

# Judicial Review, Judicial Revisionism and Judicial Responsibility

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Article abstract

Judicial review of the decisions of labour relations boards has been a nagging problem for the Supreme Court of Canada for decades. The decision of the Court in *Le Syndicat des Employés de Production du Québec et de L'Acadie v. Canada Labour Relations Board et al.* provides an opportunity for and indeed provokes review of the work of the Court in dealing with this recurring problem. This essay begins by placing in perspective the concrete issue posed in the *L'Acadie* decision. But the particular facts of that case are used only as a vehicle to explore the nature of the problem of judicial review of labour decisionmakers and the history of the Court's handling of it. A fundamental thesis of this essay is that the Court's work can be best understood as comprising two distinct periods, the early years (pre-1979) and the new era (1979-1984?). This essay articulates the view that during the early years the Court developed a law of judicial review which was wholly inadequate both in functional and doctrinal terms. In the new era the Court simplified and reformed the law of judicial review of labour boards and labour arbitrators. It is only from the perspective of the Court's previous handling of the issue that the decision in *L'Acadie* can be truly understood. When so viewed the decision is perfectly inadequate. The case creates a new distinction based upon the old confusion of "jurisdiction". This essay then develops the view that no theory of judicial review which revolves around the notion of "jurisdiction" can ever satisfactorily deal with the issues presented. In this respect the Court's own cases from the "new era" represent a much more sensible, if still a second best approach. Finally, suggestions for a legislative solution to the problem posed by *L'Acadie* are briefly explored.

# JURIDICTIONS ET ARBITRAGE

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## Judicial Review, Judicial Revisionism and Judicial Responsibility

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### ABSTRACT

*Judicial review of the decisions of labour relations boards has been a nagging problem for the Supreme Court of Canada for decades. The decision of the Court in *Le Syndicat des Employés de Production du Québec et de L'Acadie v. Canada Labour Relations Board et al.* provides an opportunity for and indeed provokes review of the work of the Court in dealing with this recurring problem. This essay begins by placing in perspective the concrete issue posed in the *L'Acadie* decision. But the particular facts of that case are used only as a vehicle to explore the nature of the problem of judicial review of labour decisionmakers and the history of the Court's handling of it. A fundamental thesis of this essay is that the Court's work can be best understood as comprising two distinct periods, the early years (pre-1979) and the new era (1979-1984?). This essay articulates the view that during the early years the Court*

### RÉSUMÉ

*Depuis des décennies, la révision des décisions des tribunaux d'arbitrage constitue un problème pour la Cour suprême du Canada. La décision *Le Syndicat des employés de production du Québec et de l'Acadie c. Le Conseil canadien des relations du travail et autres* fournit l'occasion de faire le point sur la position de la Cour suprême à ce sujet.*

*L'auteur cherche d'abord à placer la question posée dans *L'Acadie* dans la perspective des autres décisions rendues par la Cour suprême. À partir des faits propres à cette affaire, l'auteur examine la nature même du problème que pose la révision des décisions arbitrales par les tribunaux supérieurs et expose l'angle sous lequel la Cour suprême a successivement abordé ce problème. Il souligne en particulier que la position de la cour peut être mieux comprise en regardant, d'une part, les décisions que celle-ci a rendues avant 1979 et, d'autre part, celles*

*developed a law of judicial review which was wholly inadequate both in functional and doctrinal terms. In the new era the Court simplified and reformed the law of judicial review of labour boards and labour arbitrators. It is only from the perspective of the Court's previous handling of the issue that the decision in L'Acadie can be truly understood. When so viewed the decision is perfectly inadequate. The case creates a new distinction based upon the old confusion of "jurisdiction". This essay then develops the view that no theory of judicial review which revolves around the notion of "jurisdiction" can ever satisfactorily deal with the issues presented. In this respect the Court's own cases from the "new era" represent a much more sensible, if still a second best approach. Finally, suggestions for a legislative solution to the problem posed by L'Acadie are briefly explored.*

*qui ont été prises entre 1979 et 1984 approximativement. Il explique comment, à son avis, le droit a évolué de façon malheureuse, tant sur le plan pratique que théorique, pendant la période antérieure à 1979. Pendant la seconde période, la cour a par contre simplifié et modifié sa façon d'aborder la révision des décisions des tribunaux et arbitres du travail.*

*La décision L'Acadie ne peut être vraiment comprise que si on la situe dans le prolongement de la façon première qu'avait la cour d'aborder le problème. Créant une nouvelle distinction fondée sur l'ancienne confusion en matière de compétence, cette décision est, selon l'auteur, extrêmement malheureuse. Tout examen judiciaire axé sur la notion de compétence ne peut, toujours selon l'auteur, être satisfaisante. D'ailleurs, les affaires qui ont suivi la seconde période montrent de la part de la Cour suprême une approche beaucoup plus appropriée, bien qu'elle ne soit pas encore idéale.*

*L'auteur propose enfin brièvement des solutions législatives au problème posé par L'Acadie.*

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## I. INTRODUCTION

On November 22, 1984 the Supreme Court of Canada handed down its decision in *Le Syndicat des Employés de Production du Québec et de l'Acadie v. Canada Labour Relations Board et al.*<sup>1</sup> in which the Court took the opportunity to address, yet again, the nagging problem of the proper institutional relationship between courts and labour relation boards, or as it is more often and more simply put, the problem of "judicial review" of labour relation boards. The brute result of the decision is that the Court has redrawn the map of judicial review abruptly, illogically, and against all rational grounds of persuasion. To borrow the famous dictum of Mr. Justice Holmes, the decision flies in the face of both logic and experience. The main cause for concern is the unwarranted and undesirable intrusion by the Court upon the role assigned by the legislature to the labour relations board. However, only someone totally unfamiliar with the history of Canadian labour law could attack the decision solely from such first principles — that is, on the basis that it is an undemocratic "flouting"<sup>2</sup> of the will of the legislature for the court to substitute itself for the labour relations board. While such criticisms are important, too much water has flowed under the labour law bridge to start from such basic propositions. The burden of this essay will be to demonstrate that even when placed in historical context the decision remains indefensible, and raises deep questions concerning the ability and will of the Court not simply to regulate rationally its relationships with specialized labour tribunals, but to develop rationally its own jurisprudence. In short, the case exhibits a taste on the part of the Court for virtually instantaneous revising of history and its own

1. (1984) 84 C.L.L.C. 12,286 (S.C.C.) — hereafter referred to simply as the *L'Acadie* decision.

2. This verb was utilized by the late Chief Justice, then Professor, Bora Laskin in "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses", (1952) 30 *Can. Bar Rev.* 986 at 987.

jurisprudence, and thus poses profound questions of judicial responsibility. Hence the title of this essay. These latter matters are of obvious concern beyond the labour relations community. But the case is also one of immediate and more direct concern to labour relations boards, particularly in relation to the exercise of their basically broad remedial powers. Thus the essay dwells upon their problem at length. Finally, the case is most obviously a problem for the Canada Labour Relations Board and thus particular attention is paid to an appropriate and direct response to that Board's dilemma. I begin, in the next section, with a review of the Board's *L'Acadie* decision. Next the fate of the case in the Federal Court of Appeal is examined. In Section IV I set out a view of the history of the Supreme Court of Canada's involvement with judicial review. The Supreme Court's decision in *L'Acadie* is criticized in Section V. Finally, I address the issue of a legislative response to *L'Acadie*.

## II. THE BOARD'S *L'ACADIE* DECISION

There are two issues involved in the *L'Acadie* case, one of which is of no consequence, the other of profound interest. The case involved an application by the Canadian Broadcasting Corporation to the Canada Labour Relations Board for a declaration<sup>3</sup> that production employees in various eastern Canadian cities were engaging in illegal strikes in the form of concerted refusals to do overtime work.<sup>4</sup> There is absolutely nothing at all extraordinary about such an application to the Board and it represents very much a "bread and butter" issue for labour relation boards across the country. As the original decision of the Board makes clear,<sup>5</sup> the CBC initiated the proceedings on November 30, 1979 through "urgent, pressing communications" to the Board, which were "rather desperate in tone".<sup>6</sup> The Corporation was concerned because these actions by production employees threatened a number of special productions, including the French network's New Year's Eve Special. As the Board, taking administrative notice one presumes, observed:

Anyone who is familiar with Quebec customs knows that the cancellation of the latter special production alone, which has become a New Year's Eve

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3. Pursuant to s. 182 of the *Canada Labour Code*, R.S.C. 1970, c. L-1 as amended.

4. The original application to the Board actually involved two separate but related instances of work stoppages — the overtime ban and a "hunger strike" by four members of a certain classification (procurement specialists) at Montreal only, which led to all members of that classification refusing to work. The underlying causes of this dispute were the overtime issue, a problem in ascertaining lines of supervisory authority, and a long-standing conflict between set designers and procurement specialists.

5. The decision is reported at [1981] 2 Can. L.R.B.R. 52 and is dated 18 March 1980.

6. *Id.*, p. 53.

tradition and whose ratings we are told are the pride of the Corporation, would create more than a little consternation.<sup>7</sup>

How did the Board process the application?

The Board, upon receipt of the application from the Corporation, assigned, as is its normal practice, one of its labour relations officers to meet with the parties in an effort to effect a resolution and solve the dispute. He was unsuccessful. Very shortly thereafter, the parties were summoned to a public hearing in Ottawa. The hearing began on Monday, December 3, and continued on Tuesday, December 4, without interruption, until well into the morning of the following day, at which time the Board issued an order.<sup>8</sup>

As the Board explained, at the heart of the problem which led to the overtime ban was a disagreement between the parties, the Union and the Corporation, as to whether overtime was voluntary or compulsory under the terms of their then current collective agreement, which the parties were in the midst of renegotiating.<sup>9</sup> This was a longstanding problem and it had resulted in a 1975 grievance over the issue, in which a decision was handed down in 1978. The arbitrator held that overtime was voluntary. Judicial review proceedings resulted in a finding of error on the part of the arbitrator, but not reviewable error. This provided, to use the Board's felicitous metaphor, both sides with ammunition which they then used in a "guerrilla war"<sup>10</sup> over the issue lasting for six years and consisting of a series of grievances which remained unresolved. The union placed the overtime issue on the bargaining table during the current renegotiations urging wording which clearly asserted its interpretation of the provision. As the Board put it this "'hot potato' . . . [was] . . . tossed into the Board's lap as a result of the ban which the union has placed on all overtime".<sup>11</sup>

The issue which is of no concern to this essay is whether a concerted refusal of overtime amounts to a strike under Canadian labour legislation. It suffices to say that it is established in Canadian labour law that such a concerted refusal, even under a collective agreement or statute establishing that overtime is voluntary, can constitute a strike.<sup>12</sup> That is, the issue of voluntariness of the overtime under the collective agreement does not effect the finding of a strike. It is simply a separate issue and one with which these parties obviously had a great deal of difficulty. Not unnaturally, this trouble with the voluntariness of overtime manifested

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7. *Ibid.*

8. *Ibid.*

9. The Board drew attention to the fact that the negotiations were "difficult and protracted" (p. 55). This was due to the fact that the negotiations were in effect the first full set of negotiations since the union had successfully "raided" its predecessor in 1977.

10. *Id.*, p. 57.

11. *Ibid.*

12. See, for example, *Westeel Rosco*, [1981] O.L.R.B. Rep. 1849.

itself in the form of a ban on overtime. It is my reading of the Board's decision that the ban was also a general protest action aimed at prompting the employer to concede to union demands generally on the bargaining table. However, because on the facts of the *L'Acadie* case, the parties were still negotiating and had not reached the point in time at which strikes or lockouts are permitted under the statute, the strike was untimely and thus illegal. These are, for our purposes, totally uncontroversial points.<sup>13</sup>

The issue which is of great concern to us is how the Board responded to this finding of an illegal strike. The statute instructs the Board as follows:

182. Where an employer alleges that a trade union has declared or authorized a strike, or that employees have participated, are participating or are likely to participate in a strike, the effect of which was, is, or would be to involve the participation of an employee in a strike in contravention of this Part, the employer may apply to the Board for a declaration that the strike was, is or would be unlawful and the Board may, after affording the trade union or employees an opportunity to be heard on the application, make such a declaration and, if the employer so requests, may make an order

(a) requiring the trade union to revoke the declaration or authorization to strike and to give notice of such revocation forthwith to the employees to whom it was directed;

(b) enjoining any employee from participating in the strike;

(c) requiring any employee who is participating in the strike to perform the duties of his employment; and

(d) requiring any trade union, of which any employee with respect to whom an order is made under paragraph (b) or (c), is a member, and any officer or representative of that union, forthwith to give notice of any order made under paragraph (b) or (c) to any employee to whom it applies.

183.1(1) An order made under section 182 or 183

(a) shall be in such terms as the Board considers necessary and sufficient to meet the circumstances of the case; and

(b) subject to subsection (2), shall have effect for such time as is specified in the order.

(2) Where the Board makes an order under section 182 or 183, the Board may, from time to time on application by the employer or trade union that requested the order or any employer, trade union, employee or other person affected thereby, notice of which application has been given to the parties named in the order, by supplementary order

(a) continue the order, with or without modification, for such period as is stated in the supplementary order; or

(b) revoke the order.

121. The Board shall exercise such powers and perform such duties as are conferred or imposed upon it by, or as may be incidental to the attainment

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13. Although there is a good argument to the contrary. See CHRISTIE, LANGILLE, STEINBERG, "Developments in Labour Law: The 1978-79 Term" (1979) 1 *Sup. Ct. Law Review* 300-308 for the general outline of the argument.

of the objects of, this Part including, without restricting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Part, with any regulation made under this Part or with any decision made in respect of a matter before the Board.<sup>14</sup>

Leaving aside for the moment the general issue of the proper interpretation of these provisions, how did the Board invoke and utilize them in the *L'Acadie* decision? The Board, as indicated, found that the overtime ban constituted a strike and after discussing several other issues irrelevant to our purposes, issued an order prohibiting the overtime ban at certain locations. This is of no concern to the current essay. But the Board also reasoned as follows:

While it is clear that overtime is a subject of the current negotiations, considering the accumulation of related grievances, the appropriate resolution of the matter would seem to us to be to bring it before an arbitrator who would determine clearly if in fact overtime, according to the terms of the existing collective agreement, is voluntary on the part of each employee. This should be done concurrently with the continuation and completion of the current round of collective bargaining. It would have the beneficial effect of settling the problem temporarily, even if one or the other of the two parties eventually resorts to economic pressure, that is, to a legal work stoppage, to apply leverage in order to change a situation which, it feels, is unfavourable as a result of the arbitration and which could not be settled by negotiation.

During the public hearings held in connection with the Board's inquiry into this case, repeated adjournments were ordered to enable the Board to explore *in camera* directly with the parties, possibilities of a solution to this thorny problem. Among others, a suggestion was made to the parties that they proceed to expedited arbitration in order to deal with this part of the problem and to settle it, at least temporarily, until a new collective agreement is signed, or until such time as one of the parties deems it advisable to exercise its right to declare a strike or lockout, this suggestion was rejected . . . .

Let us now turn to the overtime ban. Although the employer has alleged in its application that this ban could have a disastrous effect on its programming across the entire French network, without exception, the employer was unable through its evidence to demonstrate this to the Board.

It is significant that the ban was in effect in the Montreal studios for at least three months before the date on which the application under consideration by the Board was filed . . . . It can safely be said, then, that the effect of the refusal by employees in the Montreal studios to work overtime on production schedules is not critical.

It is in light of these facts that the Board analyzed both the underlying source of the dispute over the overtime ban and the kind of remedy which could effectively re-establish the balance of forces at a critical point in negotiations for the renewal of the collective agreement, and at the same time ensure compliance with the essential provisions of the Code. Consequently because of the effects of the ban in Moncton and Quebec City, and since the refusal to work overtime is a strike prohibited by the Code, the Board orders an end to the ban in those two cities where it could have harmful effects, . . . . For the same reasons, the Board does not deem it either useful or necessary to

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14. *Canada Labour Code*, *supra*, note 3.



extend the effect of this order to the Montreal studios of the Corporation's French Services Division. *In addition, in an effort to improve the general climate of labour relations between the parties, and under the powers conferred on it under sections 182 and 183.1 of the Code, the Board orders the parties to submit the question of whether or not overtime is voluntary to an arbitrator who will proceed in accordance with the now familiar process of expedited arbitration. This should clarify the situation until the collective agreement is renewed, with or without a legal work stoppage.*<sup>15</sup> (emphasis added)

It is this additional aspect of the Board's order which is the central concrete issue lying at the heart of the Supreme Court's treatment of the *L'Acadie* case.

Let us turn for a moment to the general issue of the interpretation of sections 182 and 183.1 of the *Canada Labour Code* set out above. What is the Canada Labour Relations Board's approach and fundamental philosophy in administering that section and exercising its discretion thereunder? The Board's philosophy is best set out in its earlier decision in the *National Harbours Board*<sup>16</sup> case as follows:

It should be explained here that the Board's jurisdiction as created by the provisions of the above-quoted section 182 has existed only since Parliament's adoption of Bill C-8 and its implementation on June 1, 1978.

Being aware of the positive role that Parliament intended the Board to play in cases involving work stoppages, the latter therefore immediately developed a policy for applying this new jurisdiction. *This policy bears the mark of the desire not only to remedy the symptoms of problems arising in labour relations but also to do so in particular by determining the source of the malady causing the problems.*

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15. *Supra*, note 5, pp. 62-63. The formal order, set out at the end of the decision at pp. 64-65 reads, in its relevant parts, as follows:

3. Moreover, the ban on overtime constitutes an unlawful strike within the meaning of the Code and the Board so declares.

However, the Board has decided in the present circumstances and for the time being to exercise its discretion and not issue an order in this regard with respect to the Corporation's employees in Montreal, but hereby orders that the said ban be ended immediately in Moncton and Quebec City, that all the employees in the bargaining unit and the respondent union in these two locations comply with this order immediately, as well, the respondent union shall give notice of this order to all its members immediately;

4. The two parties, namely, the respondent union and the Canadian Broadcasting Corporation, French Services Division, are ordered to immediately submit the problem of whether or not overtime is voluntary, according to the provisions of the collective agreement now in force, to an arbitrator appointed pursuant to the provisions of s. 155(2)(c) and/or (d) of the Canada Labour Code, by means of one of the grievances which is now pending and which deals with this question. The arbitrator shall give priority to this matter, in accordance with the expedited arbitration procedure, and his decision should resolve this problem until the signing of a collective agreement which will replace the present one, which may contain different provisions on this subject.

16. [1979] 3 Can. L.R.B.R. 502.

The Board now has an experienced, dedicated support team composed of labour relations officers, and in the case of every application filed under section 182 or 183 (which, as the counterpart of section 182, deals with lock-outs), it can rapidly establish a date for a public hearing. However, at the same time, it immediately sends one of its officers to the scene of the dispute. The latter will then do his utmost, by meeting with the parties and using the method of his choice, to discover where the shoe pinches in the case of an unlawful work stoppage (strike or lockout). He has complete authority with the full support of the Board to resolve the problem in order to avoid a public hearing.

If he fails, he merely reports this fact to the Board panel assigned to hear the case and then the Board sits and hears the parties.

The judiciousness of this approach seems clear in that to date, the Board has heard only three of over twenty applications of this nature . . . .

In our opinion, Parliament was attempting to enlarge the arsenal of measures that the Board could use to assist the parties in voluntarily concluding collective agreements in an orderly manner, or settling work stoppages in an orderly manner during the term of a collective agreement. It is in this way that the Board has interpreted the basic, significant discretion given to it in sections 182 and 183. After giving the party in question the opportunity to be heard, the Board may decide not to issue an order even when faced with facts showing that an unlawful work stoppage exists. Everything depends on the higher interests to be satisfied in given circumstances: these higher interests may be summarized very simply. They involve creating or helping to create the factual situation most likely to promote healthy and orderly labour relations. In order to accomplish this, *the Board believes that in cases of unlawful work stoppages which are the result of disturbances in the relations between the parties, it is important to identify the cause in order to determine the remedy.* This is what it has instructed its officers to do in their meetings with the parties before the public hearing. In the foregoing, we mentioned the success of this policy and of the practice followed. However, even in the event that the Board's officer fails, it may happen that the Board will conclude after a public hearing that it may take the same action either by issuing an order containing specific directives conducive to remedying the cause of the disturbance or by refusing to issue an order.<sup>17</sup> (emphasis added)

Thus the basic remedial approach of the Board is to attempt to resolve and settle illegal work stoppages through the use of its labour relation officers. It is evident from the passages already set out above from the *L'Acadie* decision that this case was a "textbook" example of the Board's approach in action. Here the labour relations officer responded rapidly, but this was one of those statistically rare cases in which the case reached, again rapidly, the Board for decision. It is also evident from the passages quoted above<sup>18</sup> that the Board attempted even at this stage to craft a solution to the underlying dispute between the parties concerning overtime, and thus avoid final adjudication. In the end, the Board did adjudicate, did issue an order ending the illegal strike, but also attempted

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17. *Id.*, pp. 503 and 508.

18. *Supra*, note 15.

to fashion a remedy to put an end to the underlying dispute of which the illegal work stoppage was but a symptom. It is worth pausing, before citing high judicial approval for such an approach, in order to consider this approach from the point of view of history and commonsense.

Without citing chapter and verse, it is common knowledge to those with an association with labour relations, certainly in this country, that the problem of fairly and efficaciously adjudicating and remedying illegal work stoppages has been one of the most controversial and bitter issues of this century. Too much has been written about the *ex parte* labour injunction over too many years to necessitate repeating the familiar litany of defects here.<sup>19</sup> In light of this history it is worth wondering whether one can read the Board's statement of its fundamental philosophy, and the *L'Acadie* decision in particular, as anything but a diligent effort to understand fully the situation before it, to apply the law, but also to go beyond a remedy which addresses only the symptom of the problem to a remedy which addresses the underlying cause. This is, it is submitted, in both form and substance the very antithesis of the traditional judicial response to illegal work stoppages which involves little understanding of the true situation involved and a remedy which urges a totally superficial reversion to an alleged "status quo". As a matter of commonsense, it is a tough argument to make that the Board's approach and decision in the *L'Acadie* case does anything but confirm the orthodox understanding of the purpose of sections 182 and 183.1 of the *Canada Labour Code* (to avoid the defects of the "labour injunction"), and the wisdom of the alternative sort of remedy there provided.

It should come as no surprise then that this understanding of the genesis and purpose of this aspect of labour board authority is commonly understood and often articulated in our law. Indeed in establishing its approach to its remedial power in the *National Harbours Board* decision<sup>20</sup> the Board was able to rely upon the decision of the Federal Court in *McKinlay Transport Limited v. Goodman et al.*<sup>21</sup> in which Thurlow J. stated:

There is a further consideration that appears to me to bear on whether or not the discretion should be exercised to grant an interlocutory injunction even if the Court has jurisdiction to entertain the action and the application and the

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19. An excellent starting point is LASKIN, "The Labour Injunction in Canada: A Caveat", (1937) 15 *Can. Bar Rev.* 270.

20. *Supra*, note 16, p. 508.

21. (1978) 90 D.L.R. (3d) 689. This case is not cited for the proposition that all courts now exercise a discretion to refuse to grant injunctions in the face of new labour board powers — this point remains controversial. See, for example, *Glance Bay*, (1979) 37 N.S.R. (2d) 79 and *Eastern Provincial Airways* (1983) 60 N.S.R. (2d) 36. Rather, the point is the Court's understanding of the history and purpose of the amendments to the *Canada Labour Code*.

case for an injunction is otherwise made out. Parliament has recently enacted extensive amendments to the *Canada Labour Code* which, in my view, demonstrate that the purpose was to vest in the Canada Labour Relations Board extensive and far-reaching powers to deal with labour relations in the works and undertakings to which the statute applies including the granting of injunctions enjoining employees from participating in strikes, and the making of orders requiring employees to perform the duties of their employment — a power not exercised by a Court of equity. Not only has the Board been vested with powers more extensive and particular than those of the Courts in such situations but the area in which the Board's decisions are open to attack and review has been narrowed by the amendments. The power previously reserved to the Minister of authorizing prosecution for violation of the Act has also been vested in the Board. In the face of these provisions, even though the legislation does not specifically purport to withdraw from the Superior Courts' jurisdiction to issue injunctions in respect of conduct arising out of labour disputes, it seems to me that the Court can and ought to take into account in exercising its discretion that Parliament has shown its disposition that such matters be dealt with by the Board on the principles which it applies in the search for achievement of the objects of the legislation rather than by the Courts. It is perhaps unnecessary to add that Court injunctions have not been notoriously successful as a device for achieving harmonious labour relations or for resolving labour disputes.<sup>22</sup>

Of even greater significance for current purposes are the words of the Supreme Court of Canada itself in *Tomko v. Labour Relations Board (Nova Scotia) et al.*<sup>23</sup> In that case the Supreme Court rejected a "section 96" constitutional challenge to the powers of the Nova Scotia Labour Relations Board to control illegal work stoppages. The argument was that the power utilized by the Board was a section 96 power to issue an injunction. It was argued in that case that "the power to issue cease and desist orders . . . was not essential the maintenance of the integrity of the collective bargaining system envisaged by the . . . [Act] . . . but rather provided a remedy open concurrently with or alternatively to the injunction that Superior Court Judges could issue in like circumstances . . .". This ill-informed argument Chief Justice Laskin (in a 8-1 decision, de Grandpré J. dissenting) rejected, stating:

What is significant about the provision for a cease and desist order obtainable from the Board or, in the construction industry from the special panel for that industry is that it makes allowance for efforts at settlement before or after the making of an interim cease and desist order. *The fluidity and the volatility of labour relations issues must be counted as weighing heavily with the Legislature in providing this alternative means of seeking an accommodation between employers and trade unions under the superintendence of the Board or its special division and with the assistance of the Department of Labour, an accommodation that puts to one side the alternative routes of prosecution and Court injunction. The policy considerations are evident, and in pursuit thereof*

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22. *Id.*, pp. 691-692.

23. (1975) 69 D.L.R. (3d) 250.

the mechanism of a cease and desist order to restore the lawful *status quo ante* seems to me to be a rational way of dealing administratively with a rupture of peaceful labour relations.

The Labour Relations Board or the Construction Industry Panel does not approach the issue of a cease and desist order in the same way that a Court approaches the issue of an injunction. Unlike a Court, the Board or Panel makes its own investigation of the issues raised by the complaint and decides for itself on its own findings whether an interim order should issue; and it is required to do so irrespective of any balance of convenience once it is satisfied that there is an unlawful work stoppage. *The Board or Panel is involved in continuous supervision directed to achieving a settlement, if it can, and this is something which ordinarily militates against the issue of an injunction by a Court.* There are other differences in the respective approaches, such as the absence of any requirement under section 49 of an undertaking as to damages, and it may be doubted that requirements of full disclosure or clean hands are as compelling under section 49 as they are where an interim injunction is sought.

*The scope of superintendence by the Legislature, through an administrative agency, of the initiation and continuation of collective bargaining relations between employers and trade unions without rupture has been considerably increased, and this monitoring of the quality of those relations has necessitated the introduction of new methods for control and vindication of the policies of the legislation.* It has involved the adaptation to the legislative and administrative regime of remedies that in another, more individualistic, context had been involved and are still being exercised by the ordinary Courts.<sup>24</sup> (emphasis added)

In these words we find a frank and thoughtful acknowledgement of the “evident” policy considerations for entrusting to labour relations boards the difficult issue of dealing with illegal work stoppages, and vesting them with powers and processes radically different from those possessed by common law courts. It is in the context of these remarks that the decision of the Board in *L’Acadie* can be seen as simply a straightforward example of the legislatively desired process in action. Of even further significance in *Tomko* is the manner in which the Court dealt with the argument that the Board had “exceeded its jurisdiction in including in the interim order directions for remedial action not sought in the complaint.” Under the Nova Scotia legislation in question the Board had the authority to issue an order “requiring any person . . . to . . . cease and desist any activity or action or to perform any act or commence any activity or action or to perform any activity or commence any activity or action stated in the . . . order.”<sup>25</sup> It appears that the argument against the Board’s order was based on the fact that the Board ordered the union’s business agent, Tomko, to direct the employees involved in the illegal work stoppage to return to work. Laskin dealt with this argument that the Board had erred because it had included this unrequested part of its order, as follows:

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24. *Id.*, pp. 257-258.

25. *The Trade Union Act*, S.N.S. 1972, ch. 19 as amended, s. 49(2).

There remains only the question whether the terms of the order must be limited to the exact requests for relief sought in the complaint. There is no such limitation in s. 49(2) which empowers the Board (or the Panel) to direct an interim order to 'any person' and against 'any activity or action'. *Indeed, having regard to the purpose of the authority, it could not be otherwise so long, at least, as the activity or action whose cessation is directed by the interim order or is required thereunder is related to or connected with the illegal work stoppage.*<sup>26</sup> (emphasis added)

Because that part of the order directed at Tomko was "related to or connected with the illegal work stoppage", given the "purpose of the authority" it could not be limited in a way to deny such powers.

Against this background it is submitted that the decision of the Board in *L'Acadie* is merely a demonstration of the results of the transfer to labour boards of broad powers to effectuate the goal of industrial peace so central to the legislation. And the authorities just reviewed confirm the judicial perception of the need for such an authority, and of the inadequacy of the preexisting judicial response.

### III. THE DECISION OF THE FEDERAL COURT OF APPEAL

The union was not satisfied by the treatment it received from the Board and made an application under section 28 of the *Federal Court Act*<sup>27</sup> to have the Federal Court of Appeal "vacate" the decision of the Board on two grounds. The first, and for our purposes largely irrelevant ground, was the finding that the overtime ban was a strike within the meaning of the legislation. The second and important ground was that the Board erred in ordering the parties to submit the underlying dispute regarding the nature of overtime to arbitration. As is well known, the Canada Labour Relation Board is better protected from judicial review at the hands of the Federal Court of Appeal than other federal tribunals, judicial review being limited by section 122(1) of the *Canada Labour Code* to review under section 28(1)(a) of the *Federal Court Act* to errors of "jurisdiction" and questions of natural justice. Mere errors of law are not reviewable errors. Much more is said below about the concept of "jurisdiction", but at this point we can simply note that the end result of this bit of legislative cross referencing is to provide for the Canada Labour Relations Board the same protection enjoyed by all labour relations boards protected by a standard privative clause.<sup>28</sup> What did the Federal Court do?

To put it simply, the Federal Court of Appeal held<sup>29</sup>, issuing very brief reasons, that the Board had not exceeded its jurisdiction and

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26. *Supra*, note 23, p. 262.

27. R.S.C. 1970 (2nd supplement), ch. 10.

28. This is discussed at length below.

29. [1982] 1 F.C. 471.

thus committed no reviewable error in finding that the overtime ban constituted a strike, but had exceeded its jurisdiction when it ordered arbitration of the underlying issue of interpretation of the collective agreement. While the reasons are brief and thus cryptic, I believe they contain the seeds of a distinction which the Supreme Court brought to fruition in reasons of unfortunate length. Pratte, J. speaking for the three member panel of the Federal Court of Appeal stated:

In its application the Canadian Broadcasting Corporation asked the Board to exercise the authority conferred upon it by section 182. In exercising that authority, the Board had to hear the application and decide whether it should be allowed. Among other questions, the Board had to decide whether the concerted refusal of the employees to do overtime constituted a strike within the meaning of the Act. It was for the Board to answer this question, and in doing so, it remained within the limits of its jurisdiction unless its reply was based on a manifestly unreasonable interpretation of the Act.<sup>(4)</sup> In deciding that the refusal to do overtime constituted a strike, the Board relied on a large number of precedents; I think it is clear that its decision cannot be said to be manifestly incorrect or based on an unreasonable interpretation of the Act. It follows that, even if the Board was mistaken on this point, it did not on that account cease to have jurisdiction over the matter.

<sup>(4)</sup> *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation* [1979], 2 S.C.R. 227.<sup>30</sup>

The court then addressed the Board's power to order arbitration of the underlying dispute. After setting out sections 182 and 183.1, set out above,<sup>31</sup> the court simply stated:

I think it is clear that the order requiring the problem of overtime to be referred to arbitration is not one which is authorized by section 182. This can readily be seen from reading paragraphs (a), (b), (c) and (d) of that section. The order also does not appear to be authorized by section 183.1. The only part of that section which is relevant to this issue is paragraph 183.1(1)(a). In my view, this provision does not enable the Board to make any orders other than those provided for in sections 182 and 183; it only empowers the Board to attach the conditions which it considers appropriate to the orders which it makes under those sections. I therefore conclude that neither section 182 nor section 183.1 gave the Board the power to make the order contained in paragraph 4 of its decision.<sup>32</sup>

Thus the entire text of the Court's "reasoning" is contained in the words "I think it is clear . . ." and "this can be readily seen from reading . . .". These insights are then supplemented by "in my view, this provision does not enable . . ." and "I therefore conclude . . .".

What is noteworthy for a Canadian administrative or labour lawyer is that these remarks are unqualified by any standard of curial

30. *Id.*, pp. 474-475.

31. *Supra*, note 14 and text.

32. *Supra*, note 29, p. 476.

deference to the Board, nor even a nod to the issue of whether the Board's vision of its powers was a "manifestly unreasonable interpretation of the Act", the very test the Court had utilized several paragraphs earlier when assessing whether the Board had committed a "jurisdictional error" on the first issue of whether the overtime ban constituted a strike.<sup>33</sup> The Federal Court of Appeal nowhere offers an explanation for its different approach to the "jurisdictional nature" of the two grounds put forward. On the first issue the court applied the well known *CUPE* test under which court disagreement with the Board's interpretation is insufficient to constitute reviewable error. On the second issue it did not apply this standard of restraint. It appears sufficient that the Court disagreed with the Board. Why? (The Federal Court of Appeal did go on to find that section 121 of the *Canada Labour Code* offered no comfort to the Board, and then the Court relieved itself of the following remark:

. . . as I understand it the Act does not impose on the Board a duty to resolve labour disputes which may be the cause of strikes.<sup>34</sup>

This, it is submitted, is an extraordinary statement. It reflects a wholly impoverished vision of Canadian labour law and the role of Canadian labour relation boards in administering that law.)

The thrust of the Supreme Court of Canada's lengthy reasons is to instruct us upon the distinction which the Federal Court of Appeal drew and the different treatment which the two separate grounds of review received. We are introduced to the idea that some provisions of a statute "confer jurisdiction" while others do not. It is my view that the true significance of the decision and of the distinction cannot be understood without placing the decision of the Supreme Court, albeit briefly, in historical context. This I turn to do now.

#### IV. JUDICIAL REVIEW IN THE SUPREME COURT OF CANADA A BRIEF REVIEW

The standard of judicial review of labour relations boards, or more appropriately, the problem of the proper institutional relationship between courts and boards, is an issue concerning which imperials of ink have been put to use. There is neither time for, nor utility in, reviewing in any detail what is commonly travelled territory. It is in my view, however, useful and important to draw a distinction between two eras or periods in the Supreme Court of Canada's involvement with judicial review

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33. *Supra*, note 30.

34. *Supra*, note 29, p. 477.



of labour relations boards and labour arbitrators.<sup>35</sup> It is critical to draw a line, roughly of course, between cases decided before 1979, and those decided subsequently. The fundamental thesis is that during the earlier period judicial review consisted of an unprincipled, aggressive, and wholesale substitution of the views of the Court for the views of the legislatively selected and created specialized labour relations decisionmakers — not only labour relations boards, but labour arbitrators. The results<sup>36</sup> were unfortunate if not crippling blows to statutory purposes and statutory or collective agreement rights. The Court's record on these matters received sustained and accurate criticism, and the most significant errors made by the Court were systematically reversed by legislative amendment. In the second, post-1979 era, the Court reformed its attitudes towards its relationship with specialized labour law decisionmakers, acknowledged their purpose and statutory role, and adopted a policy of nonintervention and judicial restraint in reviewing their decisions. This division is not here proposed for the first time, and it seems to me to be one which the Supreme Court has itself in effect acknowledged.

#### A. THE EARLY YEARS — PRE-1979

There is no useful purpose served by a restatement of the record of the Court in reviewing the decisions of labour relations boards and labour arbitrators from the introduction of collective bargaining statutes based on the Wagner Act model in the 1940s, until the late 1970s. That task has already been performed. Indeed, the Court's role had been systematically and thoroughly studied by our most articulate, knowledgeable, and influential labour law commentators.

In 1952 Bora Laskin published "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses"<sup>37</sup> in the *Canadian Bar Review*. At this stage of Canadian labour law history the Supreme Court of Canada had yet to speak to the issue of judicial review of labour relations boards protected by a "a privative clause".<sup>38</sup> Yet Laskin was, at this early stage, capable of describing and condemning the results of the lower courts' involvement with this issue in a manner that was to retain a discomfoting

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35. This is a point which I (with assistance originally) have developed at length in a series of essays in the *Supreme Court Law Review*, volumes 1, 2, 3 and 5. These essays are: CHRISTIE, LANGILLE, STEINBERG, "Developments in Labour Law: the 1978-79 Term"; STEINBERG and LANGILLE, "The 1979-80 Term"; LANGILLE, "Developments in Labour Law: The 1980-81 Term"; and LANGILLE, "Developments in Labour Law: The 1981-82 Term". These are hereinafter referred to as "Developments — 1978-79" etc.

36. I do not have the time to review the substantive decisions here.

37. *Loc. cit.*, note 2.

38. *Id.*, p. 992.

relevance for our labour law for the next quarter century. The piece is a useful reminder of Bora Laskin's remarkable intellectual powers and his dominance of Canadian labour law scholarship during the period.<sup>39</sup> Laskin set the stage for his discussion with a brief outline of Canadian national labour law policy:

Less than a decade has passed since compulsory collective bargaining legislation was introduced into Canada. During this period such legislation has become part of the law of Canada and of each of its ten provinces. The presuppositions of this legislation in promotion of industrial peace were grounded on unhappy experiences in labour relations (especially in relation to problems of union recognition) and on the faith that a great deal of existing industrial strife would be dissolved by a legislative solution making compulsory negotiation the necessary consequence of a prior determination of a trade union's representative character. The problems involved in the administration of this policy induced general reliance on a bi-partisan board, headed by an independent chairman, as the agency best suited to make it work. This choice of a non-curial tribunal, composed of persons representing labour and management thinking, was fortified in the case of Canada and of eight of the provinces by the introduction of privative clauses which, in varying terms, purported to exclude review of board determinations by the courts. The purpose of this article is to examine the extent to which the provincial courts have 'flouted' this expression of a legislative policy.<sup>40</sup>

Laskin then outlined the now familiar judicial technique utilized by the courts to effect this result — that of simply declaring that the privative clause could preclude review of errors of law plain and simple, but not of "jurisdictional" errors. Then the now classic statement of the fundamental criticism of this bit of judicial handiwork was set out:

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

At the threshold of this inquiry it may be well to make the assertion that there is no constitutional principle on which courts can rest any claim to review administrative board decisions. In so far as such review is based on the historic supervisory authority of superior courts through the use of the prerogative writs of certiorari or mandamus, or their modern equivalents, it must bow to the higher authority of a legislature to withdraw this function from them.

We may well feel that judicial supremacy is the highest of all values under a democratic regime of law, and the value to which even the legislature should pay tribute. But we have not enshrined it in any fundamental constitutional law or in our political system. On the contrary, the cardinal principle of our system of representative government, inherited from Great Britain, has been

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39. The role of Bora Laskin in Canadian labour law is more completely described in BEATTY & LANGILLE, "From Vision to Legacy — Bora Laskin and Labour Law", (1985) 35 *University of Toronto Law Journal* 672.

40. *Loc. cit.*, note 2, pp. 986-987 (references omitted).

the supremacy of the legislature. In Canada this has been modified only through a distribution of legislative power consonant with federalism and by a few guarantees such as those relating to education, language and the independence of the judiciary. We must not then delude ourselves that judicial review rests on any higher ground than that of being implicit in statutory interpretation. In this connection the term 'jurisdiction' has become the convenient umbrella under which the provincial courts have chosen to justify their continual assertions of a reviewing power. Buttressed by security of tenure not enjoyed by administrative boards, and surrounded by a tradition of impartiality, which is strong enough to make people accept from judges clichés and social and economic doctrine they would not accept from politicians, members of our superior courts are inhibited in their conduct only by their own sense of self-restraint; and, of course, by the threat of appeal to other judges in the same hierarchy if a right of appeal exists. Where it does not, only self-denial controls a high court judge. Removal for misbehaviour, preserved in section 99 of the British North America Act, in conformity with the Act of Settlement, means in fact a guarantee of independence.

We would not, of course, have it otherwise. It does not follow, however, that the sacred privilege of making mistakes, conferred on superior court judges, must be denied to any other tribunal, with whose opinions these judges disagree . . . . If we are to have judicial review, let it be as an open avowal of its desirability. But circumventing the privative clause, courts needlessly and gratuitously involve themselves in matters of policy. It may be urged, with justification, that all judicial work exhibits such involvement; but evasion of privative clauses through specious interpretation and unsupported assumptions is a trespass on the policy functions of another agency. Such trespass has, in the past, evoked criticism where the statutory agency was not protected by privative clauses. In the face of such enactments, judicial persistence in exercising a reviewing power involves an arrogation of authority only on the basis of constitutional principle (and there is no such principle) or on the basis of some 'élite' theory of knowing what is best for all concerned.<sup>41</sup>

Laskin then reviewed the cases and concluded as follows:

What have been the grounds upon which the courts have interfered with labour board orders? An examination of the cases discloses that the courts treat certiorari to labour boards as if they were sitting on appeal from the verdict of a jury. . . . Does this mean anything less than that board orders will be upheld only if the courts themselves would have made them? Why have a labour board?<sup>42</sup>

For Laskin the term jurisdiction was a "comforting conceptualism"<sup>43</sup> and

. . . simply a compendious expression covering the canons of curial behaviour, including matters of evidence and procedure. This being established, it is only necessary for the courts to say that privative clauses do not oust review on matters of jurisdiction. By this simple semantic device labour board action is wide open to reversal.<sup>44</sup>

41. *Loc. cit.*, note 2, pp. 989-991 (references omitted).

42. *Id.*, p. 994.

43. *Ibid.*

44. *Id.*, p. 996.

It cannot be emphasized just how crucial these insights are for the entire history of the Supreme Court's involvement with judicial review of both labour relations boards and labour arbitrators during this early era. This issue was at rock bottom a simple constitutional one — the acts of the courts constituted a “flouting” of the fundamental doctrine of the supremacy of Parliament.<sup>45</sup> It is worth reflecting upon the analysis Laskin offered in 1952 for its relevance has not diminished with the passage of time.

In 1967 Harry Arthurs' “Developing Industrial Citizenship: A Challenge for Canada's Second Century” appeared in the *Canadian Bar Review*.<sup>46</sup> This piece contains the most carefully crafted arguments about the radical disjunction between the judicial and the administrative worlds. He wrote as follows:

The shift from courts to boards has not been accomplished without difficulty, nor is it by any means an established fact, even after a quarter-century of modern labour legislation. Juridical tradition is strongly opposed to the notion that labour-management relations exist in an industrial Alsatia, into which the royal writ does not run. In earlier times, the King's courts waged a vigorous contest to win jurisdiction from local and parochial bodies. In this century, many judges have undertaken the task of protecting citizens from the ‘new despotism’ of administrative tribunals.

Yet the courts have proved to be their own worst enemy in the contest for exclusive or even primary jurisdiction in labour matters. The Workmen's Compensation Act was the direct product of the courts' refusal or inability to safeguard the physical interests of employees. The doctrinal vagueness, procedural awkwardness, and alleged bias of the courts in regulating picketing led to their virtual ouster from this activity in England in 1906, and in the United States in 1932, and to violent demands for similar action in Canada today. The early refusal of the courts to enforce collective agreements, coupled with the light-hearted judicial observation that the remedy for breach is ‘not an action . . . but the calling of a strike’, consigned the protection of contractual rights to arbitration. The experience of the Ontario Labour Court in 1943-1944 in administering the first collective bargaining statute was apparently not satisfactory enough to warrant its resumption in the post-war era. The inappropriateness of criminal sanctions in labour relations has led the parties to virtually ignore the criminal courts as a forum for regulating wrongful conduct. The uninhibited judicial penchant for prerogative writ review of the decisions of labour relations boards has spawned several generations of privative clauses, each more sophisticated than its predecessors, each equally ineffective against the onslaught of jurisdiction-jealous jurists. All of these seemingly diverse developments are bound together by a common theme: the courts often seemed determined to handle labour litigation in a way which might have been consistent with general jurisprudential concepts, but which did not recognize the special needs and traditions of the industrial community. As a

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45. Still with us now, outside of Charter problems. I am not unaware of *Crevier v. A.-G. Quebec*, (1982) 127 D.L.R. (3d) 1 (S.C.C.).

46. (1967) 45 *Can. Bar Rev.* 786.

result, the parties and the legislators came to depend less and less on the courts as the protectors of private rights or public policy.

. . . [T]he proliferation of boards [is not] solely a negative reaction to the regular courts. It reflects, as well, a desire to bring to industrial adjudication new procedures, evidentiary rules, and remedies. To some extent these aims have been accomplished. But the major rationale of the boards is more basic yet: they are to decide cases not on common law principles, but in accordance with industrial jurisprudence — the statutes, customs and contracts which operate exclusively in the world of labour relations.

This uniqueness of both procedural and substantive rules in turn complicates the relationship between courts and boards. When board decisions are reviewed, they are frequently measured with a common law yardstick rather than evaluated in their own context. Boards may therefore be tempted to become increasingly court-like in order to avoid judicial censure. When board decisions are quashed, the courts may interject unsuitable and incongruous doctrines into well-integrated administrative policies or procedures. Thus the boards' ability to handle the problems assigned to them may be seriously impaired. Finally, when courts encounter labour problems in the context of conventional litigation, they tend to deal with them in a conventional way, rather than remit them to specialized labour tribunals. Litigants are therefore given a choice of forums and a choice of substantive rules, with the result that inconsistent decisions may co-exist in related matters. This, again, dilutes the distinctiveness and effectiveness of industrial adjudication.<sup>47</sup>

This was followed by a detailed consideration of the nature of industrial decisionmakers as opposed to courts, and the processes invoked by each. This is a theme to which Professor Arthurs has recently returned in "Re-Thinking Administrative Law: A Slightly Dicey Business"<sup>48</sup> and "Protection against Judicial Review".<sup>49</sup>

By 1971 the Supreme Court of Canada had provided Paul Weiler with more than enough ammunition to defend the thesis explicit in his title "The 'Slippery Slope' of Judicial Intervention: The Supreme Court and Canadian Labour Relations 1950-1970".<sup>50</sup>

Weiler summed up his views of the labour board cases in the following way:

It is impossible to perceive any real pattern in these decisions. Perhaps the Court does not really care about the issue of reviewability. If it agrees with the decision, it is unreviewable. If it disagrees, it is reviewable and will be quashed. *If this is the Court's attitude, one wonders who is to keep the Court itself within its proper jurisdiction and in compliance with the relevant law binding upon it.* Perhaps these cases can be explained in terms of the existence of a privative clause barring review for simple error of law but allowing review for jurisdictional errors of law. . . . I feel the distinction between jurisdictional and non-jurisdictional issues, based on substantive legal requirements in the

47. *Id.*, pp. 813-815 references omitted.

48. (1979) 17 *Osgoode Hall L.J.* 1.

49. (1983) *Revue du Barreau* 277.

50. (1971) 9 *Osgoode Hall L.J.* 1.

statute, is not ultimately tenable. Perhaps constitutional law . . . , matters of basic public policy . . . , natural justice . . . or procedural requirements . . . can be handled in that way, but no defensible grounds have been articulated in respect of the typical kind of question. *Either a principle of full review, or no review, or review only in terms of the 'rational compass of the statute' must be adopted if we are to have any law in this area at all. It seems safe to predict that only the Supreme Court can give us this kind of principled direction, but recent indications are that we will have to wait some time for it.*<sup>51</sup> (emphasis added)

His view of the arbitration cases in which the Supreme Court had involved itself was summed up in the following passage:

There are few areas of Canadian law where the Supreme Court has done a poorer job than in its efforts in the area of collective agreement and labour arbitration.<sup>52</sup>

In two articles published in the *Osgoode Hall Law Journal* in the 1970s George Adams searchingly revealed the inadequacy of the Supreme Court's view of its relationship to labour arbitrators and concluded:

Few areas of Canadian law reflect 'arid legalism' so common to judicial review of arbitration awards<sup>53</sup>.

If the words of the most important contributors to the fashioning of Canadian labour law policy (which is an honest appraisal of the status of Laskin, Arthurs, Weiler and Adams) are insufficient to paint in broad strokes the structure of judicial review in this dark era, then one can recall simply two cases, *Metropolitan Life*<sup>54</sup> on the labour board side, and *Port Arthur Shipbuilding*<sup>55</sup> on the arbitration ledger, which capture and symbolize the aggressive inadequacy of the Court's work in this area. No one familiar with the history of Canadian labour law can ignore these symbols. I believe it is acknowledged by all who have taken a fair look at the Court's work during this era, including the Supreme Court itself, that judicial review of labour relations boards and arbitrators, with or without the protection of a privative clause, meant simply a direct appeal to the courts, and the transparent substitution of the Court's own uninformed vision of the right solution to the individual situations brought before it. Such action flouted the choice of the Legislature of specialized tribunals

51. *Id.*, p. 33 reference omitted.

52. *Id.*, p. 70.

53. The two articles are "Bell Canada and the Older Worker: Who Will Review the Judges?", (1974) 12 *Osgoode Hall L.J.* 389, and "Grievance Arbitration and Judicial Review in North America", (1971) 9 *Osgoode Hall L.J.* 443. The quote is from the latter at p. 508.

54. [1970] S.C.R. 425, reversing (1969) 2 D.L.R. (3d) 652 (Ont. C.A.) and (1968) 68 C.L.L.C. 423 (Ont. H.C.). The original decision of the O.L.R.B. is found at (1967) 67 C.L.L.C. 1013.

55. [1969] S.C.R. 85, reversing (1967) 62 D.L.R. (2d) 342 (Ont. C.A.).

and thwarted the fundamental statutory policies of efficiency and expertise. Paul Weiler best captured the essence of the problem by describing the Court's uninhibited forays into labour matters as the actions of "absentee management".<sup>56</sup>

Insofar as a privative clause stood in the way of the Court's inflicting their own views upon the parties the "comforting conceptualism"<sup>57</sup> of "jurisdiction" offered a right of passage into forbidden territory.

Thus by the end of this unhappy era, review of arbitrators, not protected by a privative clause, was a booming business. Insofar as the "very question" doctrine protected "consensual" arbitrators from review, in theory, it was simply ignored in practice because no question was ever the "very question".<sup>58</sup> On the labour board side the presence or absence of a privative clause made no difference. The Court would find a preliminary or collateral jurisdictional error, and thus decide the Board never acquired jurisdiction. Or it could declare that the Board had jurisdiction, but somehow lost it on its way to its conclusion. If all else failed the Court could adopt the extraordinary technique of declaring, in the teeth of the evidence, that the board had asked itself the "wrong question".<sup>59</sup> The details and academic paraphernalia needed to support these propositions are more adequately provided in the articles discussed above, along with the substantive critique of the results of such a performance by the Court. What is crucial is that the bottom line was a major invasion by the courts of the decisionmaking processes established by national labour law policy, and the thwarting of those processes and of that policy as a result. Thus we became witnesses to a familiar and recurring bit of institutional choreography — a labour board or arbitration decision — judicial review quashing the decision — legislative overruling of the judges. Of this three step, three party tango *Metropolitan Life*<sup>60</sup> and *Port Arthur Shipbuilding*<sup>61</sup> are merely two memorable examples.

It will be recalled that in "The Slippery Slope of Judicial Intervention" Professor Weiler, in an almost desperate tone, asserted:

Either a principle of full review, or no review, or review only in terms of the 'rational compass of the statute' must be adopted if we are to have any law in this area at all. It seems safe to predict that only the Supreme Court can give us this kind of principled direction, but recent indications are that we will have to wait some time for it.<sup>62</sup>

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56. WEILER, *In the Last Resort*, Carswell, 1974, p. 134.

57. *Supra*, note 2, quoted above in note 43.

58. See the *Bell Canada* case discussed by ADAMS, *loc. cit.*, note 53.

59. See *Metropolitan Life*, *supra*, note 54.

60. *Supra*, note 54.

61. *Supra*, note 55.

62. *Supra*, note 50, quoted above in note 51.

As it turned out Professor Weiler was right, and the Canadian labour relations community had, in fact, to wait eight years from the time of his writing for the Supreme Court to fulfill his prophesy. And of the trio of options Weiler posited for the Court (full review, no review, or review in terms of the 'rational compass of the statute') the Court, not surprisingly, opted for a version of the last.

#### B. THE NEW ERA 1979-1984(?)

In the late 1970s the Supreme Court openly reevaluated its approach to the issue of judicial review and significantly revised its approach to dealing with the decisions of labour relations boards and arbitrators. Simply put, the Court took seriously much of the criticism just outlined of its own earlier work. It set out, in *CUPE v. New Brunswick Liquor Corporation*<sup>63</sup> the essence of the reasoning underlying its new approach to specialized tribunals. But while many understand the general tenor of the *CUPE* decision, it is my view that in a series of cases following *CUPE* the Court established what I have described elsewhere as a "unified and restricted theory of judicial review".<sup>64</sup> As one cannot understand the significance of this new era without an appreciation of what went before, so one cannot appreciate the impact of *L'Acadie* without learning of this period. I turn now to outline, in abbreviated form, my view that the Court in this post-1979 period constructed a "unified and restricted" theory of judicial review.

The starting point and the cornerstone of the Supreme Court's new policy is found in *CUPE v. New Brunswick Liquor Corporation*<sup>65</sup> a decision of the 1979 term. There the New Brunswick Public Service Labour Relations Board had ruled that the Corporation had violated the relevant Act by employing managerial employees to perform work which would have been otherwise performed by striking employees. The lower courts ruled that that the board's interpretation of the Act, to the effect that managerial employees could not be so utilized, was a matter "preliminary or collateral" to the main finding of violation, and that an error on such an matter could not confer "jurisdiction" upon the board.<sup>66</sup> This was, of course, a familiar "move" in the "jurisdiction" game. Mr. Justice Dickson, responded for the Supreme Court of Canada to this well established bit of judicial gamesmanship. It bodes well to keep in mind the ringing words of Laskin, Arthurs, and Weiler when reading this now familiar passage:

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63. (1979) 97 D.L.R. (3d) 417.

64. See, for example, LANGILLE, "Developments 1981-82", *loc. cit.*, note 35, p. 246.

65. *Supra*, note 63.

66. See Limerick J.A., (1978) 21 N.B.R. (2d) 441, p. 448.



With respect, I do not think that the language of 'preliminary or collateral matter' assists in the inquiry into the Board's jurisdiction.

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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.

...

At this stage, it is important to have in mind the privative clause found in s. 101 of the Act, which protects the decisions of the Board made within jurisdiction. Section 101 reads:

101(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, the Arbitration Tribunal or an adjudicator is final and shall not be questioned or reviewed in my court.

(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto*, or otherwise, to question, review, prohibit or restrain the Board, the Arbitration Tribunal or an adjudicator in any of its or his proceedings.

Section 101 constitutes a clear statutory direction on the part of the Legislature 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, as understood in Canada, and its labour relations sense acquired from accumulated experience in the field.

The usual reasons for judicial restraint upon review of labour board decisions are only reinforced in a case such as the one at bar. Not only has the Legislature confided certain decisions to the administrative board, but to a separate and distinct Public Service Labour Relations Board. That Board is given broad powers — broader than those typically vested in a labour board — to supervise and administer the novel system of collective bargaining created by the *Public Service Labour Relations Act*. The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of the Board members is all the more required if the twin purposes of the legislation are to be met. Nowhere is the application of those skills more evident than in the supervision of a lawful strike by public service employees under the Act. Although the New Brunswick Act is patterned closely upon the federal *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35, s. 102(3) is not found in the federal legislation nor, in fact, in any other public sector labour legislation in Canada. The interpretation of s. 102(3) would seem to lie logically at the heart of the specialized jurisdiction confided to the Board. In that case, not only would the Board not be required to be 'correct' in its interpretation, but one would think that the Board was entitled to err and any

such error would be protected from review by the privative clause in s. 101 . . . .<sup>67</sup>

In the end the Court articulated a test stated as follows: “‘Was the board’s interpretation so *patently unreasonable* that its construction cannot be rationally supported by the relevant legislation . . . ?”<sup>68</sup> (emphasis added)

This, it is submitted, is the adoption by the Supreme Court of the last of the three options put forward by Professor Weiler.

Thus in *CUPE* several major breakthroughs occurred. First, the Court openly reasoned in functional terms about the relative merits of courts and specialized decisionmakers in formulating its view of the appropriate relationship between those institutions. Second, the relationship was to be one of restraint. Third, the term “jurisdiction” was rightly abandoned and a test related to the issue of interpretation was substituted. The true significance of this becomes apparent below.<sup>69</sup> Fourth, and troubling in light of the *L’Acadie* decision, the concept of “jurisdiction” (in a sense of ability to “enter upon” a consideration of an issue) was retained as a useful device for distinguishing away several older precedents.

Nevertheless, the clear message to the community and to the lower courts, was that the rules of the game had been radically altered. Indeed, the Ontario Divisional Court endorsed Mr. Justice Dickson’s judgment in *CUPE* by stating that it

. . . can now be regarded as the new foundation of this branch of administrative law and renders it unnecessary any longer in these cases to indulge in the type of casuistic reasoning so frequently found in earlier cases.<sup>70</sup>

And in another case the same Court stated:

. . . the message is clear — a cautious approach must be taken by the Courts . . . The Board may well make a mistake. Unless that mistake is patently unreasonable, or so fundamentally erroneous, that it cries aloud for intervention . . . should not constitute a ground for depriving the Board of the protection of the privative clause.<sup>71</sup>

I return to the response of the lower courts below, but it is necessary first to outline how the Court at the same time and subsequently articulated a *unified* as well as restrictive theory of judicial review. Both elements of the thesis are important. First, that the new theory of judicial review is a restricted one is simply an appreciation of the *CUPE* rationale. This is familiar territory. That the new theory is a unified one is equally

67. *Supra*, note 63, pp. 421-424.

68. *Id.*, p. 425.

69. See *infra*, p.

70. *International Union of Operating Engineers, Local 793 and Traugott Construction Ltd.*, (1984) 6 D.L.R. (4th) 122, p. 131.

71. *Tandy Electronics and the United Steelworkers of America*, (1980) 115 D.L.R. (3d) 197, p. 210.

important. By this it is meant that the Supreme Court has applied the new rationale and the new restrictive test (of “patently unreasonably”) “across the board” to arbitrators and labour relations boards. But further, both to consensual and statutory arbitrators (thus eliminating the very question doctrine) and to labour relations boards protected or unprotected by a privative clause. To establish these propositions four cases must be examined, albeit briefly.

Following *CUPE* the construction of the new and unified theory of judicial review was carried on apace. Three months after handing down the *CUPE* decision regarding labour relations boards, the Court reassessed its relationship to arbitrators in the *Volvo Canada Ltd.*<sup>72</sup> decision. That case, in effect, declared the very question doctrine, restricting review of consensual arbitrators, clinically dead, but substituted the following test for judicial review of such arbitrators:

. . . arbitration is not meant to be an additional step before the matter goes before the courts, the decision is meant to be final. It is therefore imperative that decisions on the construction of a collective agreement not be approached by asking how the court would decide the point but by asking whether it is a ‘patently unreasonable’ interpretation of the agreement.<sup>73</sup>

Thus the test of “patently unreasonable” interpretation is substituted for the interventionist stance decried by Weiler, Arthurs, and Adams. The complete breakdown of the old distinction between consensual and statutory arbitrators, and the substitution of an unified and restrictive theory of judicial review came in the next term of the Supreme Court, when the decision in the *Douglas Aircraft Company of Canada Ltd.*<sup>74</sup> was handed down. This case involved a “statutory” arbitrator, heretofore not protected by the very question doctrine, and without a privative clause. Yet the Court, speaking through Mr. Justice Estey, held that the Court could only quash for reviewable errors, and that reviewable errors were those “which assume jurisdictional proportions”.<sup>75</sup> But then Mr. Justice Estey went on to state that such an error:

. . . must amount to an error relating to the construction of the constituting contract of such magnitude that the interpretation so adopted by the board may not be *reasonably borne* by the wording of the document in question . . . (emphasis added).<sup>76</sup>

While the language in *Volvo* and *Douglas Aircraft* was not exactly parallel, the essence of the reasoning points in one direction only, as has been pointed out:

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72. (1979) 27 N.R. 502.

73. *Id.*, p. 517, *per* Pigeon J.

74. (1980) 29 N.R. 109.

75. *Id.*, p. 139.

76. *Ibid.*

The decision on the proper scope of review is significant in several respects. From the purely labour relations perspective, the decision in *Douglas Aircraft* supplies further evidence that the Supreme Court has achieved a functional appreciation of specialized labour relations tribunals that was surely missing in the past . . . . Thus . . . limiting judicial review to errors of law that assume jurisdictional proportions merely reflects the purpose of labour arbitration, 'namely, the speedy, inexpensive and certain settlements of differences without interruption of the work of the parties'. Furthermore, throughout his decision on this point there is a clear indication that Mr. Justice Estey is aware of and sensitive to the legislative policies upon which labour arbitration rests and the context within which the rules of judicial review must be fashioned. The Court's appreciation of the instrumental nature of the arbitral process has matured, and the result is a more sensitive accommodation between the role of the courts and the role of labour arbitrators.

Substantively, the decision of the Court in *Douglas Aircraft* has judicially erected a protective wall around the decisions of labour arbitrators which comes credibly close to that created legislatively with the aid of privative clauses. By placing reviewable errors on a jurisdictional basis, the Court has made it clear that decisions of labour arbitrators ought not to be interfered with by the courts unless an error has been made in some fundamental sense. Further, although the decision in *Volvo Canada* did not speak in terms of jurisdictional error, the language used was indicative of a similar approach in cases of consensual arbitration. In fact, a strong argument can be made that the cumulative effect of *Volvo Canada* and *Douglas Aircraft* is to destroy any technical distinction between consensual and statutory arbitration and with it any possibility that the scope of review is a variable content.<sup>77</sup>

After *CUPE*, *Volvo*, and *Douglas Aircraft*, three of the four necessary parts of the theory were in place. Labour boards protected by a privative clause, consensual arbitrators, and statutory arbitrators were all to be dealt with in accordance with the new restrictive version of judicial review. The missing part of the puzzle was a labour relations board not protected by a privative clause. This place was filled in with the decision of the Court in the *Board of Governors of Olds College*<sup>78</sup> a decision where, after holding that there was no privative clause, and thus that a reviewable error was simply an error of law, Laskin C.J. stated:

*Certiorari* . . . is a long way from an appeal and is subject to restriction in accordance with a line of decisions of this court which, to assess them generally, preclude judicial interference with the interpretations made by the Board which are not *plainly unreasonable* (emphasis added).<sup>79</sup>

Any question about the decision as the final piece of the puzzle, and any ambiguity in the different wording in the *Volvo* and *Douglas Aircraft* decisions is surely removed by the following summation of the four cases by Chief Justice Laskin:

77. "Developments 1979-80", *loc. cit.*, note 35, pp. 251-252, as quoted in "Developments 1981-82", p. 247.

78. (1982) 42 N.R. 559.

79. *Id.*, p. 564.

Here the Public Service Employee Relations Board is operating in its home territory . . . . It was concerned with the interpretation and application of provisions confided by its constituent Act to its exclusive administration, with its decisions stated to have final and conclusive effect. In such circumstances, the proper approach by a reviewing court is not the blunt substitution of judicial review for the views of the Board but rather that expressed by Dickson, J., in *Canadian Union of Public Employees v. New Brunswick Liquor Corporation* . . . where he formulated the issue of scope of review as follows:

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

I should note that Dickson, J. was also dealing with a *Public Service Labour Relations Act* and with the administration of the Act by a board.

Mr. Justice Dickson's approach was adopted in *Volvo* . . . and is also evident in the reasons of Estey J., speaking for the Court in *Douglas Aircraft* . . . .<sup>80</sup>

Thus the Court completed *and summed up* its own remarkable achievement. Over several years and in four distinct cases covering the complete matrix of problems presented to the Court upon judicial review of specialized labour law decision makers, it had constructed a rational and restrained view of its role. It is only in light of the Court's own previous record, and the full blooded criticisms thereof by our best labour law scholars, that the significance of the theory can be understood. My own view is that the new theory was complete with the issuing of the decision in *Olds College* and I so wrote. It is my view that since writing on the basis of cases up to and including *Olds College*, the Supreme Court has affirmed the existence and viability of the new theory in a series of subsequent cases. The first case, involving judicial review of a labour arbitrator, was *Shalansky v. Board of Governors of Regina Pasqua Hospital*<sup>81</sup>. A minor problem arises here because the court has continued to speak in terms of consensual and statutory arbitration. But it is significant that that distinction made no difference to the standard of review. *Shalansky* is a very brief judgment in which the Chief Justice speaking for an unanimous court simply affirmed the unified and restrained standard of "patent reasonableness".

80. *Id.*, p. 567.

81. (1983) 83 C.L.L.C. 12,116 (S.C.C.). I treat the *Robervale Express* case, (1982) 144 D.L.R. (3d) 673, as very much an aberration in the court's performance. There the court, for purposes of the Quebec *Civil Code* and provisions on review of statutory tribunals, embarked upon a long enquiry into whether arbitrations under the *Canada Labour Code* are "statutory" or "consensual" without explaining the significance of the distinction and without referring to *Volvo*. This case is well criticized in BROWN, "Developments in Labour Law — the 1982-83 Term", (1984) 6 *Sup. L.R.* 237, p. 272 and following. It is significant that Chief Justice Laskin and the Court in *Shalansky* do not refer to *Robervale*. The case says nothing about the standard of judicial review.

*Teamsters v. Massicotte*<sup>82</sup> is a case of great significance in any assessment of the subsequent *L'Acadie* case. Here the Court spoke to the question of judicial review of a decision of the Canada Labour Relations Board in a duty of fair representation case. As we have already seen judicial review of the Canada Labour Relations Board is by way of section 28 of the *Federal Court Act* as limited by section 122 of the *Canada Labour Code* to the grounds of breach of natural justice or questions of jurisdiction.<sup>83</sup> Here the unanimous Court again speaking through the late Chief Justice rearticulated through lengthy quotations the essence of the *CUPE* decision and strongly reaffirmed the established standard of "patent unreasonableness".

It is my view, as I explain below, that a series of other Supreme Court decisions involving judicial review of labour board remedies affirms the integrity of the new theory of judicial review. But these cases are of such significance in assessing *L'Acadie* that they are best left until a discussion of that case has been completed.

But going beyond the Court's own jurisprudence, it seems to me that there is profound evidence in the decisions of the lower courts of the impact of the new unified and restricted theory of judicial review. To put it simply, there has been a pronounced tendency in the lower courts simply to drop a reference to *Volvo*, *Douglas Aircraft* and/or *CUPE*, or *Shalansky* and dismiss judicial review proceedings on the basis that the interpretation of the collective agreement by the arbitrator, or of labour relations legislation by the labour relations board, was not "patently unreasonable".<sup>84</sup>

#### V. THE *L'ACADIE* DECISION IN THE SUPREME COURT OF CANADA

We are now in a position to assess the Supreme Court's contribution in *L'Acadie*. The nature of the problem involved and its treatment by the Canada Labour Relations Board and the Federal Court of Appeal has already been outlined. As was indicated above, the Federal Court, without really articulating reasons drew, or apparently drew, a distinction in the standard of review to be applied to the two aspects of the Board's

82. (1982) 134 D.L.R. (3d) 385 (S.C.C.).

83. *Supra*, page .

84. A representative sampling of such decisions would include the following decisions of the provincial Courts of Appeal: *Sollars v. CUPE*, [1984] 4 W.W.R. 44 (Sask. C.A.); *Biltmore/Stetson (Canada) Inc.*, (1983) 150 D.L.R. (3d) 577 (Ont. C.A.); *Hawker Siddeley* (1984) 65 N.S.R. (2d) 408 (N.S.S.C. A.D.); *Kentville Police Association*, (1985) 66 N.S.R. (2d) 38 (N.S.S.C. A.D.); *Irving Oil*, (1980) 112 D.L.R. (3d) 674 (N.B.C.A.); *Suncor*, (1982) 142 D.L.R. (3d) 305 (Alta. C.A.); *North Canada Air*, (1980) 117 D.L.R. (3d) 216 (Fed. C.A.). The trial judgments are too numerous to cite.

ruling which had been challenged — the finding that an illegal strike had occurred, and that aspect of its order demanding arbitration of the underlying dispute. As I have said, it is this distinction, the seeds of which were sown by the Federal Court of Appeal which came to fruition in the Supreme Court of Canada's opinion.<sup>85</sup> To put it simply, we can regard the decision of the Supreme Court as performing the following feat. A distinction between sections of labour legislation which "confer jurisdiction" and those which do not is introduced. I can only assert at this point that this distinction is as irrelevant to the issue before the Court as it is novel. Then, the new vision of judicial review epitomized by the Court's own decision in *CUPE* is said to play a role only in reviewing decisions interpreting legislative provisions which *do not* "confer jurisdiction". But in reviewing labour board interpretation of provisions of the legislation which *do* "confer jurisdiction" the new restrictive theory does not apply, review is equivalent to appeal, and the Court is free to substitute its own opinion for that of the labour board.

One despairs of judicial reasoning and attitudes in the Supreme Court of Canada. At the most general level the decision, as I indicated in my introduction, defies both logic and experience. The case involves a public airing of a judicial proclivity for the most arid, formalistic, and mechanical approach to legal issues. The issue is treated as one of logical deduction from basic premises concerning the notion of "jurisdiction". As I demonstrate below — even the logic is bad. But more profoundly, the case ignores the bold thrust of the Court's own recent articulation of the proper approach to judicial review, which was to shift attention from the "logic" of "jurisdiction" to the issue of reasonableness of *interpretation*. This shift was motivated by a profound *instrumental* (as opposed to logical) insight that the expert tribunal is better equipped, as well as legislatively chosen, to appreciate the issues of interpretation involved. Thus, by resurrecting the false god of "jurisdiction" in the form of the new distinction between sections which confer jurisdiction and those which do not, the Court has rewritten history and redrawn the map of judicial review. The decision shows contempt by the Court for its own recent pronouncements.

I should point out that in this new distinction (sections conferring jurisdiction and those not doing so) the Court is really groping for what is clearly a distinction — basically between the "remedy" provisions of the legislation and other sections. But no logical, let alone valid *instrumental*, reason exists for a theory of judicial deference in the latter but not the former. Indeed all reason points in exactly the opposite direction — that is, that in the area of labour board remedies of all places, judicial deference ought to be the essential premise. As a footnote it can be noted

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85. *Supra*, page

that until *L'Acadie* this was the very view of the Supreme Court of Canada itself. I return to this point shortly.

We must first consider the manner in which the Supreme Court drew out the distinction implicit in the Federal Court's ruling. Mr. Justice Beetz spoke for a unanimous Supreme Court also consisting of Dickson, Estey, MacIntyre, Choinard and Wilson JJ. The late Chief Justice heard the case but did not take part in the judgment. Mr. Justice Beetz began by reviewing the Federal Court of Appeal decision and noting the restriction upon judicial review by virtue of section 122(1) of the Canada Labour Code and section 28(1)(a) of the Federal Court Act.

He then started off on the right foot as follows:

It should be recalled that privative clauses like those resulting from the combined effect of these last two provisions do not confer a right of appeal. They do not empower the court undertaking the review to make the decision which an administrative tribunal like the Board should have made, though they allow it to indicate in some cases what it should have done and to refer the case back to it for action accordingly. They do not even 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.<sup>86</sup>

So far so good. However, in the short space of the following three brief paragraphs the learned justice completely redraws the map of judicial review by distinguishing "errors of law" from not one, but *three* other sorts of tribunal blunder.

First, the following definition of a "mere error of law" is offered:

A mere error of law is an error committed by an administrative tribunal 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.<sup>87</sup>

Then such a "mere error" of law is distinguished from:

1. "One resulting from a patently unreasonable interpretation of a provision which a tribunal is required to apply within its jurisdiction".
2. "A jurisdictional error . . . [which] generally relates to a provision which confers jurisdiction, that is one which describes, lists, and limits the powers of an administrative tribunal . . .".
3. "Another error which has sometimes been regarded as jurisdictional is one relating to a matter which is preliminary or collateral . . .".

This, it is submitted, is a truly remarkable exercise of judicial power. The *CUPE* decision which in reality created a policy of restraint by warning against judicial review is now treated not as restricting judicial

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86. *Supra*, note 1, p. 12,288.

87. *Ibid.*



review, but as *creating* another ground of review. The complete text of this act of judicial creativity is as follows:

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. As Dickson J. (as he then was) described it, speaking for the whole Court in *Canadian Union of Public Employees v. New Brunswick Liquor Corporation*, [79 CLLC Para. 14,209] [1979] 2 S.C.R. 227 at 237, it is

. . . so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review . . .

An error of this kind is treated as an act which is done arbitrarily or in bad faith and is contrary to the principles of natural justice. Such an error falls within the scope of s. 28(1)(a) of the *Federal Court Act*, and is subject to having the decision containing it set aside.

A mere error of law should also be distinguished from a jurisdictional error. This relates generally to a provision which confers jurisdiction, that is, one which describes, lists and limits the powers of an administrative tribunal, or which is [TRANSLATION] ‘intended to circumscribe the authority’ of that tribunal, as Pigeon J. said in *Komo Construction v. Commission des relations du travail du Québec* [68 CLLC para. 14,108] [1968] S.C.R. 172 at 175. A jurisdictional error results generally in an excess of jurisdiction or a refusal to exercise jurisdiction, whether at the start of the hearing, during it, in the findings or in the order disposing of the matter. Such an error, even if committed in the best possible good faith, will result nonetheless in the decision containing it being set aside, because it also falls within s. 28(1)(a) of the *Federal Court Act*.

Another error 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. This however is a fleeting and vague concept against which the courts were warned by this Court in *New Brunswick Liquor Corporation (supra)*, at 233, once the initial jurisdiction of the administrative body holding the hearing has been established at the outset.<sup>88</sup>

I here spare the reader many of the obvious comments which this exercise in judicial overindulgence invites. I cannot resist, however, noting the interesting transmutation (transmogrification?) of a “patently unreasonable interpretation” into an issue of fraud, a deliberate refusal to comply with the law, and (to boot) an act both arbitrary and contrary to the principles of natural justice.

What is the net effect? As becomes clear below, the net effect is to relegate *CUPE*, and the unified and restricted theory of judicial review, recently approved by the Court as the cornerstone of its approach to labour law and judicial review, to one corner of a new map of the terrain of

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88. *Id.*, pp. 12,288-12,289.

judicial review. How is this accomplished? The key move, and one must keep one's eye on this, is the introduction of a new kind of error — error in interpreting a provision which “confers jurisdiction”. A confusing but subsidiary move is the separation of *three* distinct types of reviewable error, as set out above. But of utmost importance is the “key move”. Once this move is made, the rest is easy. It will be recalled that the Supreme Court was asked to review two aspects of the Labour Relations Board's decision — first, that the overtime ban was a strike, and second that part of the Board's order compelling arbitration of the underlying dispute regarding the nature of overtime work. The Court, albeit in a very long-winded manner simply *declares* (and I use this term advisedly) that the provisions of the Act involved in the Board's decision regarding the existence of a strike *do not* “confer jurisdiction”. It is then *declared* that the *CUPE* reasoning applies to judicial review of decisions involving such provisions. Then, and this is the part where a rabbit comes out of the hat, the Court *declares* that the provisions involved in the Board's decision to include in its order the arbitration of the underlying dispute, *do* “confer jurisdiction” and (here is the second rabbit) the *CUPE* standard of “patently unreasonable” interpretation does not apply. There is *no* standard of curial deference. The issue is simply one of appeal.

The Supreme Court of Canada is our court of last resort. I think it is important to keep this in mind in assessing the performance of the Court in this case. As a reader of the Court's judicial review decisions, I can only admit that this decision took me by complete surprise and mystifies me to this day. This new view of judicial review is simply created out of whole cloth, before our very eyes, in the *L'Acadie* decision. It defies prediction based upon the Court's own most recent pronouncements.

True, it takes some time for the Court to achieve this result, but this is the heart of the matter. A lot of the Court's time is taken up with the issue of the proper interpretation of the Board's power under sections 121 and 182 of the Code. My point here is not to address the issue of whether the Court properly interpreted those provisions but to ask the question, how did the Court come to view its role as one of interpreting the *Canada Labour Code*, rather than that of reviewing the interpretation of the Board against the legally established criterion of “patent unreasonableness”?

I have already outlined the move that the Court made to *effect* this change of view of the question before it, but where does the court *justify* that move? A justification for the creation of a new distinction would consist of two parts — the first, a demonstration that the distinction between sections which confer jurisdiction and those which do not actually is a distinction, and second, that it is sensible and appropriate to make this distinction control the standard of judicial review, or to put it more honestly, to control the distinction between appeal and review. If one looks

in the decision for either an explanation of the distinction or a reasoned explanation of why anything turns upon it, one finds, simply, nothing.

There is so much that is extraordinary in the decision that one risks losing sight of what I have called the key move. For my purposes I intend to ignore many of the gratuitous asides, explainings away of prior cases, and other dubious distinctions which the Court seems to have faith in, and keep the reader focussed upon the single key point.

The key move is best explained in the following passage:

To summarize: the provisions which the Board had to interpret in the case at bar confer jurisdiction, since they concern the orders which the Board is empowered to attach to a declaration of an unlawful strike. The question is whether the Board has the power to attach to such a declaration an order referring a matter to arbitration. I consider, therefore, that it is not doubtful but manifest that the interpretation of these provisions raises a question of jurisdiction about which the Board cannot err without committing an excess of jurisdiction. For the foregoing reasons, in my opinion, the Board erred in interpreting these provisions and exercised a power which is not within those conferred upon it.

...

In its submission the Board argued that the decision made by it in paragraph 4 of its order, and set aside by the Federal Court of Appeal, not only was not unreasonable or wrongful, but on the contrary was reasonable in view of all the circumstances mentioned by the Board in its reasons.

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The Board further argued that this decision is not based on an interpretation of its powers which is so seriously tainted by error that it can be regarded as absolutely unreasonable.

I am willing to accept this further proposition, but in my opinion it is not relevant.

It can be seen that, in the case at bar, though the Federal Court of Appeal applied the rule of a patently unreasonable error to the part of the order made by the Board which fell within its authority, namely paragraph 3, it did not even mention this rule in connection with paragraph 4, which resulted from a jurisdictional error.

In my view, the Federal Court of Appeal was clearly right to make this distinction, and the Board is wrong in proposing to ignore it. Unquestionably, as has already been noted, it is often difficult to determine what constitutes a question of jurisdiction, and administrative tribunals like the Board must generally be given the benefit of any doubt. Once the classification has been established, however, 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; and what leads to excluding the rule of the patently unreasonable error is the duty imposed on the Federal Court of Appeal to exercise the jurisdiction conferred on it by s. 28(1)(a) of the *Federal Court Act*.<sup>89</sup>

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89. *Id.*, pp. 12,297-12,298.

This puts the matter about as plainly as it can be put. Mr. Justice Beetz then spends considerable time reviewing the Board's decision and explaining that if the issue is one of "jurisdiction", it is simply one of "jurisdiction", and the Board must get it right. He ends with a flourish:

Furthermore, I do not see why different rules would be applied in this regard depending on whether it concerns judicial review of an administrative or quasi-judicial jurisdiction, or judicial review of legislative authority over constitutional matters. When the courts of law have to rule on the validity of a statute, so far as I know they do not ask whether Parliament or the legislature has expressly or by implication given ss. 91 and 92 of the *Constitution Act, 1967* an interpretation which is not patently unreasonable. Why would they act differently in the case of judicial review of the jurisdiction of administrative tribunals? The power of review of the courts of law has the same historic basis in both cases, and in both cases it relates to the same principles, the supremacy of the Constitution or of the law of which the courts are the guardians.<sup>90</sup>

What is to be made of this? The two critical points which have to be made concern the two aspects of the required *justification* for its actions which the Court does not offer. In what follows I explore both the viability of the distinction that the Court wishes to draw, and the question of whether anything ought to turn upon it. Because the distinction is a nonsensical one in the context of the issue which the Court faced, the two issues really collapse into one. The best way to approach these issues is to consider the role of the concept of "jurisdiction" in the Court's thinking.

#### A. "JURISDICTION" TALK

The Supreme Court of Canada has been charmed by the concept of "jurisdiction". Laskin called it a "comforting conceptualism".<sup>91</sup> Frankfurter called it a "verbal coat of too many colours".<sup>92</sup> In what follows the fundamental idea can be put forward as follows: "Jurisdiction" is not only "confusing", it is a meaningless and useless concept to be invoked in the context of working out the appropriate scope of judicial review of labour relations boards. In invoking it the Court commits an error in reasoning. This can be simply demonstrated. The problem in judicial review<sup>93</sup> is not what is the proper interpretation of our labour law (or a collective agreement), but who (what institution) should undertake that act of interpretation — the courts or the specialized decisionmakers created

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90. *Id.*, p. 12,299.

91. *Supra*, note 2, quoted above in note 43.

92. *U.S. v. L.A. Tucker Truck Lines Inc.*, (1952) 73 S.Ct. 67, p. 70. (quoted by Laskin, *loc. cit.*, note 2, p. 992).

93. Leaving aside natural justice and other procedural attacks upon boards.

by the legislation? The problem is one of proper institutional relationships. This question can *never* be answered by the *Court* interpreting the legislation and declaring that the Board made a “jurisdictional error” — that simply assumes an answer to the question posed. And it is the wrong answer.

I believe this much has been clear even to the Supreme Court of Canada, at least until the *L’Acadie* decision. Mr. Justice Beetz simply misses this point. This is made clear in the rather grandiose passage from the end of his judgment, quoted above, where he stated:

Furthermore, I do not see why different rules would be applied in this regard depending on whether it concerns judicial review of an administrative or quasi-judicial jurisdiction, or judicial review of legislative authority over constitutional matters. When the courts of law have to rule on the validity of a statute, so far as I know they do not ask whether Parliament or the legislature has expressly or by implication given ss. 91 and 92 of the *Constitution Act, 1967* an interpretation which is not patently unreasonable. Why would they act differently in the case of judicial review of the jurisdiction of administrative tribunals? The power of review of the courts of law has the same historic basis in both cases, and in both cases it relates to the same principles, the supremacy of the Constitution or of the law of which the courts are the guardians.<sup>94</sup>

Well, the simple reason why the Court should act differently is that the issue it faces is different. In “federalism” cases the issue is the proper interpretation of sections 91 and 92 of the *Constitution Act*. No one doubts this is a job for the courts. In our context (judicial review of labour boards) it is not only doubted that judges should have the job of interpreting labour legislation, it is the fact that our policy is quite different — it is *not* a job for the courts, it is a job for our specialized decision-makers. How did then did the courts get mixed up with the question of “jurisdiction” as a possible solution to the problem of judicial review? They were charmed, as Mr. Justice Beetz was evidently charmed, by the simple appeal of that notion. What it is that is so charming about that notion?

The simple idea is of a “inferior tribunal” doing something it should not do. The simple example is as follows: suppose the governing statute states that a magistrate can hear cases of theft under \$200, but not cases of theft over \$200. If a magistrate hears, or attempts to hear a case involving a theft of \$1,000 it appears disarmingly simple that she has attempted to do something she is not empowered to do. But how simple is it? Suppose the magistrate viewed the matter before the Court as one, plausibly on the facts, involving ten separate thefts of \$100? Or, how clear is the statute? Is there an ambiguity as to what constitutes a theft, as opposed to, say, embezzlement? The matter could, of course, be appealed

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94. *Supra*, note 1, p. 12,299, quoted above in note 90.

to a higher court, or a preemptive strike be undertaken by way of *certiorari* to the higher court. Note what happens here however. The superior court decides whether the magistrate got it right — and no one suggests that this is anything other than how the world should work. This is because the superior court is *supposed* to have the final say in the matter. Whether the magistrate can hear the case is a matter of “interpretation”. Oft times it is not a difficult issue of interpretation, but it is still an act of interpretation. And there is no controversy as to who has the power to do that act of interpreting in the end. And it really doesn’t matter in the end whether there is a preemptive strike via *certiorari*, or an appeal of the magistrate’s decision. The result is the same. The statement that the magistrate had no “jurisdiction” is a statement of a certain form of *conclusion*. It means simply that the magistrate’s interpretation of her powers was wrong. Jurisdiction is not a “thing” — jurisdictional errors do not exist in the world like chairs.<sup>95</sup> The claim of jurisdictional error is simply the label we put on one conclusion after interpreting the law and the facts.

But if the claim of “jurisdictional error” is one of a statement of the conclusion reached upon interpretation, then we have a problem in any area of law which states a preference for the “inferior tribunal” as the interpreter of its own governing statute. “Jurisdiction”, being a matter of interpretation, is hopelessly caught up in this preference as well. For a court to interfere on the basis of jurisdictional error is therefore to hoist itself up by its own bootstraps. It declares (in spite of the fact that it is not the forum chosen to interpret the statute) that it has interpreted the statute, and found that the interpretation of the statute given by the body chosen to interpret the statute, is wrong. This is true of any “jurisdictional error” whether one wishes to speak of never acquiring initial jurisdiction or losing jurisdiction along the way, as long as the claim turns upon the interpretation of the statute.

Part of the charm of the idea of “jurisdiction” is that it appears to involve a logically distinct type of question as to whether a decision-maker is exercising a power it possesses, or is deciding a case which it has the power to decide. It appears so clear that there is a distinction between our magistrate hearing a case of theft under \$200, and doing a poor job of it, and on the other hand trying to hear a case she is not empowered to hear — for example a case of theft over \$200. While there is a distinction here, the distinction is a statement of a conclusion. And the process of reasoning leading to that conclusion is no different than the process of reasoning involved in any interpretation of the governing statute. It is all interpretation. And no significance in the real world attaches to

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95. And even if they did exist in the world like chairs, are we always so sure of what is a chair as opposed some other piece of furniture? Keep in mind modern architectural trends when considering this example.

the fact that a tribunal makes a “jurisdictional mistake” as opposed to a mistake within its jurisdiction in issuing, for example, a cease and desist order. In either case it simply “exceeds” its powers and does something it was not “really” empowered to do — issue an order against a “innocent” party. The bottom line is the same.

I believe that part of the reason that the concept of “jurisdiction” has held such a powerful grip on the judicial mind is that it is usually talked about in a manner which obscures the truth that a finding of jurisdictional error is always a matter of interpretation. This was a process which Bora Laskin began when he spoke of a labour board issuing a divorce decree.<sup>96</sup> The use of such examples seems to exclude the possibility that a real “act of interpretation” of the governing statute is required to come to the conclusion that the labour board has no power to grant such a decree. We know that even the most familiar words can present tricky issues of interpretation. This is commonplace among lawyers. So the seemingly simple phrase “keep off the grass” takes on quite a different meaning if it is used in a conversation between a counsellor and a patient at a drug abuse clinic.<sup>97</sup> The fact is, if an act of interpretation seems clear it is because the context is a familiar one. It is precisely the fact that the context of judicial as opposed to administrative decisionmaking is so critically different that the interpretation of collective agreements and labour relations laws in anything approximating a hard case is a matter expressly left to the specialized tribunals, and expressly not left to the courts.

Now, it has always seemed to me clear that at a conceptual level courts, or at least some courts some of the time, understood the necessary connection between the act of interpretation necessary for any conclusion regarding appropriate use of power, and the prohibition on precisely those acts of interpretation being performed by courts.<sup>98</sup> Indeed, this, in my view, was the great achievement of the Supreme Court in the construction of its new unified and restrictive version of the appropriate scope of judicial review. The *essence* of the move to the new theory was to scrap talk of “preliminary or collateral jurisdictional errors” or “wrong questions” and shift the focus of attention away from the seemingly simple notion of “jurisdiction” to the *real* issue of *interpretation*. Thus the standard of review became one of patently unreasonable or outrageous *interpretation* (of the statute or collective agreement). This is a point of some significance. This was the key to the decision in *CUPE*, the cornerstone of the new theory. This point is conjoined with the second major insight

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96. Laskin, *loc. cit.*, note 2, p. 1,000.

97. I borrowed this example from GRAFF, “‘Keep Off the Grass’, ‘Drop Dead’ and Other Indeterminacies, A Response to Sanford Levinson”, (1982) 60 *Texas L.R.* 405. See also FISH, *Is There a Text in this Class?* Harvard, 1980.

98. A good example is Mr. Justice Dickson’s dissent in *Jacmain v. Attorney General of Canada*, (1978) 81 D.L.R. (3d) 1, p. 11

that in light of the fact that the issue is one of interpretation, that issue is one appropriately left to the specialized decisionmakers. Mr. Justice Dickson could not have put it more clearly when he spoke as follows:

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, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.<sup>99</sup>

Now, I have<sup>100</sup> praised the Court's work in constructing a unified and restrictive theory of judicial review, one which openly admits of the issue of interpretation involved in the "jurisdiction" game, and issues a call for judicial restraint. Yet in a deep sense the new theory misses the point as well. That is, it is precisely because the issues are ones of interpretation and that the contexts or worlds which courts and specialized tribunals inhabit are so different (and designed to be so) that any standard of review of "patent unreasonableness" is bound to be defective at its heart. It has been Harry Arthurs who has made this point in the most profound way. Arthurs' criticisms of the new (*CUPE*) theory are really an extension of the eloquent analysis he outlined in "Developing Industrial Citizenship".<sup>101</sup> He wrote, recently, in "Protection from Judicial Review":

On occasion, the Supreme Court of Canada has viewed any error of law as jurisdictional; or has suggested that jurisdiction might be declined or lost by 'asking the wrong question'; or has attempted to give precise shape to 'jurisdiction' by framing it within a structure of rickety synonyms such as 'preliminary' or 'collateral'; or *most recently has begun to use 'jurisdiction' as a test for administrative rabies: if the administrative decision is not 'patently unreasonable', it is made within jurisdiction and will be spared; if it exhibits signs of intellectual derangement, it will be suppressed.*

...

*Essentially, courts and tribunals they review do not inhabit the same universe of discourse. The legislature may well have assigned particular tasks to the administration precisely in order to replace value judgments enshrined in the common or civil law with a new set of value judgments. The judges' views of 'justice', however, naturally tend to remain consistent with the assumption of the system in which they continue to work, rather than with those of the new regime from which they have been excluded. Nor should we forget that these value judgments involve highly controversial political, social and economic issues. While all good judges doubtless try to avoid narrow partisanship, few of them will be willing to accept that values are in fact even implicit in the 'non-controversial' rules of law which have become part of their way of*

99. *Supra*, note 63, quoted above in note 67.

100. *Supra*, note 64.

101. *Loc. cit.*, note 46.



*understanding the world, and especially of performing their jobs. But the old saw that 'one man's due process is another's red tape' neatly reminds us of the difficulty.*

*. . . .*

*There is no reason to believe that the judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternative interpretations. There is no reason to believe that a legally trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation. And there is no reason why one group of individuals, however intelligent and well-intentioned, should project upon the rest of society an image of how things ought to be run, an image which can only be the product of their own highly unrepresentative education, experience and personal characteristics.<sup>102</sup> (emphasis added)*

While I believe Arthurs to be essentially correct, I still regard the unified and restricted theory to be a major improvement and achievement because it focusses upon the correct issue — interpretation — and then for well articulated reasons urges judicial restraint and humility. What is crucial to see is the profound impact that *L'Acadie* has had upon the development of that theory. In essence it again deflects attention from the issue of interpretation and the question of institutional competence to perform those acts of interpretation, by again reverting to the concept of “jurisdiction” in a new form. The new form is in the distinction between sections which confer jurisdiction and those which do not, and this return to “jurisdiction” is unencumbered by any theory of judicial restraint *at all*. This is discouraging. As we have noted, no talk of jurisdiction will serve the problems of judicial review. Furthermore, this new talk of jurisdiction rests upon a bizarre distinction between sections that confer jurisdiction and those which do not. What is to be made of this distinction?

#### B. NEW “JURISDICTION” TALK

As I have already indicated, there are two main points which the Supreme Court would have had to demonstrate in order to justify in *L'Acadie* the new distinction between those legislative provisions conferring jurisdiction and those which do not — first, that the distinction is a

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102. *Supra*, note 49, pp. 279-290 (references omitted).

viable one, and second, that something (the standard of judicial deference to labour relations boards interpreting both kinds of provisions) ought to turn upon it. If one looks in the decision for the development of either of these two points, one looks in vain. In a sense this is not surprising for neither aspect of the required justification exists.

First of all the distinction between sections conferring jurisdiction and those which do not, is not a viable distinction. A number of small points can be made here. For example, it does not require a lot of insight to see that the new distinction really introduces a version of the old "preliminary or collateral" matter doctrine, but then turns that distinction on its head in terms of whether judicial review is invited. The similarity between the new distinction and the old doctrine is evident because they both focus upon the *type of question* before the board, not the *answer* provided by the board. Amazingly enough, under the old doctrine, it was the "preliminary" matters which were subject to review. I say that the old distinction has now been turned on its head because now these "preliminary matters" are said to involve sections which do *not* confer jurisdiction and thus are (somewhat) protected from judicial review. Under the old law, the board's power to issue orders would not have been "preliminary", and thus not subject to attack. Yet such provisions are now said to confer jurisdiction and decisions interpreting them are said to be subject to unconstrained review. This is amazing enough in itself. Further, it is clear that determining which provisions confer jurisdiction will be as elusive an exercise as determining what is "preliminary". Mr. Justice Beetz himself called the "preliminary or collateral" test a "fleeting and vague concept against which the courts were warned by the Court in . . . [CUPE]."<sup>103</sup> But this merely demonstrates the internal inconsistency of *L'Acadie*. This is minor stuff in comparison to its other defects.

An even further irony, is found in a decision issued on exactly the same date as *L'Acadie*, in *Blanchard v. Control Data Canada Limited*.<sup>104</sup> As far as I am aware the best demonstration of the vacuity of the "preliminary or collateral" matter test of jurisdiction is to be found in Paul Craig's text *Administrative Law*.<sup>105</sup> In *Blanchard*, Lamer J., speaking for a five member court, of which Beetz J. was a member, quotes Craig at length on precisely this point. The Court seems completely oblivious to the relevance of Craig's insights for the very distinction it creates in *L'Acadie*. But again this must be considered a small point. The major point which must be made is that the distinction between provisions which confer jurisdiction and provisions not conferring jurisdiction is, if it means anything at all, that some provisions of our collective labour legislation

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103. *Supra*, note 1, p. 12,289.

104. (1984) 55 N.R. 194.

105. P.P. CRAIG, *Administrative Law*, London, Sweet & Maxwell, 1983, p. 335.

define concepts and empower the labour board to *decide* issues (is this person an employee? Has an unlawful strike occurred?) while other provisions empower the labour board to *do* certain things (issue a remedial order in an unfair labour practice case, issue a cease and desist order against an illegal work stoppage). This latter category may also include matters arising during a hearing (the power to compel witnesses etc.)<sup>106</sup>, but it is clear that it is the remedial provisions of the legislation which most importantly set out what the board may *do* after it has *decided*. It is this idea of “exercis[ing] a power . . . not . . . conferred upon it”<sup>107</sup> which captures best the new idea, and reveals it simply to be subject to the criticism of the concept of “jurisdiction” outlined above. But the net effect of *L’Acadie* is to state simply that board remedial orders are to be subject to (in effect) appeal to the courts while, its “substantive” decisions are not. There is a distinction between remedial provisions and other provisions, but why should anything in a theory of judicial review turn upon it? Nowhere does the Court answer or even address this basic question at the heart of *L’Acadie*. The Court evidently believes it sufficient to make abstract assertions about the concept of “jurisdiction”. This is, as I have already said, arid, formalistic legal reasoning in its most exquisite manifestation where words like “jurisdiction” take on a life of their own and exist in some sort of jurisprudential conceptual heaven.<sup>108</sup> The result is, to put it kindly, the type of “transcendental nonsense”<sup>109</sup> Felix Cohen laid bare half a century ago. It is as if the Supreme Court has been locked in some sort of jurisprudential time warp, oblivious to any developments in legal thinking or theorizing of this century.

But we ought to go further. If anything can be said to turn upon the distinction between remedial and other provisions of the law enshrining our national labour law policy, it ought to be that here, of all places, judicial restraint and limited review is most appropriate. To put it simply, to the extent that anything turns upon the distinction, it is precisely the opposite conclusion than that which occurred to the Supreme Court of Canada.

While much has been written by many distinguished commentators<sup>110</sup> this point can be best made by referring to the Court’s own words, especially those of the late Chief Justice Laskin. In *Naus v.*

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106. Mr. Justice Beetz expressly includes these matters at *supra*, note 1, p. 12,296. He is also most anxious to include “initial” jurisdiction.

107. *Id.*, p. 12,297.

108. H.L.A. HART, *The Concept of Law*, Oxford, 1961.

109. COHEN, “Transcendental Nonsense and the Functional Approach”, (1935) 35 *Columbia L.R.* 809.

110. See, for example, ADAMS, “Labour Law Remedies”, in SWAN and SWINTON, *Studies in Labour Law*, Butterworths, 1983, p. 55.

*Halifax Longshoremen's Association*.<sup>111</sup> The Court reviewed a remedial order of the Canada Labour Relations Board issued under s. 189 of the *Canada Labour Code*,<sup>112</sup> which reads, in its relevant part, as follows:

Where, under section 188, the Board determines that a party to a complaint has failed to comply with . . . [various unfair labour practice in other provisions of the Code] . . . the board may, by order, require the party to comply with that . . . section . . .

. . .

And, for the purpose of ensuring the fulfillment of the objectives of this Part, the Board may, in respect of any failure to comply with any provision to which this section applies and in addition to or in lieu of any other order that the Board is authorized to make under this section, by order, require an employer or a trade union to do or refrain from doing anything that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of such failure to comply that is adverse to the fulfilment of those objectives.

Laskin wrote, in words which are very important for our purposes of evaluating the assault in *L'Acadie* upon remedial orders of labour relations boards, as follows:

*Even more in fashioning a remedy conferred in such broad terms is the Board's discretion to be respected* than when it is challenged as exceeding its jurisdiction to determine whether there has been a breach of a substantive provisions of the Code. At the same time, equitable and consequential considerations are not to be so remote from reparation of an established breach as to exceed any rational parameters. What we have here is undoubtedly a unique situation to which the Board addressed a remedial authority which is not unquestionable. What we confront then is whether in the particular situation with which the Board was seized, we should be as strict in assessing the Board's powers as we would have been in dealing with the matter at first instance and thus supporting the position taken by the Federal Court of Appeal.

. . .

*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 involved in a case such as this to be more rather than less deferential* to the discharge of difficult tasks by statutory tribunals like the Board.

I find it necessary to refer only to two recent judgments of this Court to underline our approach. They are *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 and *Teamsters Union Local 938 v. Massicotte*, [1982] 1 S.C.R. 710. In both cases privative provisions, as in the present case, protected the statutory tribunals against review save for questions of jurisdiction. In the *New Brunswick Liquor* case, Dickson J. had this to say for the Court (at p. 233):

111. [1983] 1 S.C.R. 245.

112. *Supra*, note 3.

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 doubtfully so.

And again (at pp. 235-36):

The rationale for protection of a labour board's decision within jurisdiction is straight-forward 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, as understood in Canada, 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. Not only has the Legislature confided certain decisions to an administrative board, but to a separate and distinct Public Service Labour Relations Board. That Board is given broad powers — broader than those typically vested in a labour board — to supervise and administer the novel system of collective bargaining created by the *Public Service Labour Relations Act*. The Act calls for a delicate balance between the need to maintain public service, and the need to maintain collective bargaining. 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.

In *Massicotte*, this Court drew upon the observations in the *New Brunswick Liquor* case and added this summation, referring as well to the judgment of Dickson J. in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382. It said (at p. 724):

What this judgment and that in *Nipawin* clearly convey is that mere doubt as to correctness of a labour board interpretation of its statutory power is no ground for finding jurisdictional error, especially when the labour board is exercising powers confided to it in wide terms to resolve competing contentions. In so far as the *Anisminic* and *Metropolitan Life Insurance* cases deal with the so-called "wrong question" test of jurisdiction, they have no relevance here. It is impossible to say that the Canada Labour Relations Board asked itself the wrong question in any sense of departing from the inquiry in which it was engaged. It addressed itself to the issue raised by the complaint and exercised powers in relation thereto which it clearly had. At bottom, the objection is to the consequential results of that exercise, but this is a long way from any jurisdictional issue.<sup>113</sup> (emphasis added)

This, it is submitted, is as clear a statement as one could have regarding the appropriateness and adoption by the Supreme Court of Canada of a theory of judicial restraint in assessing the exercise of remedial powers by labour relations boards. And it clearly demonstrates the radical depar-

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113. *Supra*, note 111, pp. 255-257.

ture which *L'Acadie* represents. It is also crucial for our purposes to note that *CUPE* involved the regulation of industrial conflict by the labour relations board. It is also important to recall the decision of the Court in *Tomko*.<sup>114</sup> There, the labour board issued, as in *L'Acadie*, a cease and desist order against an illegal work stoppage, and did so in a form that went beyond that requested in the application for relief. In that case the provisions of the relevant Nova Scotia legislation empowered the board to issue an order "requiring any person . . . to . . . cease and desist any activity or action or to perform any act or commence any activity or actions stated in the . . . order".<sup>115</sup> And it will be recalled that Laskin defended the board's order in the following terms:

There remains only the question whether the terms of the order must be limited to the exact requests for relief sought in the complaint. There is no such limitation in s. 49(2) which empowers the Board . . . to direct an interim order to 'any person' and against 'any activity or action'. Indeed, having regard to the purpose of the authority, it could not be otherwise so long, at least, as the activity or action whose cessation is direct by the interim order or is required thereunder is related to or connected with the illegal work stoppage.<sup>116</sup>

In my view the Supreme Court had (until *L'Acadie*) adhered in its decisions reviewing the exercise of remedial power by labour boards, to the new theory of restricted judicial review and the instrumental reasoning supporting that theory as set out in *CUPE*. In the remedies cases the test of not "patently unreasonable interpretation" has been, however, sometimes rearticulated in a form of test of "rational parameters"<sup>117</sup> (*Naus*) or "related to or in connection with"<sup>118</sup> (*Tomko*).

There are two apparent problems with this assessment of the Court's view of its role in reviewing the exercise of remedial power by labour relations boards. The first is the Court's decision in *CUPE and Labour Relations Board (Nova Scotia)*.<sup>119</sup> This decision is of little or no relevance to our present discussion. Because that decision involved a *stated case* concerning the power of the Nova Scotia Labour Relations Board to remedy a bad faith bargaining finding, it involved no issue of judicial review at all. Mr. Justice Dickson makes this abundantly clear in his dissent, and the standard of review is not discussed at all by the majority. It is also of interest to note that Dickson J. was of the view that the reason the *CUPE* standard of restraint did not apply was simply the fact that this was a stated case. Put another way, he was clearly of the view that the

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114. *Supra*, note 23.

115. *Supra*, note 25.

116. *Supra*, note 26 and text.

117. *Naus*, *supra*, note 111, note 113 and text.

118. *Tomko*, *supra*, note 26 and note 116.

119. (1983) 1 D.L.R. (4th) 1.

CUPE standard would have otherwise applied, even though the case involved the interpretation of remedial provisions in the statute. This is simply ignored in *L'Acadie*.

The second apparent difficulty is apparently more one of substance, and involves the decision of the Court in *National Bank of Canada v. Retail Clerks Union*.<sup>120</sup> Indeed, in *L'Acadie* Beetz, J. asserts that this decision applies the rules he had just created in *L'Acadie*.<sup>121</sup> Of course, this is an impossibility. It is also the case that a reading of the earlier decision leads precisely to the opposite conclusion. The interpretation which Beetz, J. prefers represents, in my view, a distortion of the Court's holding in the *National Bank* decision. Far from adopting Mr. Justice Beetz's wholly unrestrained notion of appeal to the courts regarding the use of remedial power, the Court in *deliberate, lengthy* and *express* terms did precisely the opposite, citing the relevant passages from *Massicotte* and *Naus*<sup>122</sup> but insisting that there must be a "relationship" between the violation and the remedy ordered. Mr. Justice Beetz seems bent upon promoting his brief but vitriolic concurring opinion in the *National Bank* case as the substance of the Court's holding in that case. There, he denounced the Labour Board's remedies in that case as "totalitarian and . . . alien to the tradition of free nations like Canada".<sup>123</sup> In *L'Acadie*, the *National Bank* case is rewritten, from the point of view of the author of that concurring opinion. It is true that the rest of the Court did strike down portions of the Board's remedies in the *National Bank* case. But on the issue of the standard of review, the Court was faithful, not unfaithful as Beetz J. would have us believe, to the established *law* of judicial review.

## VI. WHAT IS TO BE DONE?

It is then clear, I believe, that the *L'Acadie* is a radical rewriting of recent Supreme Court jurisprudence. It is difficult to believe that *Naus* and *L'Acadie* were decided by the same court. In this case we observe the anomaly of the Court taking an unreasoned step backwards to a darker era. While nowhere in their opinion is the theory of judicial review fully developed, it seems that Mr. Justice Beetz has won recent converts, temporarily at least, to his judicial crusade against "totalitarianism". The power wielded in *L'Acadie*, with lack of supporting reasons and in the teeth of "the law", may give us pause indeed to consider this issue. It seems that Mr. Justice Beetz's enthusiasm for the courts as the sole guardians of

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120. (1984) 84 C.L.L.C. 12,150.

121. *Supra*, note 1, pp. 12,297 and 12,298.

122. *Supra*, note 120, pp. 12,158-160.

123. *Id.*, p. 12,161.

“law” is undiminished by the prospect that it may collapse the distinction between the rule of law and rule by the wildly fluctuating will of judges. The result is that his broadside against “totalitarianism” may result in a self-inflicted wound.

The positive case for a theory of judicial restraint is best made out in the words of the late Chief Justice Laskin, already quoted. The question then becomes how to secure once again what was clearly the law before the aberrational decision in *L’Acadie*. In a post-*Crevier*<sup>124</sup> world (even though, technically speaking, *Crevier* is of no relevance to the Canada Board as a federal tribunal) only the most naive could believe that it is possible to “keep the judges out”. Here I am a follower of Arthurs in “Protection from Judicial Review” who insists that a contrary view demonstrates “charming naivete”. The problem is the more limited one of ensuring that the Court returns to the pre-*L’Acadie* world of judicial review. How can this best be achieved? In my view the best hope for seeking a return to a pre-*L’Acadie* world, at least from the point of view of the Canada Labour Relations Board, involves a two pronged legislative direction to the Supreme Court of Canada. First of all, section 182 and section 183.1 of the *Canada Labour Code*<sup>125</sup> should be redrafted in the form of a single section reading as follows.

Where an interested party alleges that a trade union has declared or authorized a strike, or that employees have participated, are participating, or are likely to participate in a strike, the effect of which was, is, or would be to involve the participation of an employee in contravention of this Part, the party may apply to the Board for a declaration that the strike was, is or would be unlawful and the Board may, after investigation of the complaint and after affording the trade union or employees an opportunity to be heard on the application, make such a declaration and, may make an order *requiring any trade union employer, or person named in the order to forthwith cease and desist any activity or action or to perform any act or commence any activity or action stated in the order including, for greater certainty, and for the purpose of ensuring the fulfillment of the objectives of this Part, activities or actions which, in the opinion of the Board, will assist in securing future compliance with this Part.*

This section, as suggested, simply adopts language already approved by the Supreme Court of Canada in *Tomko*, and marries it to certain language from section 189 and wording designed to enshrine in legislative form the Board’s approach to its remedial authority over illegal work stoppages.

Such an amendment will not totally protect the Canada Labour Relations Board from the assault mounted by the Court in *L’Acadie*. A further legislative direction to the Supreme Court of Canada may be

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124. *Crevier v. A.-G. Quebec*, (1982) 127 D.L.R. (3d) 1 (S.C.C.). See also ARTHURS, *loc. cit.*, note 49.

125. *Loc. cit.*, note 14.



required. In order to get at the problem posed by *L'Acadie* it is necessary to address explicitly what occurred there. My father always used to say that it is best to mean what you say and say what you mean. I believe this approach to be valid in legislative drafting. If it accorded with Canadian legal drafting practice, I would simply suggest a federal statute simply stating "the decision in *L'Acadie* is reversed, and the *CUPE* standard of judicial review is to apply in all cases of review of the Canada Labour Relations Board". Given that this style of drafting is not accepted,<sup>126</sup> the question then becomes one of how to achieve this result in as direct a way as is possible. I would suggest the following as an amendment to section 122(1) of the *Canada Labour Code*:

Subject to this Part, every order or decision of the Board is final and shall not be questioned or reviewed in any court, except by the Federal Court of Appeal on the ground that the Board interpreted the legislation or exercised its powers thereunder in a patently unreasonable manner.

These proposed legislative amendments are offered as suggestions regarding the required direction of legislative reform. I have no special expertise in drafting per se. But of the thrust of the proposed amendments I remain certain.

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126. But see the *K.V.P. Company Limited Act, 1950*, S.O. 1950, ch. 33, reversing the decision in *K.V.P. Co. Ltd. v. McKie*, [1945] S.C.R. 698, where the text of the Act reads in s. 1(1):

"whether or not its operation is now stayed, every injunction heretofore granted against the *K.V.P. Company Limited* . . . is dissolved."