimizes the quashing of board decisions. The use of outside as opposed to in-house counsel in some cases may also add a degree of objectivity to the board's submissions and augment their persuasiveness to the judicial mind. This will be especially true where the reviewing judge is not well versed in labour law, but respects and trusts the advocate retained by the board.

A brief survey of labour boards in various Canadian jurisdictions indicates that most labour boards will retain outside counsel in those cases which are of critical importance to the board; these are generally cases where an adverse decision could significantly disrupt the board's powers or procedures. In cases which are likely to have only a peripheral bearing on the internal functioning of the board, in-house counsel will frequently be used. Each board's readiness to retain outside counsel varies. For example, the British Columbia and Canada Boards nearly always retain outside counsel when they participate in judicial review proceedings. On the other hand, the Nova Scotia Labour Relations Board normally uses in-house counsel, apparently with a high success rate. The Ontario Board uses external counsel in any case that could have substantial ramifications for its procedures, or for the interpretation of its statute.

In some provinces, such as Manitoba, the Labour Board is represented in judicial review proceedings by the Ministry of the Attorney-General. Similarly, in Quebec the Justice Ministry usually pleads the case for the Board. It is arguable that the Attorney-General appears more politically neutral than the Board's in-house counsel and at least one scholar has suggested that the Attorney-General, in the capacity of *parens patriae*, is especially well situated to represent the public interest in the judicial review

²² *Supra*, footnote 16.

of inferior tribunals.²³ In Ontario, however, the Ontario Labour Relations Board has not been represented by the Attorney-General since 1956. At that time the province became involved in several business ventures which brought it into potential conflict with the Ontario Labour Relations Board. The practical solution to the possible conflict of interest was for the Board to engage its own outside counsel on a case by case basis, or on occasion to use its in-house solicitor.²⁴

While most of the labour boards surveyed stated that they frequently participated in judicial review proceedings, their role was often limited to that of a passive observer, present only to assist the court should any difficulty arise. There is ample support in the recent jurisprudence for restricting the tribunal's role to that of *amicus curiae*.

In *Canada Labour Relations Board v. Transair Ltd.*²⁵ the Supreme Court of Canada denied the Canada Labour Relations Board standing to appeal an unfavourable decision on judicial review which had issued from the Federal Court. The majority of the Court ruled that it was inappropriate for the Board to assume the role of litigant when the issue on review was whether the Board's procedures were in violation of the rules of natural justice. In the view of the Court it would undermine the impartiality and dignity of an adjudicative Board for it to become adversarial in judicial review proceedings relating to the fairness of its procedures.

The most recent statement of the courts is found in *Northwestern Utilities Ltd. v. City of Edmonton*.²⁶ In that case the Supreme Court of Canada commented that an adjudicative tribunal's participation should be limited to representations related to its jurisdiction to make the order in question and should not extend to the question of whether it acted in accordance with the principles of natural justice. Estey J., relying on *Transair*, stated:²⁷

This appeal involves an adjudication of the Board's decision on two grounds, both of which involve the legality of administrative action. One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decisions, and it abuses one's notion of propriety to countenance its participation as a full fledged litigant in

²³ E. Campbell, *Appearances of Courts and Tribunals as Respondents to Applications for Judicial Review* (1982), 56 Aust. L.J. 293, at pp. 297-300.

²⁴ *Supra*, footnote 8. The right of the Ontario Board, like all inferior tribunals in Ontario, to be a party in judicial review proceedings is statutorily established; see The Judicial Review Procedure Act, R.S.O. 1980, c. 224, s. 9(2).

²⁵ *Supra*, footnote 5.

²⁶ *Supra*, footnote 5.

²⁷ *Ibid.*, at pp. 709 (S.C.R.), 178 (D.L.R.).

this Court in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.

Estey J. reviewed the applicable law and concluded that:²⁸

Where the parent or authorizing statute is silent as to the role or status of the tribunal in appeal or review proceedings, this Court has confined the tribunal strictly to the issue of its jurisdiction to make the order in question.

Estey J. then went on to state that although the tribunal may address the broad question of jurisdiction, it is not permitted to make representations on the issue of whether it has failed to act in accordance with the principles of natural justice, stating:²⁹

To allow an administrative board to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions.

This approach appears to leave labour boards in an awkward half-way house in judicial review proceedings. The jurisdiction/natural justice dichotomy is not very helpful, especially in the light of traditional judicial pronouncements that a departure from natural justice is a jurisdictional error, or in light of more recent decisions on the less well defined "duty of fairness" in the hearing of an application or complaint. It seems doubtful that the dilemma will be minimized by boards professing to appear solely in an explanatory capacity as a "friend of the court" rather than as an active litigant. Whatever labels are used it appears from the cases that the courts may turn a less responsive ear to a board's wish to defend the implicit fairness of its procedures. While it is one thing for the judiciary to suggest that boards should keep a low profile in the court and be restrained in addressing issues of procedural fairness, a viewpoint no doubt consistent with the experience of lawyers seasoned in judicial review advocacy, it is quite another to decree that they have no standing whatever to address an issue as important as the legitimacy of their procedures.

III. *What Labour Boards Should Do In Judicial Review Proceedings*

The nature of our adversarial judicial system gives rise to contradictory arguments as to what the role of labour boards should be in a judicial review proceeding. On the one hand, the adversary system demands neutrality from its adjudicators. To allow an adjudicative board to participate as an adversary in a judicial proceeding in which that same board's decision is being reviewed may suggest a partisanship which is, in the words of Estey J., "not ordinarily contemplated in our judicial traditions".³⁰ Judges do not plead their own cases on appeal. Not surprisingly, in the eyes of a court, for an adjudicator to take too adversarial a role in defending his own decision risks bringing the system of justice into disrepute. The shortcom-

²⁸ *Ibid.*, at pp. 710 (S.C.R.), 179 (D.L.R.).

²⁹ *Ibid.*

³⁰ *Ibid.*

ing of that view is that it applies a purely judicial standard to a tribunal that is both judicial and administrative. It also overlooks the critical distinction between appeal and review.

The preservation of the administrative process is the strongest argument for a labour board taking some part in judicial review proceedings. Board participation can help to ensure that the court gains a direct insight into the board's processes and functions. There would be clear shortcomings in a system of judicial review that would limit the court to the official record and the submissions of the adversaries, leaving it to divine from them as best it can a tribunal's procedures and policies. The adversaries before the board can hardly be relied on to present the court with a full and unbiased picture; in fact it will be each counsel's duty to colour and arrange the facts and the law to best suit his own case. Depending on their short term litigious objectives, the private parties may or may not have an interest in preserving the purpose of the legislation or the administrative process essential to it.³¹

The horns of the labour board's dilemma are clear. Neutrality must be preserved but so must the administrative process. It is critical to keep these two overriding and somewhat conflicting considerations in mind when thinking about the role labour boards should play in judicial review proceedings. Labour boards are charged with administering legislation which Parliament or the Legislature has deemed to be in the public interest. As the publicly designated upholders of this legislation, the labour boards have a duty to see that their procedures and policies, as well as the statutes they oversee, are understood by the judiciary.

Estey J. would have labour boards resolve this dilemma by producing extensive written reasons. However, the argument that the board can speak fully through its decision and need not appear in court does not always reflect reality. Professor David J. Mullan has noted that a labour board cannot always protect itself and avoid the necessity of appearing before the court in judicial review proceedings by giving full and detailed reasons for all of its decisions.³² As Professor Mullan points out, while the merits of a case are usually fully explored in the written decision, the issues of jurisdiction and of fairness which may be raised on judicial review are often not raised at the board hearing. Thus the board may simply not have had an opportunity to deal with them at the time its decision is rendered. Moreover, given the importance of expedition in the field of labour relations, it is not pragmatic or desirable to expect boards to take the time to fully address

³¹ Lawyers close to the process are repeatedly surprised by the occasional willingness of one party, be it an employer or union, to push a particularly heated case to a victory whose precedential impact will adversely affect the long term interest of its own constituency. This may happen, for example, when two unions vie for the same bargaining rights.

³² D. Mullan, *Recent Developments in Nova Scotia Administrative Law* (1978), 4 Dal. L.J. 467, at p. 494.

every conceivable argument that might form the basis for review. When jurisdictional arguments are raised for the first time before the court, depriving the court of the board's explanation will hamper the judiciary's ability to make an informed decision.

Experience also suggests that the courts may want the boards' input because of their special expertise. While some may discount the notion of the labour board as an "expert tribunal",³³ that concept still remains a frequently articulated justification for judicial deference to board decisions.

An objection to the appearance of an administrative board in judicial review proceedings is sometimes made by way of analogy to the limited role of an inferior court in an appeal from one of its decisions.³⁴ This argument fails to recognize that inferior courts normally exercise a jurisdiction with which the superior courts are very familiar, and they typically apply statutes with which the superior courts are well acquainted. On the other hand, an administrative tribunal such as a labour board is normally much more knowledgeable about the history, policies and nuances of its empowering statute than is the reviewing court. It is this degree of specialized experience which makes the labour board's presence a valuable resource during judicial review proceedings.

Public policy dictates that, as guardian of a public statute, the labour board play at least an explanatory role in judicial review proceedings, lending its presence as a "friend of the court" to fill in gaps in the official record and to answer the court's questions regarding policy. But how far does the *amicus curiae* theory go before it breaks down? When should the board sit passively as *amicus*, awaiting the questions of the court, if any, and when should it advance its submissions as a full-fledged party? Obviously, a labour board can play a more effective role in educating the reviewing court as to its internal procedures if it makes active submissions in the court of first instance instead of simply appearing to aid the court if a difficulty should arise. A factual example of the importance of representations by the board as to its policy and procedures can be seen in the Ontario Labour Relations Board's second decision to go before the courts, *Toronto Newspaper Guild v. Globe Printing Co.*³⁵ At the certification hearing the Board declined to allow management counsel to cross-examine the secretary of the union on the documentary evidence of membership filed in support of its application, or on alleged subsequent resignations of membership. On judicial review the Board appeared in the High Court and the Ontario Court of Appeal but did not make any submissions of its own.

³³ See e.g. Getman and Goldberg, *The Myth of Labour Board Expertise* (1972), 39 U. Chi. L. Rev. 681.

³⁴ *Re City of Dartmouth*, *supra*, footnote 5; *Re Workmen's Compensation Board of Nova Scotia and Treige*, *supra*, footnote 5.

³⁵ [1953] 2 S.C.R. 18, [1953] 3 D.L.R. 561.

Instead it relied solely on the union's argument that the privative clause protected the Board's decision. The only evidence as to what occurred at the Board's hearing was set out in an affidavit filed by the company. In the Supreme Court of Canada the Board did not appear. In finding that the Board's actions amounted to a denial of natural justice, Kellock J. remarked that as the Board made no submissions he could draw no inference as to why the Board had acted as it did, but was instead bound by the company's uncontested submissions.

Assuming the importance of direct submissions, in what areas of judicial review, if any, should a labour board be allowed to take an active role as a party litigant? Should it file affidavits by its own officers? Should it cross-examine on the supporting affidavits filed by the parties? Merely to ask these questions is to state the obvious risk inherent in a board becoming too active a litigant. In approaching this question it is imperative to consider the importance of a board's active participation as judged by the public interest and weigh it against any harm which that participation may do to public faith in the administration of justice.

In this regard, the position of Canadian labour boards may be contrasted with that of the National Labour Relations Board in the United States. On many occasions that Board itself becomes the prosecutor of an action in the nature of judicial review to enforce its own order, particularly in representation cases. Congress accurately foresaw the danger of inherent delay if the parties themselves were given status to apply for the judicial review of representation determinations made by the Board. Under the National Labour Relations Act,³⁶ subject to a narrow range of judicially created exceptions, only "final orders" made by the Board in the finding of an unfair labour practice are reviewable by the courts. Under National Labour Relations Board practice an employer who wishes to contest a representation finding will generally refuse to bargain, triggering an unfair labour practice complaint by the union and a hearing before an Administrative Law Judge. Once a bargaining order issues the General Counsel of the Board will file suit in the Federal Court of Appeals for the enforcement of the Board's order, or the employer will move to have the unfair labour practice finding set aside.³⁷ In either case the Board becomes an active participant in the litigation process.

The American system therefore conceives the labour board as guardian of the process and does not shrink at the prospect of the Board as litigant. Canadian conventional wisdom, however, grounded as it is in a different administrative tradition, does not so easily embrace the idea of the adjudicator as advocate. In Canada, judicial review is always instituted by

³⁶ S. 10, 29 U.S.C. S 160 (1976); *American Federation of Labour v. N.L.R.B.*, 308 U.S. 401 (1940).

³⁷ See, generally, Feerick, Baer and Arfa, *N.L.R.B. Representation Elections—Law, Practice & Procedure* (New York, 1979), pp. 259-64.

one of the parties before the board. Practically speaking, the degree to which a Canadian board will want to intervene in a court of first instance, or appeal an adverse court decision, will depend on the issue being litigated. A board may be indifferent as to the outcome of judicial review if that outcome has no practical effect beyond the interests of the two private parties. On the other hand, it may be seriously concerned if the judicial outcome destroys or jeopardizes some critical aspect of its everyday policies or procedures. Occasionally that kind of result can surface by surprise, where seemingly benign litigation produces a totally unforeseen result.

This is what happened in *Re Ajax and Pickering General Hospital and C.U.P.E.*³⁸. In that case the Ontario Board issued an order directing a union and its locals to cease and desist from threatening or furthering an unlawful strike. When the respondents failed to comply the employer moved for enforcement of the Board's order by contempt proceedings in the Supreme Court of Ontario. Following its normal practice the Board did not appear on the motion for enforcement. Hughes J. ruled that as the respondents had ceased their non-compliance before the hearing of the motion for contempt the Court was without jurisdiction to enforce the Board's order or to punish for the previous non-compliance. That unexpected result had obvious negative consequences for the force of Board orders in the future. Subsequently the Board sought and was given leave to join in an appeal which succeeded in overturning that result.³⁹ As the *Ajax* experience shows, there are times when a board should be allowed to intervene on appeal even though it did not appear in the court of first instance.

Does a labour board have standing to appeal a judgment quashing its own decision when the other parties affected do not themselves appeal? Before the decision of the Supreme Court of Canada in *Canada Labour Relations Board v. Transair Ltd.*⁴⁰ there appeared to be little doubt that it did. In *Labour Relations Board of Saskatchewan v. Dominion Fire Brick & Clay Products Ltd.*⁴¹ the Supreme Court of Canada unanimously affirmed the right of a labour relations board to appeal an adverse order relating to its jurisdiction. That principle was reiterated by the Ontario Court of Appeal in *International Association of Machinists v. Genaire Ltd.*⁴² In *Transair*, however, five judges of the Supreme Court of Canada concurred in the view expressed by Spence J. that narrowed the scope of "jurisdiction", distinguishing natural justice issues from issues of statutory jurisdiction. In

³⁸ (1981), 122 D.L.R. (3d) 109, 32 O.R. (2d) 492 (H. Ct.).

³⁹ (1981), 132 D.L.R. (3d) 270, 35 O.R. (2d) 293 (C.A.), leave to appeal to the Supreme Court of Canada dismissed, (1982), 132 D.L.R. (3d) 270n.

⁴⁰ *Supra*, footnote 5.

⁴¹ [1947] S.C.R. 336, [1947] 3 D.L.R. 1.

⁴² (1958), 18 D.L.R. (2d) 588, [1959] O.W.N. 149 (Ont. C.A.).

a passage, whose theme resurfaced two years later in *Northwestern Utilities v. City of Edmonton*,⁴³ Spence J. commented:⁴⁴

It is true that the finding that an administrative tribunal has not acted in accord with the principles of natural justice has been used frequently to determine that the Board has declined to exercise its jurisdiction and therefore has had no jurisdiction to make the decision which it has purported to make. I am of the opinion, however, that this is a mere matter of technique in determining the jurisdiction of the Court to exercise the remedy of *certiorari* and is not a matter of the tribunal's defence of its jurisdiction. The issue of whether or not a board has acted in accordance with the principles of natural justice is surely not a matter upon which the Board, whose exercise of its functions is under attack, should debate, in appeal, as a protagonist and that issue should be fought out before the appellate or reviewing court by the parties and not by the tribunal whose actions are under review. In the words of Aylesworth, J.A., as quoted above, such a proceeding would not indicate the impartiality of the Board or emphasize its dignity.

To those students of administrative law who have followed with some frustration the spectre of the judiciary treading over the privative fence on the theory that errors of natural justice go to jurisdiction that passage may come as the final irony.⁴⁵ It goes without saying that it takes little imagination for a party intent on delaying or frustrating the labour relations process to find some grounds to allege a breach of natural justice in the procedures of a labour board. Natural justice is among the most frequently invoked grounds of review by which parties seek to stay or quash the decisions of the boards.⁴⁶ Judicial decisions in these cases have a significant impact upon a board's day-to-day procedures, and to that extent *Transair* may have serious consequences for the labour boards and the labour relations process.

Recently, the issue of standing was once again addressed by the Supreme Court of Canada. In *Re Baltimore Aircoil Interamerican Corp. and Ontario Labour Relations Board*⁴⁷ the Divisional Court in Ontario found that the Board had violated the rules of natural justice by declining to hear a petition opposing certification, having first found that a subsequent counter-petition signed by a significant number of the same employees was voluntary. In the Board's practice the evidence respecting a counter-petition was always heard first. A finding that the counter-petition is valid automatically rendered the earlier petition irrelevant, a conclusion which substantially shortened the hearing. The Court ruled that the Board must

⁴³ *Supra*, footnote 5.

⁴⁴ *Supra*, footnote 5, at pp. 746-747 (S.C.R.), 440 (D.L.R.).

⁴⁵ Moreover, while Spence J.'s comment on the history of judicial slight of hand in this area seems accurate, it is unfortunate that the Court did not seem to consider what weight should be given to the fact that Parliament, in the terms of section 28 of the Federal Court Act, *supra*, footnote 11, expressly included natural justice as a head of *jurisdictional* review.

⁴⁶ For example, in the years 1975-1982 inclusive natural justice was pleaded in 21.6% of applications for judicial review brought against the Canada Labour Relations Board.

⁴⁷ (1981), 130 D.L.R. (3d) 580 (Ont. Div. Ct.).

nevertheless hear the evidence of the prior petition. The union appealed without success to the Ontario Court of Appeal, with the Board appearing.⁴⁸ Thereafter the union decided not to appeal. The Board then found itself with a binding judicial outcome inconsistent with the logic of its past certification procedures and one which it viewed as posing a substantial threat to the expedition critical to the certification process. For their own internal reasons the union and employer could live with the result of the Court's decision. The Board, however, remained responsible for processing in excess of one thousand applications for certification a year. Its concern for the overall effectiveness of the administrative process caused it to take the unusual step of appealing the decision of the Ontario Court of Appeal.

The Board's application for leave to appeal was heard by the Supreme Court of Canada on April 28, 1982. The respondent employer challenged the Board's standing to appeal, largely on the authority of *Northwestern Utilities* and *Transair*. Leave to appeal was denied⁴⁹ with costs awarded against the Board.⁵⁰ As no reasons are given for a denial of leave to appeal the final outcome need not necessarily be taken as an application or extension of *Transair*.

The *Baltimore Aircoil* case usually highlights the competing arguments about the role of a labour board on judicial review. Viewed through the "judicial" lens the compelling argument is that when the private parties have abandoned the field, leaving the matter academic, there is no further *lis* to resolve, and the Board should not pick up the litigious standard and charge forward on appeal. Moreover, it is "undignified" for the Board to cavil about its own fairness. Viewed, however, from the practical standpoint of the administrative process and day-to-day labour relations policy the consequences of the court's decision are not academic and may far outweigh issues of dignity. A compelling argument can be made that a board should have a special standing in the court as the guardian of the administrative process, particularly when a judicial outcome strikes at the heart of its procedures and by extension at the objectives of the legislation it administers. The outcome in *Baltimore Aircoil* leaves unresolved the

⁴⁸ *Ibid.*, at p. 580n.

⁴⁹ Decision dated May 10, 1982, unreported.

⁵⁰ The Ontario Labour Relations Board does not seek costs against an unsuccessful judicial review applicant on the theory that it appears in the court proceedings to serve the public interest. Moreover, costs are not normally awarded against the Board. They have been exceptionally awarded, however, where it has appeared to the court that the Board has acted improperly or has been overly aggressive in the defence of its decision: *R. v. Ontario Labour Relations Board ex parte Labourers International Union, Local 183* (1969), 4 D.L.R. (3d) 485, at p. 489, [1969] 2 O.R. 116, at p. 120 (Ont. H.C.), *aff'd* (1969), 5 D.L.R. (3d) 707, [1969] 2 O.R. 501 (Ont. C.A.); *Re Fisher and Hotel, Clubs, Restaurants, Tavern, Employees' Union, Local 261*, (1980), 110 D.L.R. (3d) 393 (Ont. Div. Ct.).

disturbing possibility of labour boards being without standing to litigate critical issues relating to their own procedures.

The issue is an important one. In matters of public rather than merely private importance before the courts a board's submissions should be heard, at least as far as they clearly relate to the discharge of a board's statutory jurisdiction. If the court's decision is to be responsive to the labour relations process it should hear the board responsible for the day-to-day administration of that process. Even situations where the attack on a board's jurisdiction is of only peripheral importance to the board, the discretion to participate should still rest with the board. A labour board will be in a much better position to judge the potential impact on its internal procedures of an adverse judicial ruling than will the reviewing court. For the court to restrict a board's participation because it deems the matter to be of little practical significance to the board would be both presumptuous and unpragmatic. For these reasons the court should not deny a board the right to make submissions in jurisdictional attacks which allege a denial of natural justice.

Significantly, the courts themselves are beginning to recognize that standards of procedural fairness can vary with the administrative context. Perhaps the best statement of the emerging approach is the following comment by LeDain J. in *Inuit Tapirisat of Canada v. The Right Honourable Jules Léger*:⁵¹

Procedural fairness, like natural justice, is a common law requirement that is applied as a matter of statutory interpretation. In the absence of express procedural provisions it must be found to be impliedly required by the statute. It is necessary to consider the legislative context of the power as a whole. What is really in issue is what is appropriate to require of a particular authority in the way of procedure, given the nature of the authority, the nature of the power exercised by it, and the consequences of the power for the individuals affected. The requirements of fairness must be balanced by the needs of the administrative process in question.

If context can determine the outcome then context must be explained. The unorthodox procedures necessitated by labour relations realities make it especially important for labour boards to have input in judicial review on the issue of procedural fairness. The most common board procedures, including the confidential scrutiny of hearsay membership documents and, occasionally, the investigations of field officers, depart substantially from the evidence gathering techniques most familiar to a court. As the "duty of fairness" becomes more defined there may be a more urgent need for

⁵¹ [1979] 1 F.C. 710, at p. 717, 95 D.L.R. (3d) 665, at pp. 671-672 (Fed. C.A.), rev'd on other grounds, *sub nom.*, *Attorney-General for Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, (1980), 115 D.L.R. (3d) 1; see also *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, (1978) 88 D.L.R. (3d) 671; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at p. 630 (1979), 106 D.L.R. (3d) 385 at pp. 411-412; and, generally, D. Mullan, *Fairness: The New Natural Justice* (1975), 25 U.T.L.J. 281, W. Tarnopolsky and G. Beaudoin, *Canadian Charter of Rights and Freedoms* (1982), pp. 278-85.

boards to convey to the courts the importance of these procedures to the labour relations process.

What happens after judicial review? Does a board's participation in judicial review undermine its credibility when the case is resubmitted to it by the courts? The Ontario Labour Relations Board has adopted an administrative practice that to some extent minimizes the "appearance of justice" problem. It has stated that although the Board remains seized of a matter when one of its decisions is quashed, a particular panel is not so seized. Therefore the Board may substitute a new panel for the original when the case is returned, to that extent enhancing the appearance of fairness.⁵² It will not do so automatically, but may as the case requires. In what must be one of the furthest judicial incursions into the administrative process yet recorded, however, the court in *Baltimore Aircoil* itself ordered the case remitted to a differently constituted panel of the Board.⁵³ Leave to appeal that part of the Court's order was also denied by the Supreme Court of Canada.

Conclusion

The judicial review of labour boards is a permanently established part of our administrative and constitutional law. While this study has dwelled on the shortcomings of a few court decisions in a particular area, it should not be construed as a message that the lot of labour boards and their decisions before the courts is hopeless. If anything, the opposite is true. Decisions of the past few years have signalled a period of unprecedented judicial respect and deference to labour relations boards.⁵⁴ If the tribunals and the courts are to work together, however, great care must be taken to ensure procedural rules that will promote an optimal balance between them. Preserving for the boards a reasonable access to the courts is a vital part of that balance.

While there is no cause for unbridled alarm, the decisions in *Transair*⁵⁵ and *Northwestern Utilities*⁵⁶ should awaken the labour relations boards, and indeed many other administrative tribunals, to the risk that they may have a diminished voice in court proceedings that could seriously affect the administrative process. As guardians of the public interest the

⁵² *Fuller's Restaurant*, [1980] Ontario Labour Relations Board Rep. 828.

⁵³ *Supra*, footnotes 47, 48, 49.

⁵⁴ See, e.g. *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* (1980), 97 D.L.R. (3d) 417 (S.C.C.); *Re Hughes Boat Works Inc. and International Union, United Automobile, Aerospace, Agricultural & Implement Workers of America (U.A.W.) Local 1620* (1979), 102 D.L.R. (3d) 661, 26 O.R. (2d) 420 (Ont. Div. Ct.); *Re The Queen in Right of Ontario and Grievance Settlement Board* (1980), 107 D.L.R. (3d) 599 (Ont. Div. Ct.); *Re Tandy Electronics Ltd and United Steelworkers of America* (1980), 115 D.L.R. (3d) 197 (Ont. Div. Ct.), leave to appeal refused (1980), 115 D.L.R. (3d) 197n (Ont. C.A.).

⁵⁵ *Supra*, footnote 5.

⁵⁶ *Supra*, footnote 5.

boards should be vigilant to preserve their traditional standing in judicial review proceedings. They should use their standing in judicial review proceedings to sensitize the judiciary to its responsibility for the preservation and enhancement of the industrial relations system. On a case by case basis they should keep the courts aware of how judicial decisions will frustrate or advance the goals of labour relations legislation and the labour relations process generally.

Inferior tribunals cannot be blind to the inherent risk to the appearance of justice that is created when they take an unduly adversarial stance in a judicial review application brought by the parties before them. For the reasons canvassed, for a labour board to assume an overly combative posture in the court poses a danger to the perceived integrity of the public law process. Further, and in this regard the record of the boards with a long-standing policy of appearing in judicial review applications is instructive, there is generally no need for the board to assume a high profile. By the same token, the board should be mindful that it remains the legislated guardian of the labour law process. As such, it has a legitimate interest to protect its jurisdiction, including the many policies and procedures that give content to that jurisdiction. Its obligation transcends the interests of the private parties, whose objectives in litigation may be indifferent to the public good. For these reasons labour boards should strive to retain their voice in the courts, while ensuring that their perspective is voiced sparingly, in measured tones and only in the public interest.

Judicial review is not an appeal and the labour boards are not courts. They should not be simplistically treated as court analogs for the purposes of judicial review. While the labour boards may hold hearings, swear witnesses, hear and resolve fairly sophisticated factual and legal arguments and render occasionally elaborate written decisions which become part of a reported jurisprudence, they are decidedly not courts. Theirs is the delicate task of overseeing the birth, life and termination of bargaining rights, to supervise the administration of collective agreements, to adjudicate health and safety disputes and to insure the legality and regularity of strikes, lockouts, picketing and, occasionally, of arbitrations. The collective bargaining law that the boards administer bears little relation to the law of master and servant or to the law of commercial contract. A scan of any volume of the Canadian Labour Relations Board Reports should bring home to anyone the scope and complexity of what labour boards do.

Given the importance of that work, it is to be hoped that in embarking on the judicial review of the decisions of labour relations boards the courts will generally continue to apply a healthy presumption that the board is more experienced than the court in the matter being reviewed. Particularly where the board's day-to-day procedures are called into question, it is to be hoped that they will preserve the wisdom of *Dominion Fire Brick*⁵⁷ and

⁵⁷ *Supra*, footnote 41.

Genaire,⁵⁸ reflecting decades of court practice by which the boards have been given the fullest opportunity to make representations on the practical ramifications of their policies and procedures for the labour relations process. It remains incumbent on the courts to appreciate that in assessing the fairness of a public tribunal's procedures it may be essential to look beyond the submissions of the private parties to a judicial review and to recognize the importance to the public law process of letting the tribunal itself be heard. If fairness to the parties is to be protected, so is fairness to the board. That is the optimal approach for the courts to take for the advancement of the labour relations process.

⁵⁸ *Supra*, footnote 42.