

THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

Vol. 64

June 1986 juin

No. 2

THE PRIVATIVE CLAUSE IN CANADIAN ADMINISTRATIVE LAW, 1944-1985: A DOCTRINAL EXAMINATION

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This article undertakes an analysis of Canadian case law relating to the interpretation of "no certiorari" provisions. The statutory focus is modern trade union legislation. It has been within that context that the jurisprudence has developed. The author's thesis is that, against a background of initial hostility towards the legislative schemes involved in such statutes, courts at first ignored the effect of privative clauses. As that subjective reaction waned, preclusive provisions flowered for a time, if somewhat timidly. Within the last few years or so, however, and notwithstanding present day judicial deference towards specialized administrative agencies, legislative attempts to limit or remove judicial review have, it is argued, again been rendered substantially worthless. The impact of section 96 of the Constitution Act, 1867, examined briefly in the article, has given that development an added impetus.

Dans cet article, l'auteur entreprend l'étude de la jurisprudence canadienne en ce qui concerne l'interprétation des dispositions de "no certiorari". Il s'agit ici de la législation moderne sur les syndicats car c'est dans ce domaine que s'est développée la jurisprudence. Selon la thèse de l'auteur, les tribunaux, dans une atmosphère au début hostile à l'utilisation des procédés législatifs employés dans ces lois, ne tinrent d'abord pas compte de l'effet des clauses restrictives. Cette réaction subjective s'étant atténuée, les dispositions d'exclusion fleurirent pour un temps, quoiqu'assez timidement. Au cours des dernières années cependant et malgré le respect actuel que montrent les tribunaux aux organismes administratifs spécialisés, l'auteur soutient que les efforts tentés par les législateurs pour limiter ou abolir les recours aux tribunaux se sont avérés en grande partie infructueux. L'article 96 de la Loi constitutionnelle de 1867, qui est brièvement étudié dans cet essai, a aussi contribué à ce développement.

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Introduction

Legislative provisions which, literally read, seek to insulate administrative agencies from judicial review are of long standing.¹ Why, then, start an examination of them with the year 1944? The answer lies in the fact that Canadian jurisprudence involving the interpretation of "no certiorari" clauses has mainly developed in the context of trade union legislation and that 1944 saw the enactment of the first statute in Canada dealing with modern collective bargaining.²

At the outset, such legislation was regarded with hostility by the courts. Most frequently this was expressed through resort to time-honoured rules of statutory interpretation, for example, that a statute which takes away common law rights is to be strictly construed.³ On occasion it was more overt. Thus in 1949 Taylor J., of the Saskatchewan Court of King's Bench, in granting *certiorari* to quash a decision of the Labour Relations Board of his province, said of the agency:⁴

The board is partisan favouring labour, as it is constituted. It lacks that knowledge of fundamental principles and the practice which has been the foundation of British justice for centuries. It listened with a ready ear to the representations of [the union] and overruled every representation made by counsel for [the employer].

Sometimes it was explicit. In the course of hearing argument before the Saskatchewan Court of Appeal in 1956 on another application⁵ to quash an order of the same Board Gordon J.A. said,⁶

. . . [T]he Act [is] heavily loaded in favour of labour . . . [No] wonder capital does not rush into this province.

That attitude permeated the approach which courts took to privative provisions in labour legislation. Thus, in 1949 Brown C.J.K.B., speak-

¹ Perhaps the earliest case in which such a provision was considered is *The King v. Plowright* (1686), 3 Mod. 94, 87 E.R. 60 (K.B.). See, H. Sutherland, *Privative Clauses and the Courts* (1952), 30 Can. Bar Rev. 69. At least by 1899 the Supreme Court of Canada had occasion to do so in *The Queen v. The Sailing Ship "Troop Company"* (1899), 28 S.C.R. 662.

² S.S. 1944 (2nd sess.), c. 69. This does not overlook the Collective Bargaining Act, S.O. 1943, c. 4. It was repealed in 1944 when labour relations in Canada were brought under federal wartime control through P.C. 1003. The Quebec Legislature entered the field prior to 1944 with The Collective Agreement Act, 1940 S.Q., c. 38. That statute, however, did not deal with the collective bargaining process.

³ E.g., *John East Iron Works Ltd. v. Labour Relations Board*, [1949] 3 D.L.R. 51, at pp. 63-64, [1949] 1 W.W.R. 842, at pp. 856-857 (Sask. C.A.).

⁴ *In re Sisters of Charity, Providence Hospital and Labour Relations Board* (Sask.), [1951] 1 D.L.R. 502, at p. 511, [1950] 2 W.W.R. 1046, at pp. 1055-1056 (Sask. K.B.). An appeal from Taylor J.'s decision was dismissed: [1951] 3 D.L.R. 735, (1951), 2 W.W.R. 66 (Sask C.A.).

⁵ *Re Labour Relations Board of Sask., Simpson Sears Ltd. v. Department Store Organizing Committee* (1956), 4 D.L.R. (2d) 757, 19 W.W.R. 439 (Sask. C.A.).

⁶ Regina Leader Post, Regina, March 29, 1956, at p. 5, col. 6-7.

ing of the "no certiorari" section of the Saskatchewan Trade Union Act,⁷ said:⁸

It would thus appear . . . that the Legislature intended that the board's orders and proceedings should be more sacrosanct than those of the Supreme Court of Canada.

This hostility was perhaps understandable. For one thing, few judges sitting in the 1940's and 1950's brought to the Bench any experience in the field of labour relations. Further, these statutes created administrative agencies with powers which, to some judges, appeared ominous. Proctor J.A., again of the Saskatchewan Court of Appeal, was certainly in that company. He said:⁹

. . . *The Trade Union Act* gives to the Labour Relations Board powers so extensive that rights usually regarded as fundamental in democratic states are severely curtailed, and in particular a citizen's right of access to the Courts to protect himself from injustice or hardship, purports to be taken away.

This factor, at least subconsciously, contributed to a very restricted application of the privative clauses found, in one form or another, in every trade union Act in Canada from 1944 on. Indeed, "restricted application" may be too mild a term. Writing in 1952 Professor Bora Laskin, in commenting on the decisions of provincial superior courts up to that time, said, "privative clauses have, in truth, been read out of the statutes".¹⁰

Times change and so do judicial attitudes. At least by the 1960's it was clear that courts were ready to approach trade union legislation more realistically and objectively. This shift in approach was exemplified in the judgment of Hall J., speaking for the Supreme Court of Canada in 1966, when he said:¹¹

Counsel for the respondent . . . emphasized that the provisions of the *Labour Relations Act* being in derogation of common law rights should be strictly construed

Whatever merit the arguments . . . had at the beginning of labour relations legislation, it seems to me that in the stage of industrial development now existing it must be accepted that legislation to achieve industrial peace and to provide a forum for the quick determination of labour-management disputes is legislation in the public interest, beneficial to employee and employer and not something to be whittled to a minimum or narrow interpretation in the face of the expressed will of legislatures which, in enacting such legislation, were aware that common law rights were being altered because of industrial development and mass employment which rendered illusory the so-called right of the individual to bargain individually with the corporate employer in the mid twentieth century.

⁷ *Supra*, footnote 2.

⁸ *In re the Trade Union Act, 1944 Capital Cab Ltd. v. Canadian Brotherhood of Railway Employees*, [1949] 2 W.W.R. 481, at p. 483 (Sask. K.B.).

⁹ *Re Sisters of Charity, Providence Hospital Labour Relations Board*, *supra*, footnote 4, at pp. 745 (D.L.R.), 78 (W.W.R.) (C.A.).

¹⁰ B. Laskin, *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses* (1952), 30 Can. Bar Rev. 986, at p. 992.

¹¹ *White Lunch Ltd. v. Labour Relations Board of British Columbia*, [1966] S.C.R. 282, at pp. 292-293, (1966), 56 D.L.R. (2d) 193, at pp. 201-202.

That attitude is now firmly entrenched. In 1983 Laskin C.J.C., in commenting on the actions of the Canada Labour Relations Board, said:¹²

It is rarely a simple matter to draw a line between a lawful and unlawful exercise of power by a statutory tribunal, however ample its authority, when there are conflicting considerations addressed to the exercise of power. *This Court has, over quite a number of years, thought it more consonant with the legislative objectives . . . to be more rather than less deferential to the discharge of difficult tasks by statutory tribunals like the Board.*

This change in attitude was accompanied, for a time, by a more liberal application, if not interpretation, of privative clauses with the result that greater scope was allowed for non-reviewable labour board decisions.

Commencing in 1978, however, and particularly since 1979, certain decisions of the Supreme Court of Canada have had the effect, it will be argued, of again rendering privative clauses substantially ineffective. Perhaps remarkably, this has not been accompanied by a return to the restrictive interpretation placed, in general, on trade union legislation by the courts at the outset of the period under examination. Quite the contrary: the liberal approach has been maintained and expanded—but the narrow interpretation of preclusive provisions has been restored and perhaps reinforced. The purpose of this article, in main part, will be to trace that development. It will, however, also discuss the effect of section 96 of The Constitution Act, 1867 on the ability of a provincial Legislature to remove the power of judicial review.¹³

¹² *Canada Labour Relations Board v. Halifax Longshoremen's Association*, [1983] 1 S.C.R. 245, at p. 256, (1983), 144 D.L.R. (3d) 1, at p. 8. (Emphasis added).

¹³ There is another constitutional provision which has the potential to affect privative clauses—namely section 7 of the Canadian Charter of Rights and Freedoms (Constitution Act, 1982, Part I). It reads:

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.

Obviously, before section 7 can have any impact on the activities of an administrative agency, or on a privative clause contained in its statute, the powers delegated to the agency must, when exercised, affect "the right to life, liberty (or) security of the person".

Granted the section *is* brought into play, then what will be its affect on a "no certiorari" provision? The answer lies in the meaning of the additional right (or qualification) which the section guarantees—"not to be deprived thereof except in accordance with the principles of fundamental justice". The Supreme Court of Canada addressed itself to that in *Reference Re Section 94(2) of the Motor Vehicles Act*, [1985] 2 S.C.R. 486. The Court held that the phrase "principles of fundamental justice" was non synonymous with "natural justice". It goes beyond mere procedural protection and requires a court (when section 7 applies) to look at the substance of the legislation before it. In so doing, the majority judgment says that a court is to determine whether it offends any of "the *basic tenets of our legal system*". There was no privative clause in the statute under consideration. When such a case arises, however, might it not be argued with force that the power of judicial review is one of the "basic tenets of our legal system" and that *any* legislative attempt to remove or limit it, where life, liberty or security of the person is involved, would offend "the principles of fundamental justice"?

I. Types of Privative Clauses

Over the years, legislative draftsmen have resorted to different formulae. In this context there may be some magic in words. We will return to that theme later. At the outset of the period being considered one or other of the following types of preclusive provisions was resorted to:

(a) What may be called a "remedy oriented" clause

Its entire thrust involves an attempt to remove the jurisdiction to grant the available remedies. An example is to be found in section 5 of the Ontario Labour Relations Act,¹⁴ considered by the Supreme Court of Canada in *Toronto Newspaper Guild v. Globe Printing Company*.¹⁵ The section read:

Subject to such right of appeal as may be provided by the regulations, the orders, decisions and rulings of the Board shall be final and shall not be questioned or reviewed nor shall any proceeding before the Board be removed, nor shall the Board be restrained, by injunction, prohibition, mandamus, quo warranto, certiorari or otherwise by any court . . .

(b) A "Jurisdictionally oriented" clause

This follows the same pattern as the foregoing but in addition attempts to bring within the decision-making power of the agency a matter, or matters, which might otherwise be interpreted as collateral or preliminary to the exercise of that jurisdiction. Such a provision was before the Supreme Court of Canada in *Farrell v. Workmen's Compensation Board*.¹⁶ It read:¹⁷

The Board shall have exclusive jurisdiction to inquire into, hear, and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court, and no proceedings by or before the Board shall be restrained by injunction, prohibition, or other process or proceeding in any Court or be removable by certiorari or otherwise into any Court; and without restricting the generality of the foregoing the Board shall have exclusive jurisdiction to inquire into, hear, and determine:

(a) The question whether an injury has arisen out of or in the course of an employment within the scope of this Part . . .

¹⁴ S.O. 1948, c. 51.

¹⁵ [1953] 2 S.C.R. 18, [1953] 3 D.L.R. 561.

¹⁶ [1962] S.C.R. 48, (1961), 31 D.L.R. (2d) 177.

¹⁷ Workmen's Compensation Act, R.S.B.C. 1948, c. 370, s. 76(1). (Emphasis added). An extreme example of this legislative device is to be found in s. 34 of the British Columbia Labour Code, R.S.B.C. 1979, c. 212. It lists eighteen particular matters as being within the Board's jurisdiction and therefore not collateral. See H.W. Arthurs, "The Dullest Bill": Reflections on the Labour Code of British Columbia (1974), 9 U.B.C.L. Rev. 280.

II. *The Interpretation of Privative Clauses*

Throughout the period being examined courts have followed the time-honoured "jurisdictional" approach to privative clauses. It, of course, involves a familiar and fundamental theme underlying the whole field of administrative law: namely, that any statutory agency has limited powers only. Those limits are set by the provisions of the statute which establishes the agency and delegates powers to it. In traditional terms, those statutory limits constitute the agency's "jurisdiction". So long as it acts within that jurisdiction the agency's proceedings and decisions are inviolate. Failure to do so renders the action *ultra vires*. It will be set aside or quashed on judicial review.

A well established extension of that theme has long enabled a superior court to avoid the literal effect of the usual kind of privative clause. If an agency in some way acts outside its statutory limits the existence of a privative section (which forms part of that statute) is irrelevant. No part of the Act applies to, or protects, what the agency has done.

The Saskatchewan Court of Appeal adopted this rationale in dealing with one of the first cases involving the Trade Union Act of the Province. Speaking for his court, Martin C.J.S., said:¹⁸

In Canada it has been repeatedly held that an express statutory abolition of *certiorari* does not oust the power of the Court to issue the writ . . . if [an agency has] acted without jurisdiction, for in such a case [the agency] has not brought itself within the terms of the statute taking away *certiorari* . . .

In 1953 the Supreme Court of Canada sounded the same theme in *Toronto Newspaper Guild v. Globe Printing Company*.¹⁹ In considering the effect of a preclusive provision in the Ontario Labour Relations Act Kellock J. said:²⁰

A provision such as s. 5 of the statute prohibits the court from questioning any decision which has been come to within the structure of the Statute itself.

By 1973 (if not earlier), this approach had resulted in all but three of the possible grounds for review being *held* to take an agency outside its jurisdiction, rendering either of the types of privative clause earlier quoted inapplicable.²¹ Let us turn to the three exceptions.

¹⁸ *Bruton v. Regina City Policemen's Association*, [1945] 3 D.L.R. 437, at p. 447, [1945] 2 W.W.R. 273, at p. 283 (Sask. C.A.). (Emphasis added).

¹⁹ *Supra*, footnote 15.

²⁰ *Ibid.*, at pp. 38 (S.C.R.), 580-581 (D.L.R.). (Emphasis added).

²¹ It may be as well to review the established grounds for judicial review. For the purposes of this article they can be summarized as follows:

1. *Procedural Error*

- (a) Denial of fair hearing or lack of "fairness".
- (b) Bias.

2. *Non-Procedural Error*

- (a) Through a failure to exercise the statutory power;

A. A preliminary or collateral issue

This can hardly be called an exception. It involves a case where the ground for review is that the agency had to consider an issue which, as the

- (i) By reason of unauthorized delegation; or
- (ii) Where the exercise of the power has been "fettered" or "dictated".
- (b) Excess in, or abuse of, the exercise of the statutory power;
 - (i) Where it is exercised for an improper purpose;
 - (ii) Where its exercise involves bad faith; or
 - (iii) Where irrelevant considerations have been taken into account or there has been a failure to consider relevant matters (compendiously referred to, on occasion, as "asking the wrong question").
- (c) Where a collateral (or preliminary) question is involved.
- (d) Where there is an error of law on the face of the record.
- (e) Where there is a lack of evidence.

The cases which hold that, with three exceptions, each of these grounds takes an agency "outside the structure" of its Act, including that part which constitutes its privative clause, are legion. In *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147, [1969] 1 All E.R. 208 (H.L.), Lord Reid embraced most of the grounds by saying (at pp. 171 (A.C.), 213-214 (All E.R.)):

But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity [i.e. which takes it outside its jurisdiction]. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. *I do not intend this list to be exhaustive.* (Emphasis added).

In *Metropolitan Life Insurance Company v. International Union of Operating Engineers*, [1970] S.C.R. 425, at p. 435, (1970), 11 D.L.R. (3d) 336, at p. 344, Cartwright C.J.C. referred specifically and with approval to the above portion of Lord Reid's judgment in *Anisminic*. His court took the same position in *Executors of the Woodward Estate v. The Minister of Finance*, [1973] S.C.R. 120, at pp. 127-128, (1972), 27 D.L.R. (3d) 608, at p. 615.

Dickson J. in *Service Employees International Union v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, (1973), 41 D.L.R. (3d) 6, having again referred to *Anisminic* with approval, applied it to the privative clause before the court in the following language at pp. 389 (S.C.R.), 11-12 (D.L.R.):

A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers *outside the protection of the privative or preclusive clause*. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it. If, on the other hand, a proper question is submitted to the tribunal, that is to say, one within its jurisdiction, *and if it answers that question without any errors of the nature of those to which I have alluded*, then it is entitled to answer the question rightly or wrongly and that decision will not be subject to review by the Courts. (Emphasis added).

court interprets the constituent statute, is preliminary or collateral to the exercise of the powers delegated by the Act. An example is found in *Farrell v. Workmen's Compensation Board*.²² There the Board had to decide whether an injury suffered by Farrell (from which he died) arose "out of or in the course of" his employment. The board held that it did not, and denied his widow compensation. Mrs. Farrell then moved by way of *certiorari* to quash that decision. At first instance Manson J., of the British Columbia Supreme Court, took the view that the question was collateral.²³ Accordingly—and as he was entitled to do on that view of the case²⁴—he reviewed the evidence and held that the Board was wrong.

The Supreme Court of Canada addressed itself squarely to the effect of the privative clause in the Act.²⁵ It was "jurisdictionally oriented". Judson J., speaking for the court, directed himself particularly to the portion of it which read: ". . . the Board shall have exclusive jurisdiction to inquire into, hear and determine . . . *the question whether an injury has arisen out of or in the course of an employment within the scope of this Part.*" The effect of his judgment is that this provision prevented the issue being regarded as preliminary or collateral to the exercise of the Board's jurisdiction. He said:²⁶

This issue is unquestionably within the jurisdiction of the Board . . . and even if there was error, whether in law or fact, it was made within the exercise of the jurisdiction and is not open to any judicial review, including *certiorari*.

This statement clearly means that a "jurisdictionally oriented" privative clause does have *some* effect. It will prevent any attempt to classify as collateral any matter or issue which, under the clause, is specifically stated to be *within* (and therefore not collateral to) the agency's jurisdiction. To that extent the clause is effective.

Does *Farrell* go further than that? Does it mean that, once the particular matter has, by the force of the legislation, been brought within "the structure of the Act" the agency's decision thereon is then absolutely insulated from review on any ground? One *might* come to that conclusion. Judson J. did say, ". . . even if there was error *whether in*

²² *Supra*, footnote 16. And see *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269, (1984), 9 D.L.R. (4th) 10.

²³ *Farrell v. Workmen's Compensation Board* (1960), 24 D.L.R. (3d) 272, at pp. 279-280, 31 W.W.R. 577, at pp. 584-585 (B.C.S.C.).

²⁴ *E.g.*, *Segal v. City of Montreal*, [1931] S.C.R. 460, at p. 473, [1973] 4 D.L.R. 603, at p. 615; *Bradley v. Canadian General Electric Co. Ltd.*, (1957), 8 D.L.R. (2d) 65, at pp. 69-70, [1957] O.R. 316, at p. 324 (Ont. C.A.); *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756, (1971), 18 D.L.R. (3d) 1; *Re Cedarville Tree Service Ltd. and Labourers' International Union*, (1971), 22 D.L.R. (3d) 40, [1971] 3 O.R. 832 (Ont. C.A.); *R. v. Home Secretary, Ex. p. Khawaja*, [1984] A.C. 74, at pp. 97, 110, [1983] 1 All E.R. 765, at pp. 772, 781 (H.L.).

²⁵ The relevant portion of the clause is set out in the text, *supra*, at footnote 17.

²⁶ *Supra*, footnote 16, at pp. 51 (S.C.R.), 179 (D.L.R.).

law or in fact, it was made within the exercise of the jurisdiction and is not open to any judicial review . . . ”²⁷ It is clear, however, that this broad statement cannot be taken that far. It is only true if the agency, now acting within its jurisdiction, “does everything right”. Thus, and by way of example, if it then considers irrelevant matters, it will exceed its jurisdiction and the privative clause will not apply.²⁸

Nonetheless, this kind of provision does have a limited effect. Where a statute specifically states that a particular issue or matter falls within the exclusive jurisdiction of the agency then, as a matter of statutory interpretation, it will be impossible for a reviewing court to treat it as preliminary or collateral to the exercise of that jurisdiction. In light of recent decisions in the Supreme Court of Canada, however, this may be something of a pyrrhic victory for the legislative draftsman. It seems that the court is bent on removing this common law ground for review—*whether or not a statute contains a privative clause and if it does then no matter what the type*.

That trend became explicit in the 1979 decision of the court in *Canadian Union of Public Employees v. New Brunswick Liquor Corporation*.²⁹ We will have occasion to examine the judgment in this case at some length in a later context. One aspect of it is, however, relevant here. The case involved an application to quash a decision made by the New Brunswick Public Service Relations Board acting under The Public Service Relations Act.³⁰ The facts were that, during the course of a lawful strike, the Union laid a complaint with the Board that the employer was replacing striking employees with management personnel contrary to section 102(3) of the Act, which read:

Where subsection (1) and subsection (2) are complied with employees may strike and during the continuance of the strike

(a) the employer shall not replace the striking employees or fill their position *with any other employee* . . .

The Board found the complaint to be well founded and made an order accordingly. In seeking to quash the order the employer argued that the question whether management personnel were “employees” within the meaning of the above section of the statute was preliminary or collat-

²⁷ *Ibid.* (Emphasis added).

²⁸ E.g., *Metropolitan Life Insurance Company v. International Union of Operating Engineers*, *supra*, footnote 21, at pp. 434 (S.C.R.), 343 (D.L.R.). The applicant for review argued that the particular point in issue was collateral. That submission was dismissed on the footing that a “jurisdictionally oriented” clause in the statute served to bring the point within the jurisdiction of the agency. Nonetheless, the decision was quashed on the ground that the agency had, while sitting within the structure of its Act, “asked the wrong question” (perhaps a synonym for “considering irrelevant matters”).

²⁹ [1979] 2 S.C.R. 227, (1979), 97 D.L.R. (3d) 417, 25 N.B.R. (2d) 237.

³⁰ R.S.N.B. 1973, c. P-25.

eral to the exercise of the Board's jurisdiction, and that in law the agency's decision on the point was wrong. Up to the level of the New Brunswick Court of Appeal that submission was upheld. Limerick J.A. put the matter this way:³¹

Two questions are therefore raised by the complainant,

1. Does the *Act* prohibit management personnel replacing striking employees? and if so,
2. Did management personnel replace employees?

It is the latter question which is the subject matter of the complaint and the primary matter for enquiry by the Board. *The first question is a condition precedent to and collateral to determining the second.*

The Supreme Court disagreed. Dealing with this issue Dickson J. said:³²

The question of what is and is not jurisdictional is often very difficult to determine. *The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so . . .*

One cannot . . . suggest that the Board did not have "*jurisdiction in the narrow sense of authority to enter upon the inquiry*".

On November 22nd, 1984, the Supreme Court handed down three further decisions reinforcing the above *dictum* and perhaps sounding the death-knell of this common law ground for review. Lamer J., in dealing with this issue in *Blanchard v. Control Data Canada Limited*,³³ said:

The current tendency is . . . to limit the concept of a "preliminary question" as far as possible. Even those who favour retaining this concept limit it to questions concerning jurisdiction in the strict sense, of the initial power to proceed with an inquiry.

Beetz J., delivering the judgment of the court in *Syndicat des Employés v. Canadian Labour Relations Board*,³⁴ put the matter this way:

By this arbitrary division of the Board's powers . . . the Syndicat is artificially introducing into the discussion the very concept of an error on a preliminary matter essential to the exercise of the jurisdiction which this Court sought to avoid in *New Brunswick Liquor Corporation*.

In *Skogman v. The Queen*³⁵ we have the possible death-knell. In his majority judgment, although in *obiter* on this point, Estey J. said:³⁶

Other refinements in this branch of the law have come and gone; for example, *the concept of collateral issues whereby the doctrine of certiorari review was limited to calling into question in the court of general jurisdiction decisions made by the lesser*

³¹ (1978), 21 N.B.R. (2d) 441, at p. 448. (Emphasis added).

³² *Supra*, footnote 29, at pp. 233-234 (S.C.R.), 422 (D.L.R.), 243-244 (N.B.R.). (Emphasis added).

³³ [1984] 2 S.C.R. 476, at p. 491, (1984), 14 D.L.R. (3d) 289, at p. 301.

³⁴ [1984] 2 S.C.R. 412, at p. 422, (1984), 14 D.L.R. (4th) 457, at p. 465.

³⁵ [1984] 2 S.C.R. 93, [1984] 5 W.W.R. 52.

³⁶ *Ibid.*, at pp. 99 (S.C.R.), 58 (W.W.R.). (Emphasis added).

tribunals which were a prelude to the exercise of the primary or principal jurisdiction of the body whose conduct was under review. We are no longer concerned with such matters.

In sum, then, the effect of a "jurisdictionally oriented" privative clause in precluding judicial review on this ground is now of little, if any, practical consequence.³⁷ If, at common law, the ground has gone there is no point in crafting a preclusive provision designed to protect an agency from attack on that basis.

B. Lack of Evidence

This is the second possible exception. Here we are concerned with a case in which an agency, *manifestly acting within the structure of its Act*, has to consider whether or not some fact or situation has been established. It arrives at a decision without any evidence before it on which to base its conclusion. On the authorities it is clear that, *in the absence of a privative clause*, a court can quash. Notwithstanding that the agency was acting within its jurisdiction, a reviewing court can, so to speak, "look within the structure of the Act" to determine whether or not there was any evidence. *R. v. Nat Bell Liquors Limited*³⁸ has been regarded as the authority for this. In examining the question the test, affirmed by the Privy Council, is "... whether any evidence at all was given on the essential point referred to. Its weight is entirely for the inferior Court".³⁹

But suppose the statute *does* contain a privative clause? Logically, review should not be open. In such a case the agency is acting within the

³⁷ A "remedy oriented" privative clause has never been interpreted as precluding review on the ground of a collateral or preliminary issue. Such a provision makes no attempt to "pull" any particular question or questions within the jurisdiction and give the agency "exclusive" power to decide it. On the contrary, its sole thrust is an attempt to *remove the remedies* by which review may be secured—not to shore up the jurisdiction; see, *Jarvis v. Associated Medical Services, Inc.*, [1964] S.C.R. 497, at p. 502, (1964), 44 D.L.R. (2d) 407, at pp. 411-412.

³⁸ [1922] 2 A.C. 128, (1922), 65 D.L.R. 1, [1922] 2 W.W.R. 30 (P.C.).

³⁹ *Ibid.*, at pp. 144 (A.C.), 13 (D.L.R.), 44 (W.W.R.). Many Canadian cases have followed that dictum; e.g., *Ramage et al. v. City of Vancouver* (1956), 6 D.L.R. (2d) 236, (1955), 20 W.W.R. 153 (B.C.C.A.); *City of Vancouver v. Brandram-Henderson of B.C. Ltd.*, [1960] S.C.R. 539, (1960), 23 D.L.R. (2d) 161; *Re Knight Lumber Co. Ltd.* (1959), 22 D.L.R. (2d) 92 (B.C.S.C.); *Re McInnes and Simon Fraser University* (1982), 140 D.L.R. (3d) 694 (B.C.S.C.). See D.W. Elliott, No Evidence: A Ground for Judicial Review in Canadian Administrative Law (1972-73), 37 Sask. L. Rev. 48.

On occasion total absence of evidence has been characterized as an error of law on the face of the record; e.g., *Re Woodward Stores (Westmount) Ltd. and Alberta Assessment Appeal Board* (1976), 69 D.L.R. (3d) 450, [1976] 5 W.W.R. 496 (Alta. T.D.); *Re Martin, Simard and Desjardins and The Queen* (1977), 87 D.L.R. (3d) 634, 20 N.R. 380 (Ont. C.A.). The English Court of Appeal in *R. v. Deputy Industrial Injuries Commissioner*, [1965] 1 Q.B. 456, [1965] 1 All E.R. 81 (C.A.) held that such a case involved a denial of natural justice. In his judgment Diplock L.J., at pp. 488 (Q.B.), 94 (All E.R.), discusses in a useful way what will amount to "some evidence".

structure of its statute—but now part of that structure is the “no certiorari” clause. In *Nat Bell* the Privy Council, in *obiter*, took that view. Lord Sumner said:⁴⁰

A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a *wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not* . . . On this point *Ex parte Hopwood* [(1850) 15 Q.B. 121] may also be referred to. In that case *certiorari* having been taken away by statute, the Court could only interfere if the justices had convicted without having any jurisdiction at all. It was alleged . . . that . . . they had had no evidence before them . . . The Court held that, even so, the fact did not take away jurisdiction. “As to the want of evidence on matter of fact,” says Patteson J., “that cannot possibly take away jurisdiction”.

In the early part of the period being examined in this article, that *dictum* was not followed. Thus, the Saskatchewan Court of Appeal, in 1949, held that a privative clause did not prevent review on the ground of a complete lack of evidence. In *Sisters of Charity v. Labour Relations Board*⁴¹ Proctor J.A., delivering the judgment of the court, said:

By sec. 15 [a privative clause] . . . it is clearly intended that there should be no appeal from a decision of the Labour Board on questions of fact, the weight to be given to evidence, or the nature of evidence to be received by the Board, *provided of course that there was some evidence on which the board's order could be based* . . .

As the years passed that position was deserted. Until recently the following passage from the judgment of Roach J.A. in the 1957 decision of the Ontario Court of Appeal in *Re Ontario Labour Relations Board, Bradley v. Canadian General Electric Co. Ltd.*⁴² was regarded as correctly stating the law:

Where the matter is not collateral but constitutes part or the whole of the main issue which the inferior tribunal had to decide, the Court is limited to examining the record to determine whether there was any evidence before the inferior tribunal. *I hasten to add, however, that the Court can do that only in the absence of a privative clause. If there is a privative clause in the Act creating the tribunal, the Court cannot do that.*

⁴⁰ *Supra*, footnote 38, at pp. 151-152 (A.C.), 19 (D.L.R.), 50 (W.W.R.). (Emphasis added).

⁴¹ *Supra*, footnote 9, at pp. 745 (D.L.R.), 78 (W.W.R.) (C.A.). The New Brunswick Court of Appeal took the same position in *R. v. Labour Relations Board*, [1952] 2 D.L.R. 621, (1952), 102 C.C.C. 387 (N.B.C.A.). (Emphasis added).

⁴² (1957), 8 D.L.R. (2d) 65, at p. 81, [1957] O.R. 316, at p. 335 (Ont. C.A.). (Emphasis added). On at least two occasions this decision has been referred to with approval by the Supreme Court of Canada. See *Labour Relations Board v. Traders' Service Ltd.*, [1958] S.C.R. 672, (1958), 15 D.L.R. (2d) 305; *Alberta Union of Provincial Employees v. Board of Governors of Olds College*, [1982] 1 S.C.R. 923, (1982), 136 D.L.R. (3d) 1. In his dissent in *Jarvis v. Associated Medical Services Inc.*, *supra*, footnote 37, Judson J. relied on it.

Here, then, was a real exception. A privative clause of either of the types earlier referred to served to immunize an agency from review on the ground (a rare event, one would hope) that it had acted without any evidence to support a factual conclusion which it arrived at in the course of exercising its jurisdiction.

Insofar as *federal* agencies are concerned, that position was changed in 1971 by The Federal Court Act.⁴³ Section 28 of the statute confers original review jurisdiction (in certain cases) on the Federal Court of Appeal. The relevant portions of the section read:

Notwithstanding . . . the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order . . . made by . . . a federal board . . . upon the ground that the board . . .

(c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

The phrase "notwithstanding . . . the provisions of any other Act" has been interpreted as nullifying the effect of any privative clause contained in a federal statute either enacted prior to the Federal Court Act or consolidated or re-enacted thereafter.⁴⁴

In such a case it is clear that the Court of Appeal, under section 28(c), can at least consider whether there was "any evidence" before the Federal agency. Obviously, the statutory language goes further than that. The Court of Appeal has so held in *Re Rohm & Haas Canada Ltd. and Anti-Dumping Tribunal*.⁴⁵

But let us return to judicial review of *provincial agencies*.⁴⁶ It appears that the position is now the same. This exception no longer exists. Its erosion started with *University of Saskatchewan v. Canadian Union of Public Employees*.⁴⁷ That case commenced in the Saskatchewan Court of Appeal. Briefly, the case involved an application by way of *certiorari* to

⁴³ R.S.C. 1970, c. 10 (2nd Supp.).

⁴⁴ *Re Attorney-General of Canada and Public Service Staff Relations Board* (1977), 74 D.L.R. (3d) 307, [1977] F.C. 663 (F.C.A.). The Federal Court of Appeal has gone one step further and held that a privative section enacted subsequent to the Federal Court Act does not prevent s. 28 review on the ground that the agency "never had . . . or exceeded or failed to exercise jurisdiction". See *Re Pioneer Grain Co. Ltd. and Kraus* (1981), 123 D.L.R. (3d) 48, 36 N.R. 395 (F.C.A.). Query where this leaves one!

⁴⁵ (1978), 91 D.L.R. (3d) 212, 22 N.R. 175 (F.C.A.).

⁴⁶ We can also include judicial review of *federal agencies* in the Trial Division of the Federal Court. Its jurisdiction is found in s. 18 of the Federal Court Act, *supra*, footnote 43. It reads:

The Trial Division has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board . . .

⁴⁷ [1978] 2 S.C.R. 834, (1978), 22 N.R. 314.

quash an order of the Saskatchewan Labour Relations Board made under The Trade Union Act.⁴⁸ The statute contained a privative clause. One of the grounds for review was alleged lack of evidence on a material issue which the Board clearly had jurisdiction to decide. The majority of the Court of Appeal dismissed the application without reaching that ground. Bayda J.A. dissented. He found that there was, indeed, a complete lack of evidence and said:⁴⁹

The Board may use whatever evidence . . . it deems appropriate *but evidence it must have*. The commission by the Board of an error of law or fact respecting that evidence cannot form the basis of an order to quash. But, for the Board to make an order . . . *without any evidence . . . is to act in excess of jurisdiction*.

The case was appealed. The Supreme Court reversed the decision of the Court of Appeal and quashed the Board's order. Martland J. delivered the brief oral judgment of the court. In its entirety it reads:⁵⁰

We are all of the opinion that, *as stated in the dissenting judgment of Bayda J.A.*, the Labour Relations Board, in certifying the respondent Union as the bargaining agent for the employees included in the bargaining unit defined in its order of July 6, 1976, purported to exercise powers under s. 5(b), of *The Trade Union Act, 1972*, *without evidence that the respondent Union represented a majority of the employees in that bargaining unit*.

The appeal is allowed, the judgment of the Court of Appeal is set aside and the Board orders questioned in these proceedings are quashed.

Farewell *Nat Bell*? Perhaps not at this stage. On the face of their judgments neither Bayda J.A. nor Martland J. referred to the privative section in the Act. That being so, might it be said that each judgment was *per incuriam*?

Two later decisions of the Supreme Court have probably laid that possibility to rest. The first is *Blanco v. Rental Commission*.⁵¹ That case came forward from the Quebec Court of Appeal. It involved an application for a writ of evocation to set aside a decision of an administrator of a Rental Commission. The statute contained a privative clause.⁵² Dealing with it Beetz J., in delivering the judgment of the court, said:⁵³

. . . [The Act] contains a privative clause which places the administrator and the Rental Commission outside the supervisory power of the Superior Court. They may therefore err in the exercise of their jurisdiction but they may not, by a mistaken interpretation of the law, appropriate jurisdiction which they do not have or decline that which they do have.

The *ratio* of the decision is to be found in the court's conclusion that the administrator had erroneously interpreted the Act so as to assume a jurisdiction which he did not possess. In *obiter*, however, Beetz J. went on to

⁴⁸ S.S. 1972, c. 137.

⁴⁹ (1977), 22 N.R. 316, at pp. 326-327 (Sask. C.A.). (Emphasis added).

⁵⁰ *Supra*, footnote 47, at pp. 835 (S.C.R.), 315-316 (N.R.). (Emphasis added).

⁵¹ [1980] 2 S.C.R. 827, (1980), 35 N.R. 585.

⁵² S.Q. 1950-51, c. 20, s. 17.

⁵³ *Supra*, footnote 51, at pp. 830-831 (S.C.R.), 588 (N.R.).

deal with an alternative submission on which the administrator's decision was attacked: namely, that if his interpretation of the Act was correct, then there was no evidence to support the order. It seems clear that the court, if it had found it necessary to do so, would have accepted this argument, notwithstanding the privative clause. The learned judge said:⁵⁴

However, even if repeated delays in the payment of rent were capable of amounting to behaviour on the leased premises likely to constitute a serious source of annoyance to the owner, within the meaning of s. 25(b), it would still have to be proven that this behaviour occurred on the leased premises.

There is no evidence to this effect.

The second decision which bears on this ground for review is *Blanchard v. Control Data Canada Limited*.⁵⁵ It is also of significance with respect to another ground—error of law on the face of the record. We will have occasion to consider this case again when we turn to that matter. Looking briefly ahead, however, we shall see that the Supreme Court no longer regards a privative clause as completely insulating an agency from review on the ground of error of law. Rather, an agency will be regarded as stepping outside its jurisdiction if its decision on the issue is “patently unreasonable”. That position has to be kept in mind in considering the significance of *Blanchard* with respect to our present context—*lack of evidence* as a ground for review.

The case involved an application for a writ of evocation to quash the decision of an arbitrator appointed under the Act Respecting Labour Standards of Quebec.⁵⁶ Section 124 of the statute provided:

⁵⁴ *Ibid.*, at pp. 832 (S.C.R.), 590 (N.R.). (Emphasis added). And see *Douglas Aircraft Company of Canada v. McConnell*, [1980] 1 S.C.R. 245, at p. 277, (1979), 99 D.L.R. (3d) 385, at p. 407; *Attorney General of Quebec v. Labrecque*, [1980] 2 S.C.R. 1057, at p. 1078, (1980), 81 C.L.L.C. 14,119.

In *Re Keeprite Workers' Independent Union and Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162, 29 O.R. (2d) 513 (Ont. C.A.), the Ontario Court of Appeal held that lack of evidence went to jurisdiction. A learned commentator has said of this decision that “[t]he authority of *Nat Bell* was brusquely brushed aside, like some wayward and unwelcome elderly relative at a family gathering, as a decision which ‘has had a checkered career’”; see J. Evans, *Remedies in Administrative Law*, in *Law Society of Upper Canada Special Lectures on Remedies* (1981), 429, at pp. 456-466.

A recent decision of the English House of Lords, if adopted in Canada, would support the conclusion that lack of evidence amounts to a jurisdictional defect, although the *ratio* may be that the Court regarded it as a preliminary or collateral issue; see *R. v. Home Secretary, ex. p. Khawaja*, *supra*, footnote 24, at pp. 97, 110 (A.C.), 772, 781 (All E.R.).

Further, *Skogman v. The Queen*, *supra*, footnote 35, cannot be ignored in this context. It involved *certiorari* to quash an order of a Provincial Court judge committing Skogman for trial on a criminal charge. The ground was complete lack of evidence on a material point. Estey J., speaking for the majority, held that this would amount to a jurisdictional defect; see, *inter alia*, at pp. 104 (S.C.R.), 62-63 (W.W.R.). The case may, however, be restricted to committal orders. The court interpreted the relevant section of the Criminal Code as spelling out a *mandatory* requirement that there be some evidence.

⁵⁵ *Supra*, footnote 33.

⁵⁶ R.S.Q., c. N-1.1.

An employee credited with five years of uninterrupted service with one employer who believes that he has not been dismissed for a good and sufficient cause may present his complaint in writing to the Commission . . .

Upon a complaint being received, the Act then gives the Commission power to attempt settlement. If that cannot be achieved, provision is made for the appointment of an arbitrator. An arbitrator's powers are spelled out as follows:⁵⁷

Where an arbitrator considers that the employee has not been dismissed for good and sufficient cause, he may

- (1) order the employer to reinstate the employee;
- (2) order the employer to pay to the employee an indemnity up to a maximum equivalent to the wage he would normally have earned had he not been dismissed;
- (3) render any other decision he believes fair and reasonable, taking into account all the circumstances of the matter.

Finally, the Act contained a privative clause.⁵⁸

The facts were that Blanchard had, over a period of time, received certain unauthorized favours from customers of his employer, Control Data Canada Limited. He was dismissed. He then made a complaint to the above commission. It was unable to settle the matter and appointed an arbitrator. He found that, while disciplinary action was justified, dismissal was not appropriate. He substituted a period of suspension without pay and otherwise ordered that Blanchard be reinstated.

In seeking to set the decision aside the employer argued, in part, that the arbitrator's interpretation of the extent of his statutory powers was "patently unreasonable". In dealing with this Lamer J. said:⁵⁹

In this context, the arbitrator might have erred on four different points:

1. he interpreted the words "dismissed without good and sufficient cause" unreasonably;
2. he applied this test unreasonably *to the facts of the case*;
3. he gave an unreasonable interpretation of the various powers conferred on him by s. 128;
4. *having regard to the evidence*, he substituted an unreasonable penalty for that chosen by the employer.

The learned judge then reviewed earlier decisions of his court which developed the proposition that a "patently unreasonable" decision on a question of law would take any agency outside of its jurisdiction and result in its order being quashed notwithstanding the presence of a "no certiorari" clause. We will later be concerned with those decisions in some detail.

On the point we are presently concerned with, Lamer J. went on to say:⁶⁰

⁵⁷ *Ibid.*, s. 128.

⁵⁸ *Ibid.*, s. 139.

⁵⁹ *Supra*, footnote 33, at pp. 495 (S.C.R.), 304 (D.L.R.). (Emphasis added).

⁶⁰ *Ibid.*, at pp. 492 (S.C.R.), 302 (D.L.R.). (Emphasis added).

In principle, *where there is a privative clause* the superior courts should not be able to review errors of law made by administrative tribunals. However, it is now settled that *some* errors of law can cause the arbitrator to lose his jurisdiction. [that is, where the decision is "patently unreasonable".]

He then concluded:⁶¹

In looking for an error *which might affect jurisdiction*, the emphasis placed by this Court on the dichotomy of the reasonable or unreasonable nature of the error casts doubt on the appropriateness of making, on this basis, *a distinction between error of law and error of fact* . . . An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. *The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts* . . .

In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal.

Let us pause to consider the implications of those statements for the answer to our present question: Does a privative clause prevent a reviewing court from considering lack of evidence as a ground for review? Clearly, under the *dicta* we have just examined the answer is "No". If a court can consider whether an agency's *finding of fact* is unreasonable it must have the power *to review the evidence* on which that finding is based.

Matters do not stop there. We recall that *Nat Bell*, in apparently affirming the power of the court to review evidence in the absence of a privative clause, said that the test to be applied is " . . . whether *any evidence at all* was given on the essential point. *Its weight is entirely for the inferior Court*" .⁶² In other words, granted *some* evidence, the ultimate *finding of fact* based on it is not open to question before a reviewing court. In principle, that is impeccable. No authority need be cited for the proposition that a reviewing court has no power at common law to sit in *appeal* from an agency's decision.⁶³ Surely to consider whether a factual conclusion arrived at by a tribunal is or is not "reasonable" involves not only an examination of the evidence but goes squarely to the *merits*. That is the function of a court of appeal. Perhaps one can be forgiven if one is reminded of the observations of Viscount Sumner in *Nat Bell* when, in commenting on the position taken in the case by Canadian courts, he said.⁶⁴

⁶¹ *Ibid.*, at pp. 494-495 (S.C.R.), 303-304 (D.L.R.). (Emphasis added).

⁶² *Supra*, text at footnote 39. (Emphasis added).

⁶³ In *Douglas Aircraft Co. of Canada v. McConnell*, *supra*, footnote 54, at pp. 277 (S.C.R.), 407 (D.L.R.), Estey J. put the matter this way: " . . . insufficiency of evidence in the sense of appellate review is not jurisdictional, and . . . in present day law and practice such error falls within the operating area of the statutory board, is included in the cryptic statement that the board has the right to be wrong within its jurisdiction, *and hence is free from judicial review*". (Emphasis added).

⁶⁴ *Supra*, footnote 38, at pp. 142-143 (A.C.), 12 (D.L.R.), 43 (W.W.R.). (Emphasis added).

It appears to their Lordships that, whether consciously or not, these learned judges were in fact *rehearing the whole case by way of appeal* on the evidence contained in the depositions, a thing which neither under the Liquor Act nor under the general law of *certiorari* was it competent to them to do. As, however, the majority in the Supreme Court proceeded on a view of *certiorari*, which purported to justify this mode of dealing with the evidence, their Lordships will consider the case in that light *without disposing of it as a case of entertaining an appeal where no appeal lay*.

If *Nat Bell* (which was not considered in *Blanchard*) has not gone it is surely fast disappearing. With it goes, in all likelihood, the protection which, until recently, a privative clause had in protecting an agency from review on the ground of lack of evidence. In such a case it seems that the agency will have stepped outside the structure of its Act and the privative clause, which forms part of it, is irrelevant. Further, even if there *is* some evidence, an agency will again lose jurisdiction if its conclusion, based on that evidence, is judged to be unreasonable.

C. Error of law on the face of the record

Here we are concerned with a case where an agency considers a question of law *while manifestly acting within its jurisdiction* and its decision is wrong—but otherwise its proceedings cannot be attacked. That is, in considering the matter the agency “did everything right” in the sense that it gave a fair hearing, was not biased, did not take irrelevant matters into account and so on. Can its order or decision be quashed by reason of the error of law?

In the absence of a privative clause, it has long been clear that a reviewing court, in such a case, can “reach into the jurisdiction” of the agency and consider whether or not its decision was correct in law.⁶⁵

Will the presence of a “no *certiorari*” clause prevent review? That is our concern. Is this an exception? Logically, it should be. The jurisdictional approach to the interpretation of preclusive provisions should insulate against attack on this ground. Here is a case where an agency is acting “within the structure” of its Act. The privative clause is part of that structure.

In the late 1940’s the answer to our question was “No”. In 1949 the Saskatchewan Court of Appeal granted *certiorari* to quash an order of the Labour Relations Board of its province on this ground, notwithstanding a privative clause. In delivering the judgment of the court in *John East Iron Works Ltd. v. Labour Relations Board (No. 3)*⁶⁶ Macdonald J.A. referred

⁶⁵ *R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 K.B. 338 (Eng. C.A.). The decision has been followed by the Supreme Court of Canada; e.g., *Board of Industrial Relations of Alberta v. Stedelbauer*, [1969] S.C.R. 137, (1968), 1 D.L.R. (3d) 81.

⁶⁶ *Supra*, footnote 3, at pp. 60 (D.L.R.), 852 (W.W.R.). (Emphasis added). There was no privative clause before the court in *Nat Bell*.

to and relied on the following statement in the opinion of the Privy Council in *R. v. Nat Bell Liquors Ltd.*:

That supervision [of the Superior Court] goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; *the other is the observance of the law in the course of its exercise.*

The learned judge then went on to say:⁶⁷

I am therefore clearly of opinion that this Court can set aside the order in question herein, *as there is an error in law apparent on its face.*

As time passed that position also changed. The turning point came in 1962 with *Farrell v. Workmen's Compensation Board*.⁶⁸ That decision has been referred to earlier. Let us, however, remind ourselves of what Judson J. said of the effect of a privative clause and then apply it in our present context:⁶⁹

This issue is unquestionably within the jurisdiction of the Board . . . and even if there was error, *whether in law or in fact*, it was made within the exercise of the jurisdiction and is not open to *any judicial review*, including *certiorari*.

For some seventeen years this case was taken to mean that a "no *certiorari*" clause *completely* precluded review on the ground of error of law on the face of the record.⁷⁰ Included in the cases taking this position is one decided in 1963 by the Saskatchewan Court of Appeal⁷¹ in which *John East Iron Works* was in effect reversed. Also included is the 1973 decision of the Supreme Court of Canada in *Executors of the Woodward*

⁶⁷ *Ibid.*, at pp. 60 (D.L.R.), 853 (W.W.R.). (Emphasis added).

⁶⁸ *Supra*, footnote 16.

⁶⁹ *Ibid.*, at pp. 51 (S.C.R.), 179 (D.L.R.). (Emphasis added).

⁷⁰ E.g., *Re Kinnaird and Workmen's Compensation Board*, [1963] S.C.R. 239, (1963), 38 D.L.R. (2d) 245; *Commission des relations ouvrières de Québec v. Burlington Mills Hosiery*, [1964] S.C.R. 342, (1964), 45 D.L.R. (2d) 730; *R. v. Saskatchewan Labour Relations Board* (1966), 55 W.W.R. 133 (Sask. Q.B.); *R. v. Ontario Labour Relations Board* (1967), 64 D.L.R. (2d) 117, [1967] 2 O.R. 469 (Ont. C.A.), per Laskin J.A. dissenting; *R. v. Midland Superior Express Limited* (1968), 66 D.L.R. (2d) 639, 63 W.W.R. 53 (Alta. App. Div.); *Noranda Mines Limited v. The Queen*, [1969] S.C.R. 898, (1969), 7 D.L.R. (3d) 1; *Board of Industrial Relations of Alberta v. Stedelbauer*, *supra*, footnote 65; *Metropolitan Stores of Canada Ltd. v. Retail etc. Union* (1973), 7 N.B.R. (2d) 88 (N.B. App. Div.); *Gould v. New Brunswick* (1975), 11 N.B.R. (2d) 281 (N.B. App. Div.); *Re Garat Foods Ltd. v. Retail etc. Union*, [1976] 2 W.W.R. 75, (1975), 64 D.L.R. (3d) 542 (Sask. C.A.); *Re J.M.L. Shirts Ltd.* (1977), 18 N.B.R. (2d) 695 (N.B. App. Div.).

It has been argued that *Farrell* should be confined to cases involving Workers' Compensation legislation; J.N. Lyon, *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* (1971), 49 Can. B. Rev. 365.

⁷¹ *Re Westeel Products Ltd. and Saskatchewan Labour Relations Board* (1963), 39 D.L.R. (2d) 108, at p. 109 (Sask. C.A.).

*Estate v. Minister of Finance*⁷² where, in dealing with a privative clause, Martland J. said, in *obiter*:⁷³

The effect which has been given to a provision of this kind is that, while it *precludes a superior court from reviewing, by way of certiorari, a decision of an inferior tribunal on the basis of error of law, on the face of the record*, if such error occurs in the proper exercise of its jurisdiction, it does not preclude such review if the inferior tribunal has acted outside its defined jurisdiction.

Against that background, the 1979 decision of the Supreme Court of Canada in *Canadian Union of Public Employees v. New Brunswick Liquor Corporation*⁷⁴ was, to some, surprising.⁷⁵ The case at least erodes the complete protection which, it seems clear, a privative clause earlier gave against review on this ground. Accordingly, this decision, it is suggested, marked a significant shift in the jurisprudence.

As we have seen earlier the case involved an application to quash a decision made by the New Brunswick Public Service Labour Relations Board acting under The Public Service Relations Act.⁷⁶ The statute contained a privative clause. The applicant alleged that the agency's decision was erroneous in point of law. In doing so it attempted to convince the court (successfully in the New Brunswick Court of Appeal) that the issue was preliminary or collateral. In the Supreme Court of Canada Dickson J. rejected that argument. He said:⁷⁷

I . . . take the position that the Board decided a matter which was plainly confided to it, for it alone to decide *within its jurisdiction*.

Given the privative clause, is it not fair to say that under the pre-1979 decisions the case should have stopped at that point, with the application for *certiorari* being dismissed? That, however, was not the result. Dickson J. proceeded to examine the issue and to consider whether the conclusion arrived at by the Board, admittedly acting within the structure of its Act, was correct or not in light of the following test:⁷⁸

. . . Was the Board's interpretation *so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review*.

⁷² *Supra*, footnote 25.

⁷³ *Ibid.*, at pp. 127 (S.C.R.), 614 (D.L.R.). (Emphasis added).

⁷⁴ *Supra*, footnote 29.

⁷⁵ The position taken by the court in this case did not arrive unannounced. Its genesis can be found in the dissenting judgment of Rand J. in *Toronto Newspaper Guild v. Globe Printing Company*, *supra*, footnote 15. It was developed further in *Service Employees Union v. Nipawin Hospital*, *supra*, footnote 21. It can also be found in Dickson J.'s dissent in *Jacmain v. Attorney General of Canada* [1978] 2 S.C.R. 15, (1977), 81 D.L.R. (3d) 1. It was not until *New Brunswick Liquor Corporation*, however, that the position became explicit.

⁷⁶ *Supra*, footnote 30.

⁷⁷ *Supra*, footnote 29, at pp. 237 (S.C.R.), 424-425 (D.L.R.), 246 (N.B.R.). (Emphasis added).

⁷⁸ *Ibid.*, at pp. 237 (S.C.R.), 425 (D.L.R.), 246 (N.B.R.). (Emphasis added).

A privative clause no longer insulates an agency's decision on a question of law arrived at within the exercise of the jurisdiction from "any judicial review" at all (to use the phrase adopted by the same court in *Farrell v. Workmen's Compensation Board*⁷⁹). Quite the contrary: notwithstanding a preclusive provision a court *can* consider the matter, and, if it finds the agency's decision to be "patently unreasonable", quash.

How was the above result arrived at in the case? The answer, it seems clear, is that the court resorted to the familiar jurisdictional theme and extended it to embrace, albeit in a qualified way, error of law on the face of the record as an available ground for review, notwithstanding a privative clause. That conclusion is not completely "patent" on the face of the judgment in *New Brunswick Liquor Corporation*.⁸⁰ However, in four later decisions of the same court that interpretation has been placed on the case.⁸¹ Accordingly, when an agency makes a decision on a question of law which a reviewing court regards as patently unreasonable it *ipso facto* steps out of the structure of its Act and a privative clause is of no avail—it is outside its jurisdiction.

A somewhat ironic comment may be made at this point. At the outset of the period being examined it is probably correct to say that privative clauses were either ignored or "written out" of the statutes by reviewing courts. That, as earlier suggested, was at a time when such

⁷⁹ *Supra*, footnote 16.

⁸⁰ But it is implicit; see, *supra*, footnote 29, at pp. 237 (S.C.R.), 424-425 (D.L.R.), 246 (N.B.R.).

⁸¹ *Teamsters Union Local 938 v. Massicotte*, [1982] 1 S.C.R. 710, at p. 724, (1982), 134 D.L.R. (3d) 385, at p. 395; *Bibeault v. McCaffrey*, [1984] 1 S.C.R. 176, at pp. 184, (1984), 7 D.L.R. (4th) 1, at pp. 6-7; *Blanchard v. Control Data Canada Limited*, *supra*, footnotes 60, 61; *Re Syndicat des Employés v. Canada Labour Relations Board*, *supra*, footnote 34, at pp. 419-420 (S.C.R.), 463 (D.L.R.).

In re Racal Communications Ltd., [1981] A.C. 374, [1980] 2 All E.R. 634 (H.L.) is worth considering in this connection. In discussing the availability of error of law as a ground for review in the face of a privative clause Lord Diplock distinguished between a case involving a *statutory agency* and one in which review was sought against the decision of an *inferior court*. With respect to the first category of case he said, at pp. 383 (A.C.), 638-639 (All E.R.):

The break-through made by *Anisminic*, [1969] 2 A.C. 147 was that, as respects *administrative tribunals and authorities*, the old distinction between *errors of law that went to jurisdiction and errors of law that did not*, was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision . . . would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity. [And therefore not protected by a "no certiorari" clause].

In then dealing with review of the decision of an *inferior court*, he said:

In the case of inferior courts where the decision of the court is made final and conclusive by the statute, *this may involve the survival of those subtle distinctions formerly drawn between errors of law which go to jurisdiction and errors of law which do not* . . .

provisions, and the labour legislation containing them, were viewed with hostility by many judges. That climate changed and, for a time, privative clause flowered, if somewhat timidly. By the end of the period, however, it seems that "no certiorari" clauses, while by no means ignored, have been substantially "eroded out" of statutes containing them. *Plus ça change, plus c'est la même chose*.

Those statements may be too extreme. After all, the "patently unreasonable" test *does* involve a court paying "curial deference" to the decision of an agency. That is a far cry—and is qualitatively different—from the attitude of at least some judges in earlier days. Thus, such an approach would no doubt have been anathema to Manson J. of the British Columbia Supreme Court when, in dealing in 1960 with the effect of a privative clause in the Workmen's Compensation Act of his province, he said:⁸²

. . . [I]t violates a principle which has run through our law from time immemorial. It is part of the spirit of Magna Charta that subjects of the Sovereign shall have the opportunity of having their rights . . . determined by the Courts.

But let us return to *Canadian Union of Public Employees v. New Brunswick Liquor Corporation*, and examine more closely what the judgment has to say about the effect of a privative clause. Dickson J. said:⁸³

Section 101 [the privative clause] constitutes a clear statutory direction . . . that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system . . . and its labour relations sense acquired from accumulated experience in the area.

The usual reasons for judicial restraint upon review of labour board decisions are only reinforced in a case such as the one at bar . . . Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met . . . The interpretation of [the question of law which arose from the Board] . . . would seem to lie logically at the heart of the specialized jurisdiction confided to the Board.

In light of these statements a number of questions arise with respect to the "patently unreasonable" test. They include:

- (1) Is it restricted to a case where the Act contains a privative clause?
- (2) If not, then is special expertise on the part of the agency the factor which will trigger its application?

⁸² *Farrell v. Workmen's Compensation Board*, *supra*, footnote 22, at pp. 276 (D.L.R.), 581 (W.W.R.).

⁸³ *Supra*, footnote 29, at pp. 235-236 (S.C.R.), 423-424 (D.L.R.), 245-246 (N.B.R.). (Emphasis added).

(3) When the test comes into play, will it apply to *any* question of law which the agency, acting within its jurisdiction, is called upon to decide?

(4) Will it apply to other grounds for review?

(5) If expertise is the factor which brings the test into play, then what is the position of a non-expert agency?

(6) Is it dangerous?

Let us consider those matters.

(1) *Is it restricted to a case where the Act contains a privative clause?*

This is a possible conclusion to be drawn from the foregoing statements in the judgment of the Supreme Court. That is, a privative clause is a statement of legislative intent that a reviewing court should exercise restraint in over-turning a decision of the agency on a question of law made within its jurisdiction. In other words, the privative clause should be read as meaning "Proceed with Caution. Curial Deference Required". If that be so then the converse would apply. In the absence of a privative clause the legislature would be taken to say "Resume Speed. The Decision Must be Right in Law".

That is the position which the Alberta Court of Appeal took in *Re Yellow Cab Ltd. and Board of Industrial Relations et al.*⁸⁴ Speaking for the court, Clement J.A. said:⁸⁵

This [the question of law] is the matter for review, and I wish to emphasize that in determining whether there has been error in law we are not to extend to the Board the latitude of interpretation which has been granted to a tribunal to whom the Legislature has, by preclusive provisions, confided questions of law. In the circumstances of the present case, the law is to be pronounced and error determined by this Court without the curial deference to the opinion of the tribunal . . .

I am of the opinion, with respect, that such tolerance of the interpretation of a statute as may be accorded to a tribunal in those circumstances, does not extend to a case where there is, as here, no effective privative or preclusive provision . . .

The power of the Board to determine the issue before it was thus not extended to its own reasonable interpretation of the law: it was limited by the parameters of statutory definition as interpreted by this Court . . .

The case was appealed to the Supreme Court of Canada.⁸⁶ While the decision of the Alberta Court of Appeal was reversed, no comment was made with respect to the matter of "curial deference". The "patently unreasonable" test was not mentioned. The only earlier cases referred to were *R. v. Northumberland Compensation Appeal Tribunal, Ex Parte*

⁸⁴ (1979), 105 D.L.R. (3d) 467, 11 Alta. L.R. (2d) 97 (Alta. C.A.).

⁸⁵ *Ibid.*, at pp. 472-473 (D.L.R.), 103-104 (Alta. L.R.). (Emphasis added).

⁸⁶ [1980] 2 S.C.R. 761, (1980), 114 D.L.R. (3d) 427.

*Shaw*⁸⁷ and *Board of Industrial Relations of Alberta v. Stedelbauer*.⁸⁸ The latter was a 1969 decision of the Supreme Court in a case where there was no privative clause. It quashed the agency's order as erroneous in law without any reference to a "patently unreasonable" test.⁸⁹ *Canadian Union of Public Employees v. New Brunswick Liquor Corporation* was not mentioned in *Yellow Cab*. It is fair to say that the whole thrust of the judgment shows that, as with the Court of Appeal, the court considered the issue as a *pure question of law*. There is no suggestion that the issue was whether or not the Board's decision was "patently unreasonable". In sum, one may conclude that the Supreme Court agreed that, there being no privative clause, "curial deference" was not required.

While the above approach may have the advantage of logic, it does lead to a strange result. In both *New Brunswick Liquor Corporation* and in *Yellow Cab* the court was reviewing a decision of a labour relations board. In the former decision the court deferred, to some extent, to the expertise of the particular agency. In the latter it did not—although dealing with the same kind of agency. It is surely a strange answer to say that the reason for the difference in approach is that, in the first case, the New Brunswick Legislature had said "no *certiorari*" while in the second case the Alberta Legislature chose not to.

In this context, the later decision of the Supreme Court of Canada in *The Alberta Union of Provincial Employees v. Board of Governors of Olds College*⁹⁰ must be considered. In it the court applied the "patently unreasonable" test. In a later decision the Alberta Court of Appeal, in *Re Suncor Inc. and McMurray Independent Oil Workers*,⁹¹ considered *Olds College*. They understood it to affirm the proposition that the "patently unreasonable" test applied *whether or not a privative clause was present*. They concluded, accordingly, that *Re Yellow Cab*⁹² had been overruled.

With respect, it is suggested that may not be correct. In *Olds College* the Act⁹³ contained two *finality* provisions. The first was section 9(1). It gave the Board power "... to decide for the purposes of the Act" whether, *inter alia*, a "matter in dispute is an arbitral item" (which was the issue before the Board in the instant case). The section ended with the statement that "... the Board's decision is *final and binding*". The second such provision was contained in section 11. It read:

⁸⁷ *Supra*, footnote 65.

⁸⁸ *Ibid.*

⁸⁹ Interestingly enough, in *obiter* Martland J. took the position, it seems clear, that if the statute *had* contained a privative clause the Board's decision would not have been open to any review at all; *ibid.*, at pp. 143 (S.C.R.), 86 (D.L.R.).

⁹⁰ *Supra*, footnote 42.

⁹¹ (1982), 142 D.L.R. (3d) 305 (Alta. C.A.).

⁹² *Ibid.*, at p. 310.

⁹³ Public Service Employees Relations Act, R.S.A. 1980, c. P-33.

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 the Board may, at any time, reconsider any order . . . and vary or revoke it.

There is high authority supporting the view that statutory provisions such as these are *not privative*—in that they do not purport, on their face, to strip a superior court of the power to issue *certiorari*.⁹⁴ Now, if the Supreme Court, in *Olds College* had placed *that* interpretation on the above sections in the Act before them then the conclusion reached in *Suncor* would be right. The “patently unreasonable” test could apply irrespective of the presence of a privative clause. *Yellow Cab* would have been overruled. That, however, was not the case. Laskin C.J.C., *held* that these finality sections were “*near privative*” and cast a “gloss on the extent to which decisions of the Board . . . [could] be overturned by a Court”, and that they precluded “judicial interference with interpretations . . . which . . . [were] not plainly unreasonable”.⁹⁵ Here, then, was some kind of a preclusive provision, albeit watered down, but sufficient on which to float the test. If that be a correct view of the case then *Yellow Cab* still stands.⁹⁶

However, another decision of the Supreme Court of Canada has cast doubt on that conclusion. Oddly enough, the judgment was handed down on the same day as that in *Olds College*. This is the case of *St. Luc Hospital v. Lafrance*.⁹⁷ It involved an application initially made to the Quebec Superior Court for a writ of evocation to set aside a decision of the Social Affairs Commission under the Act Respecting Health Services and Social Services.⁹⁸ The ground for review was an alleged error of law on the face of the record involving the interpretation of a section of the Commission’s Act. The statute contained a privative clause, *but it had no application in this particular case*.⁹⁹ Nonetheless, Chouinard J., speaking for the court,

⁹⁴ E.g., *R. v. Medical Appeal Tribunal, Ex Parte Gilmore*, [1957] 1 Q.B. 574, [1957] 1 All E.R. 796 (C.A.); *South East Asia Fire Bricks v. Non Metallic Union*, [1981] A.C. 363, [1980] 2 All E.R. 689 (P.C.).

⁹⁵ *Supra*, footnote 42, at pp. 927, 931 (S.C.R.), 4, 7 (D.L.R.). And see *Blanchard v. Control Data Canada Ltd.*, *supra*, footnote 33, at pp. 493 (S.C.R.), 302-303 (D.L.R.).

⁹⁶ In *United Nurses of Alberta, Local 11 v. Misericordia Hospital*, [1983] 6 W.W.R. 1, (1983), 46 A.R. 172 (Alta. C.A.), Moir J.A. of the Alberta Court of Appeal took the position that his court, in *Re Suncor*, had wrongly interpreted *Olds College*.

Professor David Mullan has wondered whether the Supreme Court, in *Olds College*, was on the verge of suggesting that there should be varying degrees of judicial deference, great deference with standard privative clauses but only mild respect when faced with “near privative” provisions; see D. Mullan, *Developments in Administrative Law: The 1981-82 Term* (1983), 5 *Supreme Ct. L. Rev.* 1, at p. 25.

⁹⁷ [1982] 1 S.C.R. 974, (1982), 136 D.L.R. (3d) 577.

⁹⁸ R.S.Q. 1977, c. S-5.

⁹⁹ *Supra*, footnote 97, at pp. 983-984 (S.C.R.), 584 (D.L.R.).

applied *New Brunswick Liquor Corporation* and held that the "patently unreasonable" test applied. Let us stay with that case and consider it in light of our second question.

- (2) *If the test is not restricted to a case where the Act contains a privative clause, then is special expertise on the part of the agency the factor which will trigger its application?*

St. Luc Hospital can be so read. Admittedly Chouinard J. made no mention of this factor in his judgment. Arguably, however, it is implicit. The court was concerned with the actions of an agency with specialized experience in the administration of hospitals and their medical staffs.

The British Columbia Court of Appeal took this view of the application of the test in *Re United Brotherhood of Carpenters, Local 1928 and Citation Industries Limited*.¹⁰⁰ There an order was sought quashing a decision of the Employment Standards Board established under The Employment Standards Act.¹⁰¹ The application was dismissed at first instance. In delivering the judgment of the Court of Appeal Hinkson J.A. said:¹⁰²

The third ground advanced on behalf of the appellant dealt with the matter of curial deference. *There was no privative clause in the Employment Standards Act.* That was a fact observed by the chambers judge. Despite that, counsel contended that it was not appropriate in the present circumstances to quash the decision of the board . . . Counsel contended that *only where the decision of the board was patently unreasonable* should the court intervene on an application for judicial review.

The chambers judge . . . dealt with the matter of scope of review in response to submissions made on the application and said this in referring to submissions advanced by counsel . . . :

. . . he submitted that the court should be reluctant to substitute its opinion for that of the board, unless the board's opinion was patently untenable. I see nothing in the Employment Standards Act which curtails the usual powers and responsibilities of this court when it sits in judicial review. *At the same time, it must be recognized that the Employment Standards Board possesses an expertise with respect to the matter in hand and that its views cannot lightly be set aside.*

In my opinion the chambers judge *properly instructed herself on the law* . . .

That position, it is submitted, makes good sense. Curial deference, in the name of the "patently unreasonable" test, should not be applied *pro forma* merely because a Legislature or Parliament has put some "no *certiorari*" language into its statute. Judicially perceived expertise on the part of the agency under review is obviously supportable in principle as a basis for the application of the test. That being so let us, for the purposes

¹⁰⁰ (1984), 9 D.L.R. (4th) 316, 54 B.C.L.R. 283 (B.C.C.A.). The same position was supported in *obiter* in *Re MacFarlane and Anchor Cap & Closure Corp. of Canada* (1981), 124 D.L.R. (3d) 303, at p. 309, 33 O.R. (2d) 317, at p. 323-324 (Ont. H.C.).

¹⁰¹ S.B.C. 1980, c. 10.

¹⁰² *Supra*, footnote 100, at pp. 318-319 (D.L.R.), 285-286 (B.C.L.R.). (Emphasis added).

of our further discussion, (while the point is not free from doubt), assume that this is the factor which brings curial deference into play. Sensible as the position may be, it gives rise to further problems.

(3) *When the test comes into play, will it apply to any question of law which the agency, acting within its jurisdiction, is called upon to decide?*

New Brunswick Liquor Corporation strongly suggests that the answer to this question is "No". In the course of his judgment Dickson J. said:¹⁰³

The interpretation of s. 102(3) would seem to lie logically at the heart of the specialized jurisdiction confided to the Board.

Later cases have affirmed that the "patently unreasonable" test is limited to this category of case.¹⁰⁴ Certain of them have put it in the following terms—that the decision has to involve the interpretation of the agency's "constituent Act" or "constitution", or that the agency must, at the time, be in its "home territory".¹⁰⁵ It should be noted that these latter terms are not completely synonymous with the phrase used by Dickson J. Further, the distinction can be significant. Thus in *Re Evans and Workers Compensation Board*¹⁰⁶ the agency was certainly concerned with the interpretation of a section of its "constituent Act". However, the British Columbia Court of Appeal nonetheless held that the error did not "lie at the heart of the specialized jurisdiction". They marked it off on the basis that "[n]o expertise in the field would influence the decision. It was not in an area in which the commissioners could develop a policy".¹⁰⁷ A similar position was taken by the Supreme Court of the same province in *British Airways Board v. Worker's Compensation Board*.¹⁰⁸ There Finch J. put the matter this way:¹⁰⁹

It is not a technical question dependent upon specialized knowledge. Nor is it a policy question, dependent on social, political or economic goals, for which the

¹⁰³ *Supra*, footnote 29, at pp. 236 (S.C.R.), 424 (D.L.R.), 246 (N.B.R.). (Emphasis added).

¹⁰⁴ *E.g.*, *Re Evans and Workers' Compensation Board* (1982), 138 D.L.R. (3d) 346, 38 B.C.L.R. 86 (B.C.C.A.); *British Airways Board v. Workers' Compensation Board* (1983), 7 D.L.R. (4th) 706, 50 B.C.L.R. 248 (B.C.S.C.), aff'd (1985), 17 D.L.R. (4th) 36, 61 B.C.L.R. (B.C.C.A.), leave to appeal to the Supreme Court of Canada refused (1985), 17 D.L.R. (4th) 36n.; *Re Camozzi Co. Ltd. and I.U.O.E.* (1984), 8 D.L.R. (4th) 48, 51 B.C.L.R. 372 (B.C.S.C.); *Re Gill and Workers' Compensation Board* (1983), 149 D.L.R. 678 (3d) (B.C.S.C.).

¹⁰⁵ *The Alberta Union of Provincial Employees v. Board of Governors of Olds College*, *supra*, footnote 42; *Re Service Employees International Union and Broadway Manor Nursing Home* (1984), 13 D.L.R. (4th) 220, at pp. 233-234 (Ont. C.A.).

¹⁰⁶ *Supra*, footnote 104.

¹⁰⁷ *Ibid.*, at pp. 354 (D.L.R.), 95 (B.C.L.R.).

¹⁰⁸ *Supra*, footnote 104 (B.C.S.C.).

¹⁰⁹ *Ibid.*, at p. 717 (D.L.R.), 258 (B.C.L.R.).

defendant board might be guided by its own previous decisions . . . The determination of such a legal question does not lie at the heart of the board's specialized jurisdiction.

Perhaps, as the case law develops, these may be some of the criteria which will become entrenched and govern a conclusion as to whether or not an agency's decision is to be accorded curial deference under the "patently unreasonable" test.¹¹⁰

Whatever the criteria, however, it is clear that an agency may well find itself, while acting within the structure of its Act, deciding a question lying *outside* its "specialized jurisdiction". What test is then to be applied? Logically the agency should be correct in law. That is the position taken by Finch J. in *British Airways Board*. He said:¹¹¹

Similarly, the second question . . . does not lie at the heart of the defendant board's specialized jurisdiction. *That, too, is a legal question, involving the true meaning of s.5, viewed in the whole legislative context, and involving the application of legal precedents to the extent they may assist.*

The learned judge held that the Board's decision was wrong and set aside the assessment which it had made on the basis of it.¹¹²

If the approach taken in *British Airways* is correct then it seems clear that a privative clause will have *no effect at all* in preventing review for error of law on the face of the record in the event that the decision under attack, although made by an "expert" agency, does not involve its "home territory".

Let us stay for a moment longer with the "expert" agency and raise a related question. Suppose such an agency is not only operating in its "home territory" but, in arriving at its decision, is sitting "right in the middle of its house"—is it then entitled to be "patently wrong"? Craig J.A. of the British Columbia Court of Appeal says "yes". In *B.C. Coal Ltd. v. United Mine Workers*,¹¹³ speaking in *obiter* the learned judge said:

. . . I think that it is *unnecessary to consider whether it is patently unreasonable*. I think that this issue was *so squarely within the exclusive jurisdiction of the board* . . . *that no other inquiry is necessary* . . .

¹¹⁰ In this connection the judgment of Freedman J.A. of the Manitoba Court of Appeal in *Parkhill Bedding & Furniture Ltd. v. International Molders etc. Union* (1961), 26 D.L.R. (2d) 589, 34 W.W.R. 13 (Man. C.A.), although concerned with the characterization of a question of law as preliminary or not, may be useful. At pp. 596 (D.L.R.), 21 (W.W.R.) he proposed the following test, whether ". . . the point for determination involved an examination of legal principles and considerations that went beyond the simple confines of the statute under which the Board operated".

¹¹¹ *Supra*, footnote 104, at pp. 718 (D.L.R.), 258 (B.C.L.R.). (Emphasis added). The Alberta Queen's Bench took the same position in *Re Alberta Union of Provincial Employees and Town of Bonnyville* (1984), 8 D.L.R. (4th) 559 (Alta. Q.B.).

¹¹² He held, alternatively, that if the issue did fall within the agency's specialized jurisdiction, its decision was patently unreasonable.

¹¹³ (1984), 12 D.L.R. (4th) 243, at p. 249, 56 B.C.L.R. 94, at p. 100 (B.C.C.A.). (Emphasis added).

... This case comes squarely within *Farrel et al. v. Workmens' Compensation Board*...

In other words, notwithstanding *New Brunswick Liquor Corporation*, a case may still arise where error of law on the face of the record is *just not available as a ground for review*—at least where the expert agency is protected by a privative clause, as was the case in *B.C. Coal*. Is the doctrinal pendulum starting to swing back?¹¹⁴

(4) Will the “patently unreasonable” test apply to other grounds for review?

In pursuing the answer to this question let us keep our assumption in mind: the test comes into play in favour of an agency judged to have some special expertise.

If a *preliminary or collateral matter* still constitutes, at common law, a ground for review then the test might have, on occasion, a useful role to play. By way of illustration let us consider the 1964 decision of the Supreme Court of Canada in *Jarvis v. Associated Medical Services Inc.*¹¹⁵ Mrs. Jarvis was employed by the company. She was fired and thereafter made an application to the Ontario Labour Relations Board alleging that her dismissal was for trade union activity. She asked for an order of reinstatement. Under the Labour Relations Act¹¹⁶ Mrs. Jarvis could not be considered an “employee” for the purposes of collective bargaining since she worked in a “confidential capacity” with her employer. The application to the Board, however, had nothing to do with certification or any aspect of the collective bargaining process. Rather, it brought into play section 50, which provided:

No employer . . .

(a) shall . . . discriminate against a *person* in regard to employment . . . because the *person* was or is a member of a trade union or was or is exercising any other rights under this Act.

The Board decided that Mrs. Jarvis, while not an “employee”, was a “person” within the meaning of this part of the statute. The majority of the Supreme Court classified the issue as a preliminary question of law and held that the Board’s interpretation was wrong. Only an “employee” for bargaining purposes could be a “person” protected by the above provision of the Act.

¹¹⁴ An earlier decision of the British Columbia Court of Appeal suggested that this might be so. In delivering the judgment of the court in *Re Evans and Workers' Compensation Board*, *supra*, footnote 104, at pp. 354 (D.L.R.), 94 (B.C.L.R.), Seaton J.A. said:

The Farrell case establishes an area from which the court is excluded, no matter how grave the apparent error. (Emphasis added).

¹¹⁵ *Supra*, footnote 37.

¹¹⁶ R.S.O. 1960, c. 202.

Here is the sort of case, it is suggested, where it might well be said that the Board was applying its specialized knowledge to the situation before it and that a reviewing court should pay curial deference to the decision—rather than approaching the case on the footing that the decision had to be right as a matter of pure statutory interpretation.

Two later decisions of the Supreme Court (which we have already considered in another context) enter the picture here and throw considerable doubt on the availability of the test with respect to this ground for review. One is *Blanchard v. Control Data Canada Ltd.*¹¹⁷ In dealing with a submission involving the “patently unreasonable” test Lamer J. initially reviewed the earlier decisions of his court which developed the test with respect to intra-jurisdictional errors. He concluded by saying:¹¹⁸

As this argument does not question the arbitrator's *initial jurisdiction* to rule on the award or to substitute his opinion for that of the employer, I cite these decisions in support of a rule . . . which clearly applies to non-jurisdictional errors, *without thereby stating any position on the effect of these decisions on the rule that must be applied to errors granting jurisdiction.*

Caution appears to have been replaced by certainty in *Syndicat des Employés v. Canadian Labour Relations Board*.¹¹⁹ The facts were that, on an application brought by an employer under the Canada Labour Code,¹²⁰ the Board made a declaration that the employees of the employer were engaged in an unlawful strike by observing an overtime ban. It ordered, (1) that the strike cease, and (2) that the employer and the union submit their dispute as to whether overtime was voluntary to arbitration. The statute contained a privative clause.¹²¹ The union sought review. In part it argued that the Board's finding that there had been an unlawful strike amounted to “a patently unreasonable error of law depriving it of all jurisdiction”.

Beetz J. delivered the judgment of the court. After reviewing the facts and the applicable portions of the Act he opened his judgment by saying:¹²²

It should be recalled that privative clauses . . . do not confer a right of appeal . . . they do not . . . empower the court to set aside the decision of an administrative tribunal because of a *mere error of law*. *If the Board commits such an error, its decision remains unassailable.*

A *mere error of law* is an error committed by an administrative tribunal in good faith in interpreting or applying a provision of its enabling Act, of another Act, or of an agreement or other document which it has to interpret and apply within the limits of its jurisdiction.

¹¹⁷ *Supra*, footnote 33.

¹¹⁸ *Ibid.*, at p. 494 (S.C.R.), 303 (D.L.R.). (Emphasis added).

¹¹⁹ *Supra*, footnote 34.

¹²⁰ R.S.C. 1970, c. L-1.

¹²¹ *Ibid.*, ss. 121, 122(1).

¹²² *Supra*, footnote 38, at pp. 419-421 (S.C.R.), 463-464 (D.L.R.). (Emphasis added).

A mere error of law is to be distinguished from one resulting from a *patently unreasonable interpretation of a provision which an administrative tribunal is required to apply within the limits of its jurisdiction*. This kind of error amounts to a fraud on the law or a deliberate refusal to comply with it . . .

A mere error of law *should also be distinguished from a jurisdictional error* . . .

[One] . . . which has sometimes been regarded as jurisdictional is one relating to a matter which is *preliminary or collateral*, but supposedly essential to the exercise of the jurisdiction as a kind of condition thereof.

The learned judge then dealt with an alternative ground on which review was sought—namely that the question of whether or not there had been an unlawful strike was a collateral issue. He dismissed that argument, holding that the question was intra-jurisdictional and did not involve a “patently unreasonable” error.

Beetz J. then turned to consider the second part of the Board’s order in which it required the parties to proceed to arbitration. He held that this exceeded the powers delegated to the Board and therefore was a “jurisdictional error”. That being so, the next question was whether, in interpreting the provisions of the Act which the Board relied on, it was entitled to curial deference. He held that it was not. He said:¹²³

The point is whether the Board does have the power to make such a decision. If it does not, *it must be set aside however reasonable or desirable it may be or may appear to be* . . .

Once the classification has been established [that it is “jurisdictional”] . . . it does not matter whether an error as to such a question is doubtful, excusable or not unreasonable, or on the contrary is excessive, blatant or patently unreasonable. *What makes this kind of error fatal, whether serious or slight, is its jurisdictional nature* . . .

Now, all this was said, of course, within the context of a jurisdictional error occurring at the end, not the commencement, of the enquiry. It is submitted, however, that the judgment is sweeping enough to embrace that latter kind of jurisdictional error, where it is established—namely a preliminary or collateral matter. It is equally a “question of jurisdiction”. Beetz J. summed up his judgment by saying:¹²⁴

Once a question is classified as one of jurisdiction, and has been the subject of a decision by an administrative tribunal, the superior court . . . cannot, without itself refusing to exercise its own jurisdiction, refrain from ruling on the correctness of that decision, or rule on it by means of an approximate criterion.

This is why the superior courts which exercise the power of judicial review *do not and may not use the rule of the patently unreasonable error once they have classified an error as jurisdictional.*

The sweep of that judgment is sufficient, it is submitted, to prevent curial deference being extended to an expert agency when review is sought on the basis of that declining ground—a preliminary or collateral matter.

¹²³ *Ibid.*, at pp. 440-441 (S.C.R.), 478-479 (D.L.R.). (Emphasis added).

¹²⁴ *Ibid.*, at pp. 441-442 (S.C.R.), 479-480 (D.L.R.). (Emphasis added).

But let us stay with the decision for a moment. We have earlier reminded ourselves that, for many years, courts have found all of the grounds for review (with three possible "exceptions", which we have examined) to involve jurisdictional error.¹²⁵ That being so, *Re Syndicat* may prevent the extension of the "patently unreasonable" test to any of them. That may be regrettable. Again, assuming special expertise on the part of the agency, might curial deference not be appropriate in a case where unauthorized delegation is the ground? Or where it is alleged that such an agency took into account irrelevant matters ("asked the wrong question") or failed to consider relevant matters? Such possibilities appear to be foreclosed.

Finally, however, let us remember that the minority judgment of the Supreme Court of Canada in *Blanchard*¹²⁶ has, it seems, extended the common law ground of "lack of evidence" to include an examination of the factual conclusion arrived at by the agency. In so doing, however, it has also extended the "patently unreasonable" test to embrace it.

(5) *If special expertise is the factor which brings the test into play, then what is the position of a non-expert agency?*

It is clear from *New Brunswick Liquor Corporation*¹²⁷ that "expertise" means specialized knowledge and experience gained by an agency operating in an area which is foreign to the judiciary. There it was a labour relations board. Other examples abound. All of the various marketing agencies should be included. The Canadian Radio and Television Commission and National Transportation Commission would also qualify.

But let us consider the case of a crimes compensation board. The agency established by the Saskatchewan Criminal Injuries Compensation Act¹²⁸ is an example. It has power, (1) to determine whether injury or death was the result "of an act or omission of another person . . . [which] is within the description of any of the criminal offences set out in the schedule to [the] Act", and if so then, (2) to "make an order for payment of compensation".¹²⁹ The statute contains a privative clause.¹³⁰

Manifestly, in exercising these powers this agency is not drawing upon special, peculiar knowledge and experience. Quite the contrary. Judges have far more experience in determining whether criminal conduct has occurred and in assessing damages for death and personal injuries. That being so, then logically there is no room for the application of the "patently unreasonable" test. In dealing with *any* intra-jurisdictional

¹²⁵ *Supra*, footnote 21.

¹²⁶ *Supra*, footnote 33.

¹²⁷ *Supra*, footnote 29.

¹²⁸ R.S.S. 1978, c. C-47.

¹²⁹ *Ibid.*, s. 10.

¹³⁰ *Ibid.*, s. 33(1).

question of law the agency will "have to get it right". Insofar as error of law on the face of the record is concerned the privative clause is a dead letter. The issue has yet to arise, but that appears to be the necessary result. In arriving at it, however, let us remember it is based on the assumption that special expertise is the factor which triggers the test—not the presence or absence of a privative clause.^{130a}

The foregoing discussion of the implications of the "patently unreasonable" test for error of law on the face of the record has been somewhat chaotic. Perhaps that is unavoidable. The law is still in a state of flux. Nonetheless it might be as well to pause for a moment, before passing on to consider our final question, and summarize the conclusions arrived at. Not all of them are free from doubt. They are:

(a) It seems that the presence or absence of a privative clause has nothing to do with the test. It is brought into play by judicial recognition of special expertise possessed by an agency.

(b) It does not have general application to every decision made by an expert agency. It is limited to those that lie "at the heart of the specialized jurisdiction".

(c) There *may* be a case where a decision involves such a high degree of special expertise, that *granted the presence of a privative clause*, it is absolutely insulated from review. No test applies. The agency has an unqualified "right to be wrong". We are back to pre-*New Brunswick Liquor Corporation* days.

(d) Where a decision is made by an expert agency on a matter lying at the other end of the spectrum—that is, one which in no way involves the "specialized jurisdiction"—the test has no application. *Irrespective of the presence or absence of a privative clause the decision will be quashed if it is wrong in law.*

(e) Even where an expert agency is involved, there is no room for the application of the test to any ground for review that is characterized as "jurisdictional". That being so it seems that there is little, if any, room for the extension of the test to grounds for review other than error of law on the face of the record.

(f) Logically, the test will have no application to a non-expert agency. A privative clause in its statute will be completely ineffective in preventing review for error of law.

(6) *Is the "patently unreasonable" test dangerous?*

Now let us turn to the final, and general, question. Clearly, the test is in main part subjective. So is the answer to this question. So long as reviewing courts are made up of judges who are not only learned and

^{130a} But see *R. v. Crimes Compensation Board of Saskatchewan*, [1986] 2 W.W.R. 696 (Sask. C.A.), reported after this article was written.

careful (as the vast majority are) but who also bring to their task experience with the administrative process in general, and some understanding of the area within which a particular agency has to work, there is little to fear. By way of contrast, however, it might be interesting to wonder how this test would have been used, and what its result might have been, if it had been available at the outset of the period being examined in this article. With the greatest respect, it is suggested that at least some of the judges in that earlier time would have warmly welcomed it—a quick way to quash.

Furthermore, the test was developed in the context of trade union legislation, an area in which, after more than forty years experience, judges now feel comfortable when called upon to undertake judicial review. They have developed their own expertise which has reduced, if it has not eliminated, subjective reaction. But what of the future? We may see Legislatures, or Parliament, embarking on fundamentally new kinds of regulatory schemes which will affect established interests where, yet again, most judges will lack the kind of experience which will permit, at the outset, an objective approach to be taken. In such cases, and no matter how cautious the rhetoric may be in which the test is couched,¹³¹ may it not result in the kind of unfortunate decisions with which trade union legislation was earlier faced?

Subjectivity, of course, is no new thing in administrative law. It is wrapped up in the whole concept of "jurisdiction". Reid J.A. recognized that in *Re Hughes Boat Works Inc. and UAW*.¹³² In dealing with the concept he said:¹³³

It is, I believe, true that the process of characterizing alleged errors as errors of law or errors of jurisdiction is essentially a subjective one . . .

I would . . . prefer that the subjective nature of the process be acknowledged and that we attempt to state the considerations that should be borne in mind. Thus, rather than simply categorizing elements in the decisions of tribunals as jurisdictional or otherwise, I think we should try to illustrate what will lead a Court to interfere or to refrain from interfering . . .

That statement may be prophetic. It may well be that *New Brunswick Liquor Corporation* (decided before *Re Hughes*—and relied on in it) marks a cautious first step away from the whole jurisdictional approach to judicial review.¹³⁴ The minority judgment of Lamer J. in *Blanchard*¹³⁵

¹³¹ Such as "the decision must be outrageous and unjustifiable on its face"; see *Re Northside Electric Ltd. and IBEW* (1983), 4 D.L.R. (4th) 635, at p. 644 (Alta. Q.B.).

¹³² (1979), 102 D.L.R. (3d) 661, 26 O.R. (2d) 420 (Ont. C.A.).

¹³³ *Ibid.*, at pp. 668 (D.L.R.), 427-428 (O.R.).

¹³⁴ E.g., Dickson J., in the course of his judgment in *New Brunswick Liquor Corporation*, said: "The question of what is and what is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so"; *supra*, footnote 29, at pp. 233 (S.C.R.), 422 (D.L.R.), 243 (N.B.R.).

¹³⁵ *Supra*, footnote 33.

can be so read. Those who support such a non-doctrinal trend will welcome the position taken by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service*.¹³⁶ He said, in part:¹³⁷

Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety" . . .

By "illegality" . . . I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system . . .

D. Summary

Let us pause and look back briefly over the matters so far discussed. Of the early part of the period with which we are concerned Professor Bora Laskin said that the courts, in interpreting privative sections, had "written them out of the statutes".¹³⁸ In later years they were, to a limited extent, "put back in". Lack of evidence and error of law on the face of the record were, it has earlier been argued, *completely* protected from review. Towards the end of our time span the first of those grounds, it seems probable, became no longer immunized. By 1979 error of law on the face of the record was gone as a *completely* protected ground. In a word, each may now be classified as a jurisdictional error which takes an agency outside the structure of its Act and a privative clause is irrelevant.

What, then, is the effect today of either of the two types of privative clause which we have so far considered, insofar as complete preclusion of judicial review is concerned? As to the "remedy oriented" clause, the answer is "None". The "jurisdictionally oriented" clause still has the effect given to it by *Farrell*. In stating that some particular matter is within

¹³⁶ [1985] A.C. 374, [1984] 3 All E.R. 935 (H.L.).

¹³⁷ *Ibid.*, at pp. 410 (A.C.), 950-951 (All E.R.). (Emphasis added).

More than one learned commentator has considered this trend. One interesting discussion is to be found in J.G. Gowan, Recent Developments in Judicial Review, in Law Society of Upper Canada, Bar Admission Course Materials, Charter of Rights and Administrative Law (1983), p. 7.

¹³⁸ *Supra*, footnote 10.

the "exclusive jurisdiction" of the agency it prevents the point being classified as collateral and open to attack on *that* ground. Apart from this its effect is precisely the same as the other type of clause.

The foregoing statements are subject to one possible qualification. Where an "expert" agency makes a decision involving a matter which is at the very centre, so to speak, of its specialized jurisdiction a privative clause, of either type, may completely immunize it from review. This is based on *B.C. Coal Ltd. v. United Mine Workers*,¹³⁹ discussed earlier.

III. *Constitutional Restraints on Provincial Privative Clauses under Section 96 of the Constitution Act, 1867*

Section 96 reads:

The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province except those of the Courts of Probate in Nova Scotia and New Brunswick.

It is well known that this provision goes beyond a mere appointing power. It will operate against a provincial agency to which judicial powers are delegated and where, in the exercise of those powers, the tribunal is judged to be analogous to a superior, district or county court. It is not the purpose of this article to review the decisions dealing with that aspect of section 96.¹⁴⁰ Rather, our concern is to examine two recent decisions of the Supreme Court of Canada which hold that this provision constitutionally inhibits the power of a provincial legislature to enact a privative clause. The examination can be brief. Both cases, and their implications (including their impact on the power of Parliament to enact preclusive provisions), have been extremely well discussed elsewhere.¹⁴¹

The first is *Attorney General of Quebec v. Farrah*.¹⁴² There the court was concerned with the Quebec Transport Act.¹⁴³ It made provision for

¹³⁹ *Supra*, footnote 113.

¹⁴⁰ *Labour Relations Board of Saskatchewan v. John East Iron Works' Ltd.*, [1949] A.C. 134, [1948] 4 D.L.R. 673, [1948] 2 W.W.R. 1055 (P.C.); *A.E. Dupont v. Inglis*, [1958] S.C.R. 535, (1958), 14 D.L.R. (2d) 417; *Tomko v. Labour Relations Board*, [1977] 1 S.C.R. 112, (1975), 69 D.L.R. (3d) 250; *Reference Re Residential Tenancies Act 1979*, [1981] 1 S.C.R. 714, (1981), 123 D.L.R. (3d) 554; *Massey-Ferguson Industries Ltd. v. Government of Saskatchewan*, [1981] 2 S.C.R. 413, (1981), 127 D.L.R. (3d) 513.

¹⁴¹ D.J. Mullan, *The Uncertain Constitutional Position of Canada's Administrative Appeal Tribunals* (1982), 14 Ott. L. Rev. 239; R. Elliott, *Constitutional Law—Judicature—Is Section 96 Binding on Parliament?—Reference Re Establishment of Unified Criminal Court of New Brunswick* (1982), 16 U.B.C.L. Rev. 313; R.A. Macdonald, *Constitutional Law—Validity of Legislation—Privative Clause Ousting Judicial Review—Crevier v. Attorney-General for Quebec et al.* (1983), 17 U.B.C.L. Rev. 111; B.L. Strayer, *The Canadian Constitution and the Courts* (2nd ed., 1983), pp. 81-85.

¹⁴² [1978] 2 S.C.R. 638, (1978), 86 D.L.R. (3d) 161.

¹⁴³ L.Q. 1972, c. 55.

the regulation of the motor carrier industry within the Province. In doing so, it established a two-tiered administrative structure. The second part of it consisted of a "Transport Tribunal", comprised of provincially appointed judges. It was given certain appellate jurisdiction over decisions made by the first tier of the structure. The Act contained two privative provisions relating to the decisions of the appellate agency. The first read:

The Transport Tribunal shall also have jurisdiction, *to the exclusion of any other court*, to hear and dispose of:

(a) in appeal, *on any question of law*, any decision (of the lower agency) which terminates the matter . . .

The second provided that:

*No extraordinary recourse contemplated in . . . the Code of Civil Procedure shall be exercised . . . against the Transport Tribunal . . .*¹⁴⁴

In a unanimous decision, the Supreme Court held that these preclusive provisions, taken together, constituted the Transport Tribunal a superior court and therefore offended section 96 of the Constitution. Why so? Pratte J. answered as follows:¹⁴⁵

This power of the Superior Court to correct certain types of illegalities committed by inferior tribunals in the exercise of their jurisdiction was an integral part of the Court's supervisory authority as it existed in 1867; it is therefore clear that such control power cannot be validly transferred by the Legislature from the Superior Court to a court [the Transport Tribunal] that is not comprised within the enumeration contained in s.96 . . .

Before considering the implication of that, let us turn to the second of the Supreme Court decisions in this area. It is *Crevier v. Attorney-General for Quebec*.¹⁴⁶ Here again the court was concerned with Quebec legislation—the Professional Code.¹⁴⁷ That statute governs the activities of some thirty-eight professional societies in the Province. Each is required to have a discipline committee to deal with allegations of misconduct. The Act then establishes a "Professions Tribunal". It provides that ". . . an appeal shall lie to such tribunal from any decision of a committee on discipline . . .". The Act contained the following clauses:

¹⁴⁴ Amongst many other things, the Quebec Code of Civil Procedure confers on superior courts the power to undertake judicial review. The substantive law governing the exercise of that jurisdiction is analagous to that found in the common law provinces. The procedural law differs. Instead of *certiorari* (or one or other of the prerogative writs), judicial review proceedings are most commonly commenced by a "writ of evocation". It is one of a number of procedures which are compendiously referred to in the Code as "extraordinary recourse". For a good discussion of the remedial structure of Quebec administrative law see Gerald E. LeDain, *The Supervisory Jurisdiction in Quebec* (1957), 35 Can. Bar Rev. 788.

¹⁴⁵ *Supra*, footnote 142, at pp. 654 (S.C.R.), 177 (D.L.R.). (Emphasis added).

¹⁴⁶ [1981] 2 S.C.R. 220, (1981), 127 D.L.R. (3d) 1.

¹⁴⁷ R.S.Q. 1977, c. C-26.

175 . . . The tribunal's decision *shall be final* . . .¹⁴⁸

194 *No extraordinary recourse contemplated in . . . the Code of Civil Procedure shall be exercised and no injunction granted against* . . . [the Professions Tribunal]
 . . .

Dealing with these provisions, and speaking for his court, Laskin C.J.C. said:¹⁴⁹

The second issue . . . concerns the effect upon s. 96 of a privative clause . . . which purports to insulate a provincial adjudicative tribunal from *any review* of its decisions. Is it enough to deflect s. 96 if the privative clause is construed to preserve superior court supervision over questions of jurisdiction *and if (as in this case) such a construction is not open because of the wording of the privative clause, is the clause constitutionally valid? In my opinion, where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason . . . of constituting the tribunal a s. 96 court.*

At a later page he went on to say:¹⁵⁰

It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal *cannot constitutionally be immunized from review of decisions on questions of jurisdiction* . . . However, given that s. 96 is in . . . [the Constitution Act, 1867] and that it would make a mockery of it to treat it in non-functional terms as a mere appointing power, *I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review.*

Let us pause for a moment to consider one rather surprising aspect of *Crevier*. The court read the privative provisions in the statute as being completely effective. They prevented "*any curial review*". With respect, was that really so? Is not the better view that, after making proper allowance for the remedial aspect of judicial review in Quebec, they merely amounted to a re-run of one of the standard kinds of "*no certiorari*" clauses—earlier tagged the "remedy oriented" type? On that view of the matter then, of course, the case could have been disposed of without recourse to section 96.¹⁵¹

That aside, in both *Farrah* and *Crevier* the court clearly adopted a thesis earlier advanced by Professor W.R. Lederman, that the provinces cannot constitutionally "deny to the superior courts power to review and determine finally the scope of statutory and common-law powers conferred on provincial government officials or on provincial minor courts or non-curial tribunals".¹⁵²

¹⁴⁸ Emphasis added. As earlier discussed, this provision is probably not privative; *supra*, footnote 94.

¹⁴⁹ *Supra*, footnote 146, at pp. 234 (S.C.R.), 12 (D.L.R.). (Emphasis added).

¹⁵⁰ *Ibid.*, at pp. 236-237 (S.C.R.), 13-14 (D.L.R.). (Emphasis added).

¹⁵¹ See Mullan, *loc. cit.*, footnote 96, at p. 7.

¹⁵² W.D. Lederman, *The Independence of the Judiciary* (1956), 34 Can. Bar Rev. 1139, at p. 1174.

Prior to *Crevier* there could be "magic in words". In a handful of cases legislative draftsmen departed from the traditional kinds of privative clauses and successfully ousted judicial review. Thus, in 1973 the Supreme Court of Canada in *Woodward Estate v. Minister of Finance*¹⁵³ found that a draconian provision in a British Columbia statute completely precluded judicial review. Briefly, in the case the defendant Minister, in exercising powers delegated to him by the Succession Duty Act,¹⁵⁴ made a decision which was manifestly outside his jurisdiction. Thereafter the Legislature amended the statute by declaring that "any determination made by the Minister . . . is hereby ratified and confirmed . . .".¹⁵⁵ Dealing with the amendment Martland J., speaking for the court, said:¹⁵⁶

Without these words, the Minister's determination would have been without legal force or effect . . . But the Legislature clearly had power to breathe life into it, to give it statutory confirmation . . . An administrative decision which has received statutory confirmation cannot be reviewed on *certiorari*.

Could this device be used today? It seems not. The effect of the amendment would be, *ex post facto*, to turn the minister into a superior court, with power "to determine the limits of his jurisdiction".¹⁵⁷

A more palatable statutory provision was considered by the Alberta Supreme Court Trial Division in 1977 in *Re Canadian Pittsburgh Industries and International Association of Bridge, Structural & Ornamental Ironworkers*.¹⁵⁸ The Act¹⁵⁹ contained a variation on the standard kind of privative clause. Section 5 started with both "remedy oriented" and "jurisdictionally oriented" provisions. It then added the following:

(3) Notwithstanding subsections (1) and (2) a decision . . . of the Board may be questioned or reviewed by way of an application for certiorari . . . if an application therefor is filed with the Court and served . . . no later than 30 days after the date of the Board's decision.

Four applications for *certiorari* were before the court, alleging various jurisdictional defects. Each had been launched *after* the expiry of thirty days from the date of the decision. McDonald J. held that the above provisions completely precluded review.¹⁶⁰ It seems clear that under

¹⁵³ *Supra*, footnote 21.

¹⁵⁴ R.S.B.C. 1960, c. 372.

¹⁵⁵ S.B.C. 1970, c. 45, s. 5.

¹⁵⁶ *Supra*, footnote 21, at pp. 129 (S.C.R.), 616 (D.L.R.).

¹⁵⁷ The provision in the statute was, of course, an exercise in legislative supremacy. Section 96 does not directly affect the powers of a legislature. Nonetheless the effect of the amendment would be, it is submitted, the one suggested in the text.

¹⁵⁸ (1977), 77 D.L.R. (3d) 581, 3 Alta. L.R. (2d) 162 (Alta. T.D.).

¹⁵⁹ Alberta Labour Act, S.A. 1973, c. 33, as amended S.A., 1975 (2nd Sess.), c.60, s. 13.

¹⁶⁰ The Ontario High Court reached the same result, in interpreting a similar "time limit" clause, in *Re Cessland Corporation Ltd. and Fort Norman Explorations Inc.* (1979), 100 D.L.R. (3d) 378, 25 O.R. (2d) 69 (Ont. H.C.). There is authority to the

Crevier such an attempt to remove judicial review would be unconstitutional. Remarkable as the transformation might seem, would it not be correct to say that, after thirty days, the agency would be a superior court?

A 1973 decision of the British Columbia Court of Appeal is also worth considering in this context. It is *Re Robertson and British Columbia Securities Commission*.¹⁶¹ *Certiorari* was sought on the grounds of a denial of a fair hearing and lack of evidence. The applicant succeeded in the British Columbia Supreme Court. On appeal the court turned its attention, in part, to a provision in the Securities Act¹⁶² which provided that, "[e]xcept with the consent of the Attorney General no action whatever and no proceedings by way of injunction, mandamus, prohibition or other extraordinary remedy lies or shall be instituted" against the securities commission. Consent had not been secured. The court also considered a section of the statute giving to any affected party an *unrestricted right of appeal to the Court of Appeal* against any "direction, decision, order, or ruling of the Commission".¹⁶³ Taggart J.A., in delivering the judgment of his court, held that these provisions, taken together, operated so as completely to bar the *certiorari* application. Accordingly, even though he found the grounds for review to have been established, the application was dismissed.

In *Re Robertson* the learned judge relied particularly on the effect of the *appeal provisions* in the statute in light of the decision of the Supreme Court of Canada in *Pringle v. Fraser*.¹⁶⁴ Following that earlier decision, he found that these provisions constituted a "code" for the review *by a superior court* of proceedings before the commission and excluded any

contrary. In *The Dominion Cotton Mills Company v. The Trecothick Marsh Commissioners* (1905), 37 S.C.R. 79 Taschereau C.J.C. interpreted this kind of preclusive device as having no greater effect than the standard type. He said, at p. 92, "... a statute taking away the writ, like this one does, after the six months, has no application when the judgment or proceedings of an inferior tribunal are impeached, as here, for want of jurisdiction in that tribunal". The above decision of the Supreme Court was not considered in either *Re Canadian Pittsburgh Industries*, or *Re Cessland Corporation Ltd.* It was followed, and applied, by the British Columbia Supreme Court in *Re McColl* (1973), 42 D.L.R. (3d) 763, 14 C.C.C. (2d) 365 (B.C.S.C.). This type of "no *certiorari*" clause is found in many English statutes. In *Smith v. East Elloe Rural District Council*, [1956] A.C. 736, [1956] 1 All E.R. 855 (H.L.), a majority of the House of Lords held it to be completely effective. The English Court of Appeal took the same position in *Woollett v. Minister of Agriculture and Fisheries*, [1955] 1 Q.B. 103, [1954] 2 All E.R. 776 (C.A.). Professor H.W.R. Wade has argued that the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission*, *supra*, footnote 21, "repudiated" *East Elloe* on this point; see H.W.R. Wade, *Constitutional and Administrative Aspects of the Anisminic Case* (1969), 85 Law Q. Rev. 198, at p. 207.

¹⁶¹ (1973), 42 D.L.R. (3d) 135, [1974] 2 W.W.R. 165 (B.C.C.A.).

¹⁶² S.B.C. 1967, c. 45, s. 140(1). (Emphasis added).

¹⁶³ *Ibid.*, s. 31(1).

¹⁶⁴ [1972] S.C.R. 821, (1972), 26 D.L.R. (3d) 28.

other avenue of relief. Accordingly, and when coupled with the requirement of the Attorney General's consent, they operated so as completely to exclude review by *certiorari*.

The case was appealed to the Supreme Court and the appeal dismissed, without reasons.¹⁶⁵ No doubt, in post *Crevier* days, the same result would be reached. *Pringle v. Fraser* is still good law. Thanks to the *appeal provisions* in the statute a *superior court* would have unfettered powers to consider (amongst other matters) whether the agency had transgressed the limits of its jurisdiction. Section 96 would not be a problem.¹⁶⁶

Suppose, however, that in *Re Robertson* the legislature had contented itself with the requirement of the Attorney General's consent before review proceedings could be launched. Would that be effective to bar *certiorari*? In pre-*Crevier* days it might have been. After all, the requirement of a fiat from an Attorney General is not unknown to our law. Such a limitation on the availability of *certiorari* might have been particularly effective in a statute delegating powers to a minister of the Provincial Crown.

But *Crevier* is with us. Again, it seems clear that this kind of preclusive device would also be struck down. Such a provision would give an Attorney General the power, by withholding consent, to create a section 96 court.

There is another device which, if resorted to in pre-*Crevier* days, might have resulted in complete removal of judicial review. This would have involved turning off the *superior court's* jurisdictional tap; that is, an amendment to the statute establishing the superior court of a province which specifically removed the power of the court to grant *certiorari* against a particular agency, or in any other way to undertake review of its decisions or proceedings.¹⁶⁷ Again, *Crevier* would now strike this down.

But a variation on that theme might today achieve total immunization from review; namely, adding to the statute establishing the provincial agency a provision that its members are to be appointed by the Governor General under section 96. Is this completely unreal? Arguably so: for one thing a provincial legislature could not force the federal cabinet to advise the Governor General to make such appointments. For another, the

¹⁶⁵ [1975] 1 S.C.R. vi.

¹⁶⁶ *Capital Regional District v. Concerned Citizens of British Columbia*, [1982] 2 S.C.R. 842, (1982), 141 D.L.R. (3d) 385, would support that conclusion.

¹⁶⁷ A faint parallel can be found in the jurisdiction to grant *ex parte* injunctions in labour disputes. In more than one province this power has been cut down; e.g., Queen's Bench Act, R.S.S. 1978, c. Q-1, s. 45.20(1). Long before *Crevier* Professor Lederman would have argued that this device is unconstitutional—on the footing that the power of review is part of the essential core of the jurisdiction of a superior court and is beyond the reach of a provincial legislature (or, in his view Parliament); *loc. cit.*, footnote 152.

appointees would have to be members of the provincial Bar,¹⁶⁸ and that might be a disadvantage. Finally, it is politically unlikely that a provincial administration would put itself in a position where it would have to ask federal authorities to arrange, and pay,¹⁶⁹ for such appointments. If we assume, however, that the same political party holds power at each level then it might be that these problems could be worked out and the device used.

Conclusion

Forty years ago hostile courts either ignored privative clauses or wrote them out of the statutes. Today benign courts have achieved the same result. In the interim, legislative supremacy was for a time given limited recognition. Error of law on the face of the record and absence of evidence were completely beyond the reach of judicial review when a preclusive provision was part of the structure of a statute. That time has now passed. Accordingly, the standard type of clause is now, as a matter of common law, mainly of historical interest only.

To that has been added constitutional barriers—at least with respect to provincial legislation. Even the most inspired draftsman, having turned his back on the usual kind of “no *certiorari*” provision, will probably see his efforts flounder on section 96 of the Constitution Act, 1867.¹⁷⁰

All that, however, constitutes a narrow, doctrinal view of the development of Canadian administrative law. From about the early 1960's on (although not always in the context of the interpretation of privative clauses) Canadian courts have become more and more sensitive to the needs of a properly functioning administrative machine, while at the same time being mindful to protect the individual against arbitrary action. That has been most recently expressed in the development of the “patently unreasonable” test for error of law; a test it seems, not limited to a case where the statute contains a “no *certiorari*” clause, but available wherever it can be shown that an agency is possessed of, and exercising, particular expertise.

¹⁶⁸ The Constitution Act, 1867, ss. 97, 98.

¹⁶⁹ *Ibid.*, s. 100.

¹⁷⁰ One possibility remains. In both *Farrah* and *Crevier* the Supreme Court was concerned with an agency exercising adjudicative (“judicial”) powers. Arguably, s. 96 would not be brought into play with respect to a privative clause purporting to protect an agency exercising “purely administrative” powers. Neither case would apply. The decision of the Supreme Court in *Attorney-General of Quebec v. Udeco Inc.*, [1984] 2 S.C.R. 502 would assist in supporting that position. The same reasoning would apply to an agency exercising “legislative” powers; see, MacDonald, *loc cit.*, footnote 141, at p. 315.