

Perfecting the Administrative Solution to Labour Disputes. British Columbia Experiment La solution administrative aux conflits de travail. L'expérience de la Colombie Britannique

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Résumé de l'article

« Les cours de justice ne peuvent vraiment avoir qu'une vue sommaire de l'ensemble des problèmes du travail. Leur intervention dans le passé n'a été que sporadique et fortuite. Les juges ne connaissent pas en profondeur le processus dynamique des relations professionnelles et de la négociation collective. Pour ces raisons, le nouveau Code du travail a écarté la compétence des cours en matière de conflits du travail. La nouvelle loi recherche une solution administrative plutôt que judiciaire aux conflits du travail. »

C'est ainsi que s'exprimait le ministre du Travail de la Colombie Britannique au cours d'un débat en 1973.

Rechercher "une solution administrative plutôt que judiciaire aux différends du travail" est, pour s'exprimer en termes généraux, une politique qui est commune dans la législation canadienne en matière de négociation collective. Cependant, ce qui est propre au Code du travail de la Colombie Britannique, ce sont les moyens par lesquels le Code du travail de cette province cherche à mettre au point la solution administrative « Nouvelle, controversée, discutable au point de vue constitutionnel ». Telle est la façon dont un commentateur a décrit cette disposition qui se lit ainsi : « 33. La Commission a et exerce compétence exclusive pour déterminer les limites de sa compétence en vertu de cette loi, d'une convention collective et de règlements et pour connaître de tout fait ou question de droit qui sont essentiels à l'exercice de sa compétence et pour déterminer si elle exercera ou non sa compétence et de quelle manière elle l'exercera. » L'arrière-plan de la désobéissance judiciaire à la clause privative dans la législation du travail au Canada fait voir pourquoi la législature de la Colombie Britannique a conféré cette compétence nouvelle à l'organisme chargé d'appliquer le Code du travail dans cette province. À une date aussi reculée que 1952, le professeur Bora Laskin (fonction qu'il occupait alors) faisait observer « l'apparente utilité » des efforts variés faits dans l'après-guerre pour écarter la juridiction de la cour des questions attribuées aux commissions de relations du travail. « Face à de tels textes législatifs, notait Laskin, la persistance des cours à exercer un pouvoir dérivé n'exerce pas une attribution d'autorité que sur le fondement d'un principe constitutionnel (et un tel principe n'existe pas) et sur la base de quelque théorie « élitique » de connaître ce qui est préférable pour tout le monde. »

Le concept qui sous-tend l'intervention des cours en matière de clauses privatives, qui enjoignent à ces cours de ne pas intervenir, n'existe pas qu'au Canada. Notez la clause privative ordinaire écartant du pouvoir de révision judiciaire « toute décision, ordre, directive ou réglementation du tribunal administratif » en question. Puisqu'une « décision, un ordre... ou une réglementation » outrepassant les pouvoirs statutaires du tribunal (c'est-à-dire sa compétence) n'est en réalité ni une « décision », ni un « ordre », ni un « règlement », ils ne sont pas protégés par la clause privative. Donc, le plus que ces clauses ont signifié, c'est d'exclure l'intervention de la cour, là où l'erreur d'une commission, qu'elle soit de fait ou de droit, n'est pas une relative à sa compétence.

C'est en vue de donner des dents à la clause privative du Code, contenue à l'article 34(2) que l'Assemblée législative de la Colombie Britannique a adopté l'article 33. En résumé, conformément à l'article 33, la Commission est autorisée à fixer les limites de sa propre compétence — y compris à cette fin le pouvoir de connaître de tout fait et de toute question de droit qu'il lui faut trancher pour établir sa compétence — d'où il découle que toute erreur que la Commission commet n'entache pas sa compétence et se trouve dans les limites de la clause privative.

Cependant, on peut prévoir que, malgré l'article 33 du Code, les cours aient l'intention de réclamer juridiction. L'article étudie quatre de ces arguments. Deux autres, qui se rapportent à l'aspect constitutionnel de la compétence de la Commission, touchant à la question du partage des pouvoirs entre le gouvernement fédéral et les provinces du Canada, ne sont pas étudiés. Bien qu'il ne s'agisse qu'une question de temps avant que ces arguments d'ordre constitutionnel soient vérifiés judiciairement au Canada, la jurisprudence sur laquelle ils se fondent a été examinée dans d'autres instances. Des quatre autres arguments, on peut dire qu'ils se rapportent à la solution administrative des différends du travail et à l'habileté des cours à retirer sa compétence à l'organisme administratif.

La conclusion à laquelle on en arrive, c'est que le Code de la Colombie Britannique, grâce à l'interaction de l'article 33 et des autres dispositions de la loi relatives à la compétence fait obstacle à la justification ordinaire de la cour pour excéder ou contourner la clause d'exclusion. Cependant, ce n'est pas toutes les affaires que les cours de la Colombie Britannique l'ont acceptée. L'affaire *Pruden* contre *Assessment Authority of British Columbia* a établi que, là où, aux fins d'établir sa juridiction, la Commission de cette province doit interpréter une loi autre que le Code, il y a matière à révision de sa décision par les cours en la manière habituelle. Le présent article met en doute cette conclusion eu égard à la compétence exclusive de la Commission non pas simplement de déterminer elle-même les limites de sa compétence, mais aussi de « connaître de tout fait ou de toute question de droit nécessaire pour établir sa compétence ». Il suffit de noter que les mots « toute... question de droit » ne sont pas qualifiés; ils ne se lisent pas toute... question de droit découlant de la loi, (c'est-à-dire du Code).

Là où la Commission administrative se trouve ainsi en présence de questions d'ordre juridique préliminaires à son rôle essentiel — questions au sujet desquelles elle n'a pas de qualification spéciale — on peut penser que le maintien de la compétence des tribunaux de décider en dernier ressort est souhaitable. Mais le principe que l'affaire *Pruden* a posé n'est pas aussi limité qu'on peut le croire. À la suite de cette affaire, les tribunaux de la Colombie Britannique ont élargi le critère de « la loi externe » aux fins de révision des décisions de la Commission au-delà de la loi générale de façon à inclure plusieurs lois spéciales du travail qui comprennent « les définitions, les dispositions et les règles de procédure du Code du travail ». L'inclusion des dispositions légales du Code au moyen de clauses générales d'incorporation à ces lois avait pour objet comme le signalait la Commission, d'éviter une situation « où les parties à un conflit découlant du *Collective Bargaining Continuation Act* seraient obligées de faire la navette entre les tribunaux et la Commission au fur et à mesure que se révéleraient les ramifications légales du différend ». Et la Commission ajoutait ce qui suit : « Il serait contraire à un principe législatif fondamental d'avoir recours à deux tribunaux pour administrer un ensemble de législations du travail. Le thème principal des réformes de 1973-74 était l'établissement de la Commission des relations du travail comme l'organisme responsable de toutes les questions de relations du travail en Colombie Britannique. En plus de ses fonctions dérivées du Code du travail, la Commission s'est vue confier un mandat en vertu de cinq autres lois... »

En fait, le maintien du droit de réforme des tribunaux non seulement va-t-il à rencontre de la politique législative appuyant les réformes en Colombie Britannique, mais aussi des effets que l'on recherchait par l'introduction des clauses d'incorporation. Comme elles-ci incorporent aux fins de chaque pièce de législation l'article 33 du Code du travail la compétence exclusive de la Commission de « déterminer les limites de sa compétence en vertu de la loi » ne réfère pas en pareil cas au Code, mais à la loi dans laquelle a été incorporé l'article 33, ce qui ne laisse par conséquent aucune place à l'approche fondée sur le concept de « la loi externe ».

La question posée est loin d'être nouvelle cependant. Car, en remontant aussi loin que 1952, le professeur Laskin se demandait « pourquoi les tribunaux, en tant qu'agences de l'État, ne respectent pas l'autorité et la responsabilité d'une autre agence, la législature, dans les matières où ne repose aucune question relative au partage des pouvoirs législatifs ». Si, comme on le croit, l'intention du législateur de créer une commission du travail indépendante et autonome sert l'intérêt public en minimisant le désordre dans le monde du travail, alors quelle justification y a-t-il à cette aversion pour la clause privative?

Perfecting the Administrative Solution to Labour Disputes

The British Columbia Experiment

P.A. Joseph

An analysis of the unique nature of the administrative solution to labour disputes in British Columbia experience, with particular reference to section 33 of the Labour Code.

The *Labour Code* of British Columbia received royal assent on 7 November 1973.¹ The provincial legislature believed that the substitution of self (economic) regulation through administrative control of labour disputes was the needed response to British Columbia's labour problems.² In promoting the Bill's passage, the then Minister of Labour, the Hon. W.S. King, explained:

"The courts of law can only really catch a glimpse of the overall labour picture. Their interference in the past has been sporadic and fortuitous. The judges lack the intimate knowledge of the very dynamic process of industrial relations and collective bargaining. *For these reasons, ... the new labour code has removed the court's jurisdiction over labour disputes The new law seeks an administrative rather than a judicial solution to labour disputes.*"³

Not of recent times has Canadian collective bargaining legislation preferred judicial procedures to the flexible, administrative procedures of the permanently constituted board. Thus for the *Labour Code* to seek "an administrative rather than a judicial solution to labour disputes"⁴ is not new.⁵ The striking feature of the Code is section 33, the clause by which it seeks to effect the administrative solution. "[N]ovel, controversial, and arguably unconstitutional",⁶ this provision attests to the legislature's desire to devise a privative clause which would succeed where others had failed.⁷

It is noteworthy that in the case of Canada and eight provinces, the initial post-war collective bargaining statutes contained privative clauses purporting to exclude judicial review of board decisions. As early as 1952,

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however, virtually upon the enactment of these clauses, Bora Laskin observed the "apparent futility" of these attempts to oust the superior courts.⁸ "In the face of such enactments", Laskin cautioned, "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 'elite' theory of knowing what is best for all concerned".⁹ This objection to judicial review, based on the principle of legislative supremacy in Canada, serves notice of the constitutional argument enjoining the court's obedience to the privative clause. Yet, the following decades of judicial activism in administrative law enabled Professor N.W.R. Wade to comment recently that it is to be hoped that courts will *not* be dissuaded by the Code's unusual provisions from assuming their traditional supervisory role.¹⁰

In light of these opposing views, this article examines whether the Minister in 1973 was correct when he pronounced "the code has removed the court's jurisdiction".¹¹ The examination falls into two parts. The first (under the headings *THE JURISDICTIONAL PROVISIONS*, *THE BACKGROUND TO SECTION 33*, *APPROACHES TO SECTION 33*) reveals why British Columbia experimented with "novel, controversial, and arguably unconstitutional" legislation.¹² Despite a noticeable drafting imperfection, it will be shown that the Code's Provisions can be penetrated only in disregard of the statutory direction that "[e]very enactment shall be ... given such fair, large, and liberal construction and interpretation as best ensures the attainment of its objects".¹³ Through interacting one with another, these provisions preclude the usual conceptual justification for judicial review in face of the privative clause.

The second part reveals whether the legislature has in fact created a collective bargaining regime operating exclusive of the courts. As the headings here indicate (*THE BOARD'S RETREAT* and *THE JUDICIAL INCURSION*), British Columbia courts desiring to intervene have not hesitated to disavow the Code's instruction.

THE JURISDICTIONAL PROVISIONS

Discussed first is section 34(1), the principal intent of which is to grant the Board exclusive jurisdiction to resolve questions "arising under this Act".

Section 34(1)

“34.(1) The board has exclusive jurisdiction to decide any questions arising under this Act, and, upon application by any person, or on its own motion, may decide for all purposes of this Act any question, including, without restricting the generality of the foregoing, any question as to whether

(in parts (a) to (w), a range of subject-matter arising under the Code).”

This provision contains the drafting defect. The debates in 1973 indicate that the legislature intended not only to remove the court’s powers of review but also to bequeath the Board exclusive, original jurisdiction over all matters involving the Code, whether arising directly or incidently in the course of proceedings under it.¹⁴ Section 34(1) not only fails to invest this exclusive jurisdiction but — to the extent it leaves the courts concurrent jurisdiction — also enhances the likelihood of judicial review of Board decisions.

The drafting defect

The section confers jurisdiction in three stages. First, the opening words grant the Board exclusive jurisdiction, reinforced by the privative clause, to decide all questions “arising under [the] Act”. The second stage, “and may decide for all purposes of this Act any question”, is distinct from the first. These words denote concurrent jurisdiction in the Board *and* the courts to interpret and apply law external to the Code, where such law must be considered in the course of proceedings under it.

It is difficult to envisage situations in which courts could exercise this original jurisdiction, since only the Board can preside over Code proceedings.¹⁵ Nonetheless, the consequences affecting the third stage by which section 34(1) confers jurisdiction confirm that the retention of concurrent jurisdiction at this second stage is a drafting error. The third stage is an extension of the second, bestowing jurisdiction by way of specification (in parts (a) to (w)) of matters which the Board “may decide for all purposes of this Act”. As an extension of the second, it requires to be read in the same light as denoting concurrent and not exclusive jurisdiction.

The Board has declined this reading, however,¹⁶ preferring in effect to treat the specifications as extensions of the first rather than second stage by which jurisdiction is granted. This is understandable in view of the importance to the Code’s operation of the matters so specified, matters which the legislature intended to be the Board’s exclusive concern. And yet at least one British Columbia court has served notice of concurrent jurisdiction to deter-

mine these matters (the court here disclaiming jurisdiction to entertain questions not so specified).

In *Pitura v Lincoln Manor et al.*,¹⁷ the issue was whether the Supreme Court had jurisdiction to determine liability in tort for intimidation and interference with contractual relations arising from a construction contract. Munroe J. did not examine the sections bequeathing the Board's jurisdiction, yet accepted that where the issue is whether the *Labour Code* or a collective agreement has been breached the Board has exclusive jurisdiction.¹⁸

These are questions not specified in parts (a) to (w). This is significant because Munroe J. affirmed the court's jurisdiction to proceed with the common law action on the ground that "[the] letter of undertaking ... is not a collective agreement between the plaintiff and the defendant union".¹⁹ In contrast to the former issue (whether breach of the *Labour Code* or a collective agreement has occurred), parts (c) and (g) of section 34(1) designate whether a collective agreement "has been entered into" and "is in full force and effect" to be questions for the Board.

In deciding, then, that the contested letter did not satisfy the Code's requirements so as to constitute a collective agreement, the court effectively construed section 34(1) as allocating the questions in (a) to (w) concurrently to the courts and the Board. Indeed, the court added that if the legality of a strike or lockout must be established in support of a claim for damages, the court must remit the matter to the Board for determination.²⁰ Since this is a further issue not addressed by parts (a) to (w), presumably Munroe J. treated it as falling within the Board's exclusive jurisdiction conferred by the opening words of the section, "to decide any question arising under [the] Act".

Whatever the judge's perception of the court's relationship to the Board, these rulings comply with the drafting of section 34(1) which, on any reading, fails to bequeath the Board exclusive jurisdiction other than at the first stage.

An avenue for review?

The existing ground for review, established on the 'external law' doctrine, is examined below. The possibility arises at this stage, however, of the courts extending their review jurisdiction on a further ground, coinciding with their concurrent jurisdiction over such matters as that in issue in *Pitura*.

It is not a necessary condition of jurisdiction shared concurrently with the courts that, by that fact, it be also reviewable. But the judicial presump-

tion is that the legislature does not intend the foreclosure of judicial review in every instance when it invests an inferior tribunal with jurisdiction and decrees that that jurisdiction be immune from review.²¹ Labour cases in particular illustrate this where the legislature seeks to secure the independence of the administrative decision-maker from the outset, by granting exclusive and not concurrent jurisdiction.²² *A fortiori*, where the initial jurisdiction confided is not exclusive — where the subject-matter of the empowering statute does not render the issues wholly inappropriate for judicial decision — the courts can be expected to apply the presumption more readily.

Therefore, it may be that a superior court inclining toward a contrary view of the legalities would not be loath to upset a Board decision entered under parts (a) to (w) of section 34(1), whatever the effect of the Code's privative clause; otherwise, the courts may ask, why did the legislature preserve their original jurisdiction? However, to date the opportunity for the British Columbia courts to overturn the Board on any of these matters has not arisen.

As a result of the drafting defect, then, section 34(1), to the extent that it encourages judicial review, does not heed the Minister's statement in 1973, admonishing the courts for their past intervention and declaring that henceforth their jurisdiction is removed.²³ This is pertinent since the legislature endorsed the Minister's statement when it enacted the Board's extraordinary mandate (namely section 33, discussed below) to determine the extent of its own jurisdiction; surely, it is anomalous to confer exclusive jurisdiction to determine jurisdiction and, at the same time, reserve to the courts their traditional powers to police jurisdictional error.

Thus, although section 33 is still capable of excluding those powers,²⁴ section 34(1) is in need of strengthening. The amendment proposed is to remove the court's original jurisdiction for *all* purposes of the Code, deleting the existing words in parenthesis and substituting the italicized parts:

“34.(1) The Board has exclusive jurisdiction to decide any question arising under this Act, and, upon application by any person, or on its own motion, (may decide for all purposes of this Act any question, including) *to decide for all purposes of this Act any question howsoever arising, and, without restricting the generality of the foregoing, has and shall exercise exclusive jurisdiction to decide any question as to whether*

(specifying paragraphs (a) to (w)).”

Section 31

The second provision granting general powers to the Board reads:

“31. Except as otherwise provided in this Act, the Board has and shall exercise exclusive jurisdiction to hear and determine an application or complaint under the provisions of this Act and to make any order permitted to be made and, without limiting the generality of the foregoing, the board has and shall exercise exclusive jurisdiction in respect of

- (a) any matter in respect of which the board has jurisdiction under this Act or the regulations;
- (b) any matter in respect of which the board determines under section 33 that it has jurisdiction; and
- (c) any application for the regulation, restraint or prohibition of any person or group of persons from
 - (i) ceasing or refusing to perform work or to remain in a relationship of employment; or
 - (ii) picketing, striking, or locking out; or
 - (iii) communicating information or opinion in a labour dispute by speech, writing, or any other means.

The most exceptional feature of this provision is paragraph (b) in that it is dependent upon the exercise of the Board's section 33 jurisdiction (discussed presently). Also exceptional is paragraph (c) granting exclusive jurisdiction over *inter alia* strikes and lockouts. Reinforcing this is section 32(1) which stipulates that “no court has or shall exercise any jurisdiction in respect of ... a matter referred to in section 31”, and, in respect of the labour injunction,²⁵ that “no court shall make an order enjoining or prohibiting any act or thing in respect of”.

Other sections

Further provisions requiring mention are sections 32(2), 87 and 89. Section 87 divests the courts of jurisdiction in respect of torts (specifically, trespass and interference with contractual relations) committed in furtherance of strikes, lockouts, or picketing permitted by the Code. The companion provision is section 89. This excludes the conspiracy action in respect of acts done in contemplation or furtherance of a labour dispute which, in the absence of combination or agreement, would not be wrongful.²⁶

Overriding these provisions is section 32(2). This provision saves the court's jurisdiction where a “wrongful act or omission ... causes an immediate danger of serious injury to any individual or causes an actual

obstruction or physical damage to property".²⁷ By virtue of section 32(3), however, the court's jurisdiction to issue injunctive relief on an *ex parte* application does not survive.

Section 33

The unique feature of the Board's jurisdiction is section 33. As well as being an independent source of jurisdiction, this provision strengthens the grants of exclusive jurisdiction in sections 31 and 34(1) and, not least, the privative clause in section 34(2).²⁸

"33. The board has and shall exercise exclusive jurisdiction to determine the extent of its jurisdiction under this Act, a collective agreement, or the regulations, and to determine any fact or question of law that is necessary to establish its jurisdiction, and to determine whether or not or in what manner it shall exercise its jurisdiction."

THE BACKGROUND TO SECTION 33

In Canada the inherited principle of legislative supremacy is modified by a distribution of legislative power consonant with federalism. But as Lakin earlier explained,²⁹ the supremacy of the legislature is still the cardinal principle of the Canadian political system.³⁰ The relationship of the judiciary to the legislature, therefore, is restrictively defined by the rule enjoining judicial obedience to the enacted word. This rule, and the relationship it so defines, is manifest in the general interpretative function assigned to the courts in applying statutes; so long as enactments remain within the federal-provincial allocation of legislative power, this function in Canada has never permitted judicial invalidation of statutes on constitutional grounds.

Consequently, if legislative supremacy be the cardinal principle, then the only justification for the courts assuming their supervisory role over inferior tribunals is to ensure the sanctity of the legislature's word — to ensure that the administrative agency created by statute complies strictly with the terms of its creation. Commonplace with the expansion of government this century is the privative clause. Contained in the empowering statute, it is itself a term of the administrative agency's creation, albeit as a direction addressed in this instance not to the statutory body but to the courts. Simply, it expresses the desire of the law-making organ that bodies performing certain specialised functions be free from judicial constraints, and, if the usual policy applies, that they be unrestricted by the procedures that bind courts in the discharge of their functions.

In no field is that desire more clearly expressed, Laskin observed,³¹ than in labour statutes promoting settlement of disputes through collective bargaining. Yet the law reports attest that in no jurisdiction in Canada has the legislature successfully freed the labour board from judicial control.³²

Consider the Ontario labour statute containing the usual privative provisions.³³ On each occasion these were considered, the court emphatically rejected the notion that they could be construed so as to empower the Board to err on a matter on which its jurisdiction depends.³⁴ The reasoning is familiar. Since a “decision, order, direction, declaration or ruling” held to be made without jurisdiction is not, in truth, a “decision, order, direction, declaration or ruling”, it does not fall within the privative clause.³⁵ On the authorities, the most that these clauses have achieved is to exclude the prerogative writs where the Board’s error, whether of law or fact, is designated ‘non-jurisdictional’. However, administrative lawyers familiar with *Anisminic v Foreign Compensation Commission*³⁶ know that the kinds of error so designated are few. (Recently, indeed, Lord Diplock acknowledged in the case of inferior tribunals, that “for all practical purposes” *Anisminic* “abolished” the category of ‘non-jurisdictional’ error of law.³⁷

Thus, in *Metropolitan Life Insurance Co v International Union of Operating Engineers*,³⁸ it was no answer that the Ontario Labour Board was within its statutory jurisdiction in embarking on the certification proceeding since, the Supreme Court held, the Board in the course of the inquiry stepped outside its jurisdiction by asking itself a question not assigned by the legislature. This, for purposes of the judicial inquiry, rendered it irrelevant that the Board’s practice in these proceedings had been developed out of regard for the Act’s principles facilitating appropriate bargaining units.

Significantly, following the Supreme Court’s decision an amendment to the Ontario Act reinstated the practice struck down in *Metropolitan Life*.³⁹ This indicates not only the legislature’s disapproval of the court’s decision but also its desire to protect that which the court here failed to respect, that is, the administrative tribunal’s ability to expedite the settlement of labour disputes. Yet, while the amendment reinstates the Board’s practice, it has not freed it from the jurisprudence of *Metropolitan Life*. Recently, the Ontario Board affirmed that while its former discretion in certification proceedings is preserved, it can still exceed its jurisdiction in such proceedings by asking itself “the wrong question”. This acknowledgement of the Board, viewed against the legislature’s desire to protect its independence, shows the extent to which the conceptualism of *Anisminic*⁴⁰ has minimised the effect of the privative clause in the labour statute.

It is against this background that section 33 of the Code reveals its purpose. It expresses the clearest legislative intent to deprive superior courts of the ability to resurrect jurisdiction from the privative clause. In the words of the Minister of Labour in 1973, commenting on the Code's procedure for an appeal from a three-man panel to a full-sitting of the Board:

“Allowing for a special appeal to an administrative agency, as provided in the labour code, is an important innovation in Canadian labour law, ... It is a recognition of the unsuitability of review in the courts of administrative decisions by prerogative writs, such as certiorari et cetera, where the issue of jurisdiction and not the substance of a decision is considered.”⁴¹

Further:

“[T]o jeopardize the decision to court actions ... [could] emasculate the board's effectiveness to come to grips with labour problems. That certainly has been the problem in the past.”⁴²

APPROACHES TO SECTION 33

This section concentrates on arguments that may be used to circumvent section 33. This is done not for the reason that a court would attempt these arguments (rather than grapple with these, history indicates that a court wishing to intervene would simply ignore section 33)⁴³ but rather to illustrate the logic in support of the Code achieving its object. Preceding this a brief account of the way in which section 33 and its companion provisions interact so as to remedy “the problem in the past”.

The legislative interaction

Sections 31 and 34(1) reinforce the Board's unique section 33 jurisdiction. First, section 33, exclusively empowering the Board to determine the extent of its jurisdiction, renders the issue of jurisdiction itself a question arising under the Code. Section 34(1), conferring “exclusive jurisdiction to decide any question arising under this Act”, thus complements section 33. To similar effect, second, section 31(a) confers “exclusive jurisdiction” over “any matter in respect of which the board has jurisdiction under this Act”; the issue of jurisdiction itself being one such “matter”. If that were not sufficient, section 31(b) extends that grant to also include “any matter in respect of which *the board determines under section 33* that it has jurisdiction”. Added to this, section 32(1) stipulates that “no court has or shall exercise any jurisdiction in respect of a matter that is ... referred to in section 31”; *inter alia* in respect of the Board's jurisdiction *simpliciter* or

any matter the Board determines under section 33 to be within its jurisdiction.⁴⁴

The main privative provision, however, is section 34(2):

“34(2) Except in respect of the constitutional jurisdiction of the board, a decision or order made by the board under this Act, a collective agreement, or the regulations, *upon any matter in respect of which the board has jurisdiction, or determines under section 33 that it has jurisdiction under this Act*, a collective agreement, or the regulations, is final and conclusive and is not open to question or review in any court on any grounds, and no proceedings by or before the board shall be restrained by injunction, prohibition, mandamus, or any other process or proceeding in any court, or be removable by certiorari or otherwise into any court”.⁴⁵

In view of section 33, the salient parts of this clause are the words “upon any matter in respect of which the board has jurisdiction”. Specifically, if a tribunal is empowered independently of its primary jurisdiction to determine what is, and what is not, within that jurisdiction, then any error it thereupon makes is ‘non-jurisdictional’ and within the scope of the privative clause. Indeed, the only explanation for the legislature expressly referring in that clause to section 33 is that it intended to emphasise this in the event of an application for review. The words in question (“or determines under section 33 that it has jurisdiction under this Act, ...”) are superfluous since section 31(b) unambiguously states that “the board has and shall exercise exclusive jurisdiction in respect of ... (b) any matter ... [so determined] under section 33”. Since, therefore, the section 33 reference could be excised without affecting section 34(1), presumably it was included out of an abundance of caution, directing the courts’ attention to the reasoning excluding the usual avenue for review.⁴⁶ Nevertheless, six arguments may be attempted in support of the prerogative writ.

Possible arguments

Two of these, involving constitutional challenges to the Board’s jurisdiction, are peculiar to the allocation of federal-provincial powers in Canada and will not be examined. The first is based on the proposition that there is a constitutional right of access to the courts for purposes of ensuring judicial review of inferior tribunals. The second is that the Board’s power to define its jurisdiction is, when exercised, a function analogous to that of a ‘section 96’ court, thus violating the constitutional requirement for federal appointment of judges. Although it is doubtless simply a matter of time before both arguments are judicially tested in Canada, it suffices that the jurisprudence on which they are based has been examined elsewhere.⁴⁷

Of the remaining four that are examined, these are germane to the administrative solution to labour disputes and the ingenuity of courts to wrest jurisdiction from the administrative board.

The section 33 determination

The first of these is avoidable by the Board. The Board, it has been seen, has the capacity to determine its jurisdiction, and to designate matters as being within that jurisdiction.⁴⁸ For that purpose it may be argued that section 33 requires there to be a determination (that there is jurisdiction to determine a matter) *and* that it be expressly recorded by the Board in order to avail itself of the privative sections. In the absence of that preliminary measure, Board decisions on matters which it believes are its exclusive concern may be unprotected.

Despite the certainty of one commentator,⁴⁹ the argument fails on three grounds. The first is based on section 32(1), which excludes the courts in respect of "a matter that is, or may be, referred to in section 31";⁵⁰ section 31(b) referring to "[a] matter in respect of which the Board determines under section 33 that it has jurisdiction". The operative words being "or may be", section 32(1) thus excludes the court's review jurisdiction in respect of any matter which the Board *may* determine as being within its jurisdiction. Since the Board's section 33 jurisdiction is unfettered, this encompasses all matters which the Board proceeds to entertain — matters which the Board could, if it so wished, *expressly* designate as being within its jurisdiction.

The second ground is closely related. Simply, if the Board can designate matters within its jurisdiction by express ruling, cannot the Board effect the same *impliedly* by reason of its proceeding with matters on which its decision depends? The difference between an express and an implied ruling for purposes of section 33 is the same as that between express and implied repeal of statutes. In result, there is no difference, for in the absence of express provision the legislature is deemed to intend the repeal of an earlier inconsistent statute. Similarly, the Board may be presumed to proceed with applications on the basis that it has addressed the issue of jurisdiction; in the majority of cases, in fact, the Board's jurisdiction being so clear as not to warrant mention.

This analogy to express and implied repeal would not succeed were it a stated condition of section 33 that each jurisdictional determination be expressed in the decision. But section 33 speaks only of a determination howsoever effected, impliedly or expressly.

The third ground is that the privative provisions of sections 32 and 34(2) achieve their purpose notwithstanding the section 33 determination, express *or* implied. The reason is that any matter which an inferior tribunal proceeds to entertain, in truth, raises the question whether it has jurisdiction.⁵¹ But where the *Board's* jurisdiction is in question, sections 33 and 34(1) direct that that matter be for the Board alone to determine, thus bringing the issue of jurisdiction itself within the protective terms of section 32 and 34(2).

Hence it is enough that the Board possesses its section 33 jurisdiction, regardless of whether the determination be express, implied or made at all. A Board decision disputed on jurisdictional grounds is (to quote section 34(2)) "a decision made by the Board ... upon [a] matter in respect of which the Board has jurisdiction".

Natural justice

The Supreme Court of Canada has affirmed that failure to comply with the rules of natural justice is a matter affecting jurisdiction, not procedure.⁵² Consequently, *unless* the Code relieves the Board of the obligation to comply with the rules, bias or failure to afford parties the opportunity to be heard will render Board proceedings reviewable. In light of the Code's objective, one would expect the legislature to designate the Board its own master in determining minimum standards of justice for all purposes of the Code's procedures. That expectation caused confusion at the outset, however. The uncertainty of the politicians during the legislative debates, whether the Code ought to exclude the rules, is recorded in Hansard. In the clause by clause examination of the Bill, the Attorney General debated the Opposition's call for access to the courts. In the event of denial of natural justice, the Attorney General refuted that judicial redress was no longer possible:

"And when I suggest in this Bill that the right to go to the courts in terms of a denial of natural justice is still present, I say that it's present in terms of all our inferior tribunals in the Province of British Columbia It isn't true to say that regardless of any error there is no access to the courts... [I]n spite of ... [the privative clause], the rules of common law apply and the question of natural justice applies... . As I say, the unwritten laws of England apply to this inferior tribunal" ⁵³

Compounding the uncertainty, the Minister of Labour endorsed the Attorney General's speech,⁵⁴ yet reiterated to the House that the object of the legislation was to remove the judiciary from the Province's labour relations.⁵⁵

Which of the Minister's views prevails is unresolved. On the one hand, section 21, though empowering the Board to determine its own practice and procedure, stipulates that it "*shall* give full opportunity to the parties to any proceedings to present evidence and to make submissions".⁵⁶ In the normal case, a decision given in breach of that requirement would render it amenable to the prerogative writs. On the other hand, if breach of natural justice be a *jurisdictional* error, it is a logical necessity that a body empowered to determine the extent of its jurisdiction is empowered to determine whether it need comply with natural justice.

In this sense, there is a conflict between the mandatory requirement of section 21 and the Board's expansive section 33 jurisdiction. It was early recognised by the Board that the draftsman may not have anticipated all the effects of the Code's major reforms. Observing that "different parts of the Code may not fit perfectly together",⁵⁷ the Board resolved that it had a commitment to make the legislation work: "to smooth off the rough edges in the legislation to the extent this is legally permissible".⁵⁸ In that case, the Board adhered to its commitment by recognising the need "to afford natural justice to the parties, as embodied in s.21".⁵⁹ In resolving thus, the Board did not go as far as to disclaim its section 33 jurisdiction to discharge its functions in disregard of the rules, as indeed it is empowered to do. However, on the assumption that the Board would be loath to invite an application for review attendant on the ruling that it had this jurisdiction, it is unlikely that the Board will renege on its commitment to respect the section 21 requirement.

Finally, it may be noted, it is not expected that a court would uphold a Board decision in breach of natural justice under the third limb of section 33, conferring "exclusive jurisdiction ... to determine ... in what manner it shall exercise its jurisdiction". It is likely that this would be construed as empowering the Board with regard to procedure not affecting jurisdiction.⁶⁰

Jurisdiction "under this act"

The jurisdictional provisions pivot on section 33. The third argument on which a court might evade these provisions involves a restrictive interpretation of section 33. This requires focussing on the primary jurisdiction that the section confers on the Board: namely, "to determine the extent of its jurisdiction *under this Act, ...*".⁶¹ By so doing, it is possible to treat the Board's section 33 jurisdiction as being circumscribed by the jurisdiction possessed under the Code independently of section 33. The section 33 jurisdiction could not then be invoked by the Board to determine matters held, as a matter of statutory construction, to be in excess of the Code. Fur-

ther, the fact that the jurisdiction conferred by section 33 is exclusive would not defeat this reasoning, nor therefore a court ruling that/the Board had asked itself 'the wrong question'.

The difficulty with this argument is that the Board, in determining the extent of its jurisdiction "under this Act", is also endowed by section 33 with the "*exclusive jurisdiction ... to determine any fact or question of law that is necessary to establish its jurisdiction*".⁶² This second limb mandates the Board to construe the Act for the very purpose of establishing jurisdiction. Furthermore, what the Code's provisions enact are themselves questions arising under the Act so as to fall exclusively within the Board's section 34(1) jurisdiction. Hence, the Board is insulated from judicial review even were a court able to establish, as a matter of construction, that the Board claimed jurisdiction under section 33 on an erroneous view of its enabling statute; in short, the function of statutory interpretation normally reserved to the courts for this purpose is transferred to the Board.⁶³

External law

The 'external law' approach is an extension of the third argument in that it too postulates the restrictive effect of the words "under this Act".⁶⁴ Although no more tenable than the third, this approach is one on which the British Columbia courts *have* intervened. The following examines the development of the doctrine and the Board's response to it.

THE BOARD'S RETREAT

Re Pruden

Early in the Code's operation, the Board did not seek to qualify section 33. In *Workmen's Compensation Board Employees et al.*,⁶⁵ the Board on applications for certification of two Crown agencies was required to determine whether the doctrine of Crown immunity exempted the agencies from collective bargaining under the Code. The Board noted that its predecessor under the *Labour Relations Act* had consistently declined jurisdiction.⁶⁶ In holding under the new legislation that the agencies were not exempt, the Board confined the issue to "a very difficult question of the extent of its jurisdiction under s.33".⁶⁷ This involved the Board in a consideration of section 35 of the *Interpretation Act*, granting the Crown's immunity from statute.⁶⁸ In applying that section, the Board made no mention of possible judicial scrutiny. In fact, the Board acknowledged its responsibility to the legislature, not the courts:

“The legislature contemplated that this Board would take a responsible attitude in respecting the legal framework from which it derives its jurisdiction. *By the same token, when it enacted provisions such as ss.33 and 34, it certainly did not envisage that the Board would adopt a narrow, legalistic approach in defining the scope of its powers ...* . In applying such legal concept as “Crown agency”, the Board must see that it fits sensibly into the contemporary realities of industrial relations and labour law policy in British Columbia.”⁶⁹

This passage is not indicative of an administrative tribunal mindful of the prerogative writ; that the board’s inquiry involved law external to the Code did not dissuade the Board from claiming exclusive jurisdiction to dispose of the matter. This is no longer the case.

In *Pruden v Assessment Authority of British Columbia*,⁷⁰ the Supreme Court held, quashing the decision of the Board,⁷¹ that the Board erred in its interpretation of the statute creating the British Columbia Assessment Authority. The Board assumed jurisdiction on the ground that the relevant sections of the Act and the Code were not in conflict. Section 20 of the *Assessment Authority of British Columbia Act* provides:

“20(1)(a) [E]very person employed by the Crown or by a Municipality in respect of assessment, and who is designated by the authority, shall, ... be deemed to be an employee of the authority...”

(2) Where there is a conflict between this Act and any other Act, this Act prevails.

(3) The Labour Code of British Columbia Act applies to employees under this Act.”

The Authority did not designate *Pruden*, an employee of the municipality succeeded by the Authority, as an employee pursuant to section 20(1)(a). The Board held that the juxtaposition of this section and section 53 of the Code, governing employee successor rights, required the Authority to designate every person whose employment survives the succession; that the discretion reserved to the Authority pursuant to section 20(1)(a) was confined to those instances where there were legitimate business reasons for discontinuing the employment.

However, quashing the order that *Pruden* be constituted an employee of the Authority,⁷² Hutcheon J. held that the right to re-employment inferred from section 53 of the Code was repugnant to section 20, which conferred an unfettered discretion to designate successor employees. On appeal Seaton J.A. delivering judgment for the British Columbia Court of Appeal⁷³ upheld Hutcheon J’s decision that the Board erred in its interpretation of the external statute.

The Board's attitude has been to not challenge the correctness of that decision. In granting certiorari, Hutcheon J. equivocated:

*"It may be argued that by reason of one or more sections of The Labour Code, the board has exclusive jurisdiction to decide questions having to do with the construction of The Labour Code. The same argument cannot be made with respect to the construction of other statutes."*⁷⁴

The Board took the earliest opportunity to resolve his Honour's equivocation. Even before Hutcheon J.'s decision was reported, Chairman Weiler in *Transport Labour Relations and General Truck Drivers* resolved that section 33 did indeed insulate from judicial review "only Board decisions interpreting the Code, not our readings of external statutes".⁷⁵

The second reported instance of judicial review of a Board decision is *Re British Columbia Hydro and Power Authority*.⁷⁶ The issue was whether the *British Columbia Hydro and Power Authority Act*⁷⁷ had eliminated the Board's jurisdiction to enforce the Code's "good faith bargaining" requirements⁷⁸ pending changes to the Hydro pension scheme. The Joint Council of Unions argued that the Board's decision attracted its section 33 jurisdiction. Disagreeing, the Board noted that the determination it was required to make "is not one *under this Act* (Labour Code)".⁷⁹ Citing *Pruden v Assessment Authority of British Columbia*:

*"That fact does not prevent the Board from proceeding to determine the issue, but it allow that decision to be reviewable by the courts in the normal manner."*⁸⁰

The Board determined that the obligations imposed by the Code were compatible with the Hydro statute, and rejected the employer's argument that it was relieved of the duty to negotiate. The British Columbia Supreme Court was of contrary opinion,⁸¹ following which the Supreme Court of Canada⁸² upheld the Court of Appeal's decision⁸³ to reinstate the Board's ruling.

In the initial proceeding before Murry J., the jurisdiction of the superior courts to review the Board's decision on the Hydro statute was not in issue, counsel for the Board agreeing that the power existed.⁸⁴ (The matter of jurisdiction was not again raised in the appeals.) Judicial review of Board decisions involving the application of 'external law', then, seems settled. The difficulty in supporting it in light of the Board's section 33 jurisdiction is discussed below.⁸⁵

Statutes Incorporating The Code

The influence of *Pruden* is evident not only with respect to the Board's principal jurisdiction under the Code. The Board, by incorporation of the

powers conferred by the Code, is entrusted with the administration of a number of labour statutes of specific application.⁸⁶ The usual incorporation clause is contained in the *Essential Services Disputes Act*:⁸⁷

“2(2) Unless inconsistent with this Act, the definitions, provisions and procedures of the Labour Code of *British Columbia* ... apply to this Act.”

This clause is read in conjunction with section 39A of the *Interpretation Act*, stipulating:

“39A. Where an enactment provides that another enactment applies, it applies with the necessary changes and so far as it is applicable.”⁸⁸

Six months prior to *Pruden*,⁸⁹ the Board explained the legislative premise underlying the reform of British Columbia labour law. In *Canadian Cellulose Co Ltd et al.*,⁹⁰ it explained the integrated policy of the statutes vesting jurisdiction in the Board, a policy aimed at establishing one body responsible for all phases of the Province's labour relations. In this case, the Board examined the incorporation clauses under the *Collective Bargaining Continuation Act*.⁹¹ Quoting Hansard,⁹² the Board held that it had exclusive jurisdiction to administer the Act, explaining that a decision in favour of co-ordinate jurisdiction in the courts would be anathema to “the whole development of labour law in this province;” that it “would make a mockery of the orderly system of dispute settlement ... now operative under the Code”.⁹³ For example:

“It is not difficult to imagine a situation in which the parties to a dispute under the Collective Bargaining Continuation Act would be required to shuttle back and forth between the courts and the Board as the legal ramifications of the dispute unfolded.”⁹⁴

The Board repeated the policy opposing co-ordinate jurisdiction:

“[I]t would be inconsistent with a fundamental legislative premise to have two tribunals administering one body of labour law. The major theme of the 1973-4 reforms was the establishment of the Labour Relations Board as the body responsible for all phases of labour policy in British Columbia. Apart from its functions under the Labour Code, the Board was entrusted with a legislative mandate under five other statutes — The intention of the legislature was to have one integrated perspective on all facets of the collective bargaining process, rather than several isolated bodies each developing labour policy within its own domain.”⁹⁵

Recently, in *Medical Associate Clinic and Hospital Employees' Union, Local 180*,⁹⁶ the Board reconsidered its jurisdiction pursuant to the incorporation clauses in the *Essential Services/Disputes Act*. This case involved an application under that Act to have the Board declare applicable a section

permitting a union to elect binding arbitration. To make this declaration the Board was required to first determine (*inter alia*) whether the Union was a “health care union” within the meaning of the *Essential Services/Disputes Act*.⁹⁷

As in the earlier case involving the *Collective Bargaining Continuation Act*, counsel’s objection was that there was *no* jurisdiction in the Board to administer the legislation; in *Medical Associate Clinic et al.* counsel arguing in the alternative that any jurisdiction it possessed was reviewable. The Board noted that counsel relied “on such cases as *British American Oil Company Limited* (1963), 44 WWR 416; *Lodum Holdings Ltd* (1968), 67 WWR 38; and *Assessment Authority of British Columbia* [1976] 6 WWR 185”.⁹⁸ The Board did not comment on counsel’s argument as to how *Pruden v Assessment Authority of British Columbia* affected the issue, but proffered that the combined effect of the incorporation clauses was to render applicable to the *Essential Services/Disputes Act* sections 31, 33 and 34 of the Code.⁹⁹ The Board inclined to the view, then, that not only did it possess jurisdiction to decide matters assigned by that Act, but also that its jurisdiction was exclusive and unreviewable. However, in contrast to the attitude earlier expressed in construing the *Collective Bargaining Continuation Act*,¹⁰⁰ the Board expressly declined to rule further than that it had jurisdiction, refusing the legislature’s invitation to hold that incorporation of the Code negated the potential for review. The Board expressed its caution thus:

“That is a brief sketch of some of the arguments in support of the proposition that the Board’s jurisdiction over the issues in this case — including the issue of whether the HEU is a health care union — is an exclusive jurisdiction. Having given that outline, we should say that it is not our intention at this time to express any firm view on that subject. At an absolute minimum, it is clear to us that the Board is legally entitled to exercise an original jurisdiction”¹⁰¹

Although, as noted, the Board did not indicate how *Pruden* affected its jurisdiction under this Act, the Board’s reference to *Health Labour Relations Association v Hospital Employees’ Union*¹⁰² is a clue. In that case Murray J. treated the *Essential Services Disputes Act* as a statute external to the Code (the incorporation clauses notwithstanding), but which, subject to the court’s power of review of inferior tribunals, the Board may interpret and apply for purposes of the Code.

Here, the question was whether the court had jurisdiction to determine whether an arbitrated award under that Act constituted a collective agreement. Murry J. held that section 34(1) of the Code dealt with “two separate and distinct matters”.¹⁰³ First, his Honour accepted that it confers exclusive

jurisdiction on the Board to decide any question *arising under* the Code. Second, his Honour stated that it empowers the Board to decide for *purposes of* the Code questions otherwise arising, namely, whether a collective agreement has been entered into or is in full force or effect: this “may very properly” be decided by the Board for purposes of the Code “even although that collective agreement has been imposed by the *Essential Services Disputes Act*”.¹⁰⁴ However, “[a]s the matters before me do not arise under the Labour Code but under the *Essential Services Disputes Act*, I do not consider that section 34 deprives me of jurisdiction in this case.”¹⁰⁵ In Murray J’s opinion, then, any Act other than the Code is ‘external law’ within the meaning of *Pruden*, the Code’s incorporation notwithstanding.

Citing *Health Labour Relations Association et al.*, the Board repeated its caution in claiming jurisdiction under the *Essential Services Disputes Act* in *Ladner Private Hospital Ltd. et al. and Hospital Employees’ Union, Local 180*.¹⁰⁶ The following dicta illustrate the Board’s acceptance of Murray J.’s decision, applying the ‘external law’ approach the statutes incorporating the Code:

“As a general proposition, the Board is entitled to take into account statutes other than the Labour Code in the course of adjudicating issues under the Code itself... . If it is necessary for the Board to interpret and apply legislation external to the Code, its jurisdiction to do so is an original one and subject to judicial review”.¹⁰⁷

Applying that “proposition“:

“Nor is there anything in the *Essential Services Disputes Act* which would suggest that this authority of the Board to consider statutes other than the Labour Code is inapplicable in the case of that statute.”¹⁰⁸

With reference to counsel’s objection to the Board’s jurisdiction:

“[T]he most that can be said about a decision under Section 34(1) (g) of the Code is that the Labour Relations Board will be required to consider the effect of Section 6 of the *Essential Services Disputes Act* In this respect, we accept the dicta of Murray J in the *Health Labour Relations Association* decision, *supra*, as a correct expression of the Board’s jurisdiction.”¹⁰⁹

In this light it cannot be contended that the Board disclaimed its stated policy in construing the *Collective Bargaining Continuation Act*¹¹⁰ for reasons other than the way in which the judiciary, commencing with *Pruden*, has penetrated the Board’s exclusive jurisdiction. The ease with which those inroads have been made is attributable mainly to the abbreviated manner in which these statutes have bequeathed jurisdiction to the Board; incorporation of the Code’s provisions by general clauses invites the characterization of the statutes as legislation external to the Code. For

this reason it is difficult to understand why the draftsman elected not to duplicate in these statutes (with the necessary modifications for the purposes of each) sections 31-34 of the Code, thereby excluding the 'external law' approach pursuant to the Board's jurisdiction to determine its jurisdiction under each Act respectively.

THE JUDICIAL INCURSION

(a) 'External law' and section 33

In *Pruden*, Seaton J.A. for the Court of Appeal explained the retention of the court's power to review:

"[W]e have not been required in this case to consider the Board's exclusive jurisdiction, the privative clauses in the code or the court's power to grant certiorari respecting decisions of the Labour Relations Board of British Columbia."¹¹¹

This was stated in response to counsel's position, that "the interpretation of the [external] Act by the board is [not] protected by the privative clauses of the code":¹¹²

"His position was that the Board was entitled to interpret the Act as part of its function but such interpretation was open to review on certiorari."

Without further reference to the Code, the Court of Appeal affirmed Hutcheon J.'s decision to quash; counsel's concession inviting the court's oversight of the Board's section 33 jurisdiction.

The language of section 33 is unambiguous. Not only does it give the Board "exclusive jurisdiction to determine the extent of its jurisdiction under this Act" (that is, the Code). It also grants the Board "exclusive jurisdiction ... to determine any fact or question of law that is necessary to establish its jurisdiction". These words do not confine the Board to questions of law or fact arising on the Code's provisions: read literally, the exclusive jurisdiction "to determine any fact or question of law" embraces *any* statute or rule of common law where, in the Board's opinion, the determination is necessary for it to establish jurisdiction. Seaton J.A. for the Court of Appeal reasoned otherwise, however. Characterizing the issue as one of 'external law', the judge thought it axiomatic that the court's power to review survived.¹¹³

*Re British Columbia Hydro and Power Authority*¹¹⁴ illustrates the error in that assumption. Here, it was not disputed that in the absence of the Hydro statute the Board had exclusive jurisdiction to enforce the Code in

order to compel the Authority to bargain collectively.¹¹⁵ Whether the statute did pre-empt the Board's jurisdiction (that is, in circumstances where it was otherwise conceded) involved a question of law requiring determination. Section 33, in these circumstances, is explicit. Further, as evidence that the determination *was* necessary in order for the Board to establish jurisdiction, the Court of Appeal and Supreme Court of Canada upheld the Board's jurisdiction on the very interpretation of the Hydro statute as that on which the Board proceeded.¹¹⁶ As with the Board, then, these courts could not determine jurisdiction *irrespective* of the 'external law' determination.

The same necessity for the Board to entertain 'external law' arose in *Association of Commercial and Technical Employees, Local 1728 and McGeer, et al.*¹¹⁷ Though no application for review was made in this case, the Board's acceptance of *Pruden* further illustrates the criticism. Here the Board held that it had original jurisdiction to rule on a "somewhat murky area of quasi-constitutional law" in order to establish jurisdiction to entertain an unfair labour practice complaint.¹¹⁸ Allegations were made against a Minister of the Crown (and others) in respect of statements about members of a certified bargaining unit seeking successorship rights in educational establishments. It was alleged that these violated section 5 of the Code, in that they amounted to "coercion or intimidation" capable of compelling persons to cease to be members of a trade union. The Minister's objection to the Board's jurisdiction was that his statements, made as Member of the British Columbia Legislative Assembly, were protected by the parliamentary privilege of freedom of speech. Rejecting this, the Board ruled:

"[R]esolution of this issue requires a judgment from the Board about a complex and somewhat murky area of quasi-constitutional law, all of which is external to the Labour Code itself. But all parties were agreed that the Board does have an *original* jurisdiction to make up its own mind about the legal question, once if [*sic*] was raised in the course of an unfair labour practice complaint which was properly brought under the Labour Code. Of course, *since our judgment here turns on the interpretation of a body of law outside the Labour Code, this is not a matter within the Board's exclusive jurisdiction under Section 33 et al. of the code.*"¹¹⁹

This decision, that the Board had only an original jurisdiction to resolve the Minister's objection, is pertinent in that the objection was raised in the course of a matter "properly brought under the ... Code". The issue, therefore, was the same as in *Re British Columbia Hydro and Power Authority*: whether the Board's jurisdiction was ousted by external law in circumstances where there was no dispute that it otherwise existed.¹²⁰

To reiterate, section 33 designates "exclusive jurisdiction" in the Board "to determine any fact or question of law that is necessary [for the

Board] to establish its jurisdiction ... under this Act". The canons of statutory interpretation require that words of enactment be given effect;¹²¹ that plain words be given their ordinary meaning;¹²² but that this be declined where it would result in an absurdity or otherwise negate the legislature's intent.¹²³ No absurdity, nor negation of the legislature's intent, results from attributing the words of section 33, above, their ordinary meaning. Thus, to construe the Code as granting only an original, reviewable jurisdiction over these 'external law' issues necessitates excising from section 33 the second limb, empowering the Board with regard to "any fact or question of law".¹²⁴ Confirming this, consistency requires that the *single* jurisdiction granted by section 33 *vis a vis* each of the three limbs be either original *or* exclusive. Contrary to the view in *Association of Commercial and Technical Employees, Local 1728 and McGeer*, it cannot be both exclusive and original depending on the character of the law affecting jurisdiction, that is, as being exclusive (and unreviewable) when involving the Code and original (and reviewable) when involving 'external law'.

'External law' and competing policy regimes

Attendant on the 'external law' approach, the Board in *Transport Labour Relations and General Truck Drivers* acknowledged the considerable potential for review resulting from the need to interpret statutes empowering other tribunals.¹²⁵ Commenting in this case on the "uneasy interaction" of the Code and the *Anti-Inflation Act*:

"The Labour Code does not exist as a lonely legal island. Its practice must be meshed in a coherent way with other integrated segments of the legal system, whether these be employment standards, human rights, occupational health and safety, or price and income controls. ... this Board ... does not exist in an institutional vacuum. We are an administrative tribunal with the primary responsibility to interpret and apply a comprehensive *collective bargaining* law. But it is the Anti-Inflation Board which is the primary jurisdiction over the *wage and price* controls."¹²⁶

Deferring to *Pruden*, the Board conceded that any decision based on these "other segments of the legal system",¹²⁷ even though such decisions be exclusively for purposes of the Code, would be amenable to judicial review.¹²⁸ Such was not the case in British Columbia prior to *Pruden*, however. Indeed, in *Re Lodum Holdings Ltd*,¹²⁹ the potential for review which the Board acknowledged in these circumstances¹³⁰ caused Dryer J. to reject the 'external law' ground as the test for jurisdiction.

In an application to quash two decisions of the Board's predecessor under the *Labour Relations Act*, the issue before Dryer J. was whether a

transaction concluded by the company was a "sale, lease, or transfer" within the meaning of section 12(11) of that Act. If so, pursuant to section 12(11) any existing collective agreement would continue to bind the company notwithstanding the transaction. The judge agreed that neither he *nor* the Board could determine this by reference to the enabling statute alone; indeed, that "the whole law must be considered".¹³¹ Counsel further submitted, citing *Parkhill Furniture and Bedding Ltd v International Moulders Union*,¹³² that whenever a tribunal is required to apply legal principles external to the enabling statute, it must do so correctly to be within its jurisdiction. His Honour did not agree, holding the question here to be one assigned to the exclusive jurisdiction of the Board. Whether it erred in applying "the whole law", then, was not a ground on which to attack the Board's decision that the applicant was bound by the existing collective agreement. In so holding, the court did not doubt the potential for judicial review were it to accept counsel's 'external law' argument:

*"In determining almost any question that comes before a labour relations board or any other statutory or other inferior tribunal, the whole law must be considered. In very few situations can the question be determined by reference to the enabling statute alone, and even when, at first sight, it might appear to be so, that does not so appear because the other principle of law involved in the decision are so unassailable as to achieve little prominence in the inquiry. Furthermore, the principles under which certiorari is to apply must be applicable to all inferior tribunals and not merely to those which operate under a statute with simple confines."*¹³³

Although *Pruden* overrules *Re Lodum Holdings Ltd.*, neither Hutcheon N. nor the Court of Appeal referred to this decision, possibly for the reason that counsel for the Board in *Pruden* conceded the 'external law' ground for review.¹³⁴ Alternatively, it may be that their Honours were cognizant the Code had indeed excluded the traditional ground affirmed by Dryer J.

'External law' and the labour statute

Finally, the potential for review arises not only where policy regimes as those acknowledged in *Transport Labour Relations et al.*¹³⁵ impinge on the Board's jurisdiction; contrary to the legislative reform,¹³⁶ it arises *also* within the broad framework of the Province's *labour* regime.

In *Ladner Private Hospital Ltd. et al. and Hospital Employees' Union Local 180*,¹³⁷ the Board rejected the argument that it had no jurisdiction under section 34(1) (g) of the Code to determine whether an award arbitrated under the *Essential Services Disputes Act* constituted a collective agreement. In so doing, the Board also confirmed the 'external law' ground

for review. This was despite not only the Code's incorporation into that Act, but also its observation that "there is now ... *a substantial proportion* of collective bargaining disputes in this Province to be settled by binding arbitration under that legislation".¹³⁸

This case involved issues exclusively within the Province's labour regime — the application was made under the Code¹³⁹ and involved "significant issues of policy" the Board noted, issues critical to the Province's labour relations.¹⁴⁰ But because the *Essential Services Disputes Act* — itself a labour statute — was incidentally involved in the application, the Board affirmed the potential for review. This was "unavoidable in view of the judgment of Murray J. in the *Health Labour Relations* case",¹⁴¹ the policy basis of the Board's decision on the *Essential Services Disputes Act* notwithstanding:

"In making this judgment under the Code, we are directed to have regard to the objects of the Code set out in section 27. We are unable to perceive any industrial relations considerations which would compel us to conclude that the arbitration ... has failed to impose collective agreements On the contrary, ... unless there are compelling industrial relations considerations which dictate a contrary conclusion [i.e., considerations comprising the Board's policy], the Board will be inclined to find that the result of an arbitration under the *Essential Services Disputes Act* is a collective agreement in force and effect This inclination is a product of the purposes and objects of the Code articulated in section 27:

- (a) securing and maintaining industrial peace, and furthering harmonious relations between employers and employees;
- (b) promoting conditions favourable to the orderly and constructive settlement of disputes between employers and employees or their freely chosen trade-unions."¹⁴²

At least for purposes of those statutes incorporating the Code, this case shows it is a misnomer for courts to talk of "external law" *qua* the ground for review of Board decisions. Aside being extensions of the Code through the incorporation clauses, these statutes and the Code *comprise* the Province's labour legislation, to be administered according to the labour policy to which the Board gave effect in that case. Certainly, the Minister in 1973 was anticipating the removal of the court's jurisdiction over "labour disputes"¹⁴³ — not simply those to be governed by the Code — when he spoke of the court's inability to grasp "the overall labour picture".¹⁴⁴

CONCLUSION

Given post-war labour policy in Canada, it is problematic that the settlement of the three-cornered constitutional debate of the seventeenth cen-

tury, guaranteeing freedom from abuse of executive power, is today expressed in terms of the citizen's right of access to the courts.¹⁴⁵ *Pruden v Assessment Authority of British Columbia*¹⁴⁶ is a reminder of that right, and the judiciary's ability to preserve it when threatened by privative provisions. Yet, it cannot be said that the tribunal responsible for administering the British Columbia legislation was insensitive to that reminder, since to have challenged *Pruden* would have set the Labour Relations Board and the courts on a collision course which only the courts could have won. The Board's immediate acceptance of that decision can best be described as an attempt to protect its autonomy in those areas most critical to the Code. To have challenged *Pruden* on a literal construction of the Code would have risked further scrutiny of its jurisdiction, and the possibility of the judiciary undermining further the legislative policy.

The speeches in the House in 1973 suggest that judges in British Columbia would be loath to re-enter the labour relations arena.¹⁴⁷ But labour disputes invariably work to the economic detriment of some party, and courts have seldom declined the opportunity to find a violation of legal right where property interests are threatened.¹⁴⁸ It is not unlikely that the Board's response to Hutcheon J.'s decision was devised in the knowledge of this.¹⁴⁹

Since *Pruden*, there has been no attempt to penetrate further the Code's privative clauses, the inroads made in that case seemingly satisfying the judiciary's desire for lordship over the administrative tribunal. The compromise apparently reached may satisfy those who believe that the scope of judicial review ought to reflect the relative expertise of the judge and the administrative decision-maker; the former trained to determine the limits of the law, the latter mandated to apply policy in accordance with the law. Where the administrative decision-maker is faced with legal issues preliminary to its policy regime, issues in respect of which the agency has no special qualification, it might be thought that the retention of the court's jurisdiction to make the final determination is desirable. Exponents of this view, then, might welcome *Pruden*.¹⁵⁰

But for the judiciary to delve further into the British Columbia Code would be not only an unwelcome intrusion, but also an assertion of judicial supremacy over the legislature. Laskin warned of this as early as 1952, "why the courts, as one agency of government, should not respect the authority and responsibility of another agency, the legislature, in matters where no issue of distribution of legislative power arises".¹⁵¹ The Code sought to, and did, exclude the orthodox justification for penetrating the privative clause. "[The Privative clause] cannot be intended to transform

tribunals into judicial libertines”, the Supreme Court explained recently: “The view that tribunals are not competent to set the limits of their own jurisdiction is firmly entrenched”.¹⁵² Although the connotations of the word “libertine” are better ignored, this is exactly what the British Columbia legislature intended, and by clear words of enactment did, when it enacted section 33.

How justified, then, is Professor Wade’s recent comment, counselling courts not to be dissuaded by the Code’s novel privative provisions?¹⁵³ This is difficult to reconcile with his teachings on legislative supremacy: “that the rule enjoining judicial obedience to statutes is one of the fundamental rules on which the legal system depends”.¹⁵⁴ Since Professor Wade’s opinions are entitled to the greatest respect, it would be enlightening to learn the basis on which he would distinguish the Code as being inherently different from other statutes. True, his thesis is that the “rule” is rather “the ultimate political fact” on which legislative supremacy hangs¹⁵⁵ but this cannot, of itself, vindicate distinguishing the Code as an instrument unworthy of the court’s loyalty. Even accepting what judges may perceive of their constitutional authority, does not the public interest in devising workable procedures for minimising labour disruption demand that loyalty?

FOOTNOTES

1 S.B.C. 1973, c. 122, hereinafter “the Code”. “The Board” refers to the British Columbia Labour Relations Board (see the Code, Part II).

2 As at 1973, the Province reputed to have “the worst (labour relations) record by far of any in Canada”; British Columbia Legislative Assembly Debates (1973) (Third Session) (hereinafter “Debates”), at 442 per D.A. ANDERSON (Victoria). See also C.D. GABELMANN (North Vancouver), at 455.

3 *Ibid.*, at 399-400 (emphasis added). See also the Minister’s speech, *infra*, C. *The Background to Section 33*, expressing the unsuitability of judicial review of Board decisions.

4 *Ibid.*

5 While more of a transplant than an excision of the basic Canadian system of investigation and conciliation of labour disputes, the initial post-war reforms establishing the permanent board entrusted boards with substantially the same powers and administrative functions as those possessed today under labour statutes; see generally, H.D. WOODS, *Labour Policy in Canada* (2nd ed., 1973).

6 H.W. ARTHURS, “*The Dullest Bill*”: *Reflections on the Labour Code of British Columbia* (1974) 9 U.B.C.L.R. 280, at 326.

7 For Government Members' antipathy towards the courts in labour matters, see Debates, at 475 (per Hon. G.R. Lea, Minister of Highways) and 933 (per G. Liden, Delta). For Opposition acknowledgment that there was "at one time a bliggard of injuctions", see G.S. WALLACE (Oak Bay), at 444. The Opposition's major objection to the clauses excluding access to the courts appealed more to emotion than reason. See e.g., G.B. GARDOM (Vancouver-Point Grey), eulogising the prerogative writ, "justice" and "equity" and "600 years of precedent" from Magna Carta to the present; Debates, at 1044. More than one Member thought the retention of the prerogative writ "critical to the system of democracy as we know it" (per D.A. Anderson, at 1045). Editorial comment was similarly impassioned; see ARTHURS, *ibid.*, at 324.

8 LASKIN, *Certiorari to Labour Boards: The Apparent Futility of the Privative Clause* (1952) 30 Can. B. Rev. 986.

9 *Ibid.*, at 991.

10 Expressed in the guest lecture at the Administrative Law Conference, University of British Columbia, Oct. 1979. But cf., Professor Wade's plea to courts for subterfuge rather than "naked disobedience" to the ouster clause; (1979) 95 L.Q.R. 163, and in (1977) 93 L.Q.R. 8, to avoid exposing their disobedience pleading to courts to retain the "highly artificial reasoning" sustaining the distinction between jurisdictional/*non*-jurisdictional error. Contrast Lord Diplock's dictum, *infra*, corresponding to note 37.

11 *Supra*, note 3.

12 *Supra*, note 6.

13 *Interpretation Act*, R.S.B.C. 1976, c. 42, s. 8. Cf., Laskin's instruction, *supra*, note 8, at 990, that "[w]e must not ... delude ourselves that judicial review rests on any higher ground than that of being implicit in statutory interpretation".

14 E.g., see the Minister's speech, *supra*, corresponding to note 3.

15 But cf., the 'external law' ground for review, *infra*, E. *The Board's Retreat* and F. *The Judicial Incursion*.

16 E.g., see *Construction Labour Relations Association of British Columbia et al.* [1975] 2 Can. L.R.B.R. 374, at 380 (declaring exclusive jurisdiction with respect to part (h)); *Canadian Cellulose Co Ltd et al.* [1976] 1 Can. L.R.B.R. 400, at 401-3 (declaring the same with respect to parts (g) and (w)); *Greater Vancouver Regional District and the Corp. of Delta and C.U.P.E., Local 454* [1979] 2 Can. L.R.B.R. 273, at 279-80 (declaring the same with respect to parts (c), (d) and (g)).

17 (1978), 9 B.C.L.R. 77 (B.C.S.C.).

18 *Ibid.*, at 80.

19 *Ibid.*

20 *Ibid.*, at 79.

21 For recent judicial acceptance of the presumption, see *Re Racal Communications Ltd* [1980] 2 All ER 634 (H.L.), at 638 per Lord Diplock.

22 See generally LASKIN, *supra*, note 8.

23 *Supra*, corresponding to note 3.

24 See *infra*, D. *Approaches to Section 33*.

25 See Debates, at 399.

26 See *Miko and Sons Logging Ltd v Penner* [1976] 4 WWR 756 (per McKay J.); *Alcan Smelter and Allied Workers, Local No 1* (1977), 3 B.C.L.R. 163 (per MacFarlane J.); *Pitura v Lincoln Manor Ltd et al.*, *supra*, note 16. For discussion, see ARTHURS, *supra*, note 6, at 301-313.

27 For a Board decision disclaiming jurisdiction to entertain actual or apprehended breaches of the general law, see *Canex Placer Ltd, et al.* [1975] 1 Can. L.R.B.R. 269. See also, ARTHURS, *ibid.*

28 Cf., the summary manner in which Addy J. in *Re British Columbia Packers Ltd et al. and British Columbia Council United Fishermen and Allied Workers Union* (1974), 50 D.L.R. (3d) 602 (affirmed 82 D.L.R. (3d) 182), at 609, dealt with the privative clause in the Canada Labour Code, R.S.C. 1970, c L-1, s. 122. See *infra*, note 32.

29 *Supra*, note 8, particularly at 989-91.

30 While not sovereign in the sense of unbridled legislative authority, the powers of the provincial legislatures are plenary within their provincial domain. See, e.g. *McCawley v The King* [1920] AC 691, per Lord Birkenhead for the Privy Council, declaring the Queensland legislature to be "master of its own household" as a body "sovereign within its powers".

31 *Supra*, note 8.

32 For a candid denial of the legislature's ability to exclude the courts, see *Re British Columbia Packers Ltd. et al.*, *supra*, note 28, at 609, per Addy J.:

"There are numerous decisions of common law Courts of the highest jurisdiction over many years which have held that Courts of superior jurisdiction possessing powers of prohibition and entrusted with the duty of supervising tribunals of inferior jurisdiction, *have not only the jurisdiction but the duty to exercise those powers notwithstanding privative clauses ...*" (Emphasis added.)

33 *Ontario Labour Relations Act*, R.S.O. 1970, c. 232, ss. 95(1) and 97.

34 *Inter alia*, *Toronto Newspaper Guild v Globe Printing Co* [1953] 2 S.C.R. 18 (S.C.C.); *Jarvis v Associated Medical Services Ltd* (1964), 44 D.L.R. (2d) 407 (S.C.C.); *Metropolitan Life Insurance Co v Int'l Union of Operating Engineers* [1970] S.C.R. 425 (S.C.C.); *R v Labour Relations Board (Ont.)*; *ex parte Nor. Elec. Co.* [1970] 2 O.R. 654, affirmed [1971] 1 O.R. 121.

35 The reference is to the privative clauses of the Ontario Statute, *supra*, note 33.

36 [1969] 2 A.C. 147(H.L.).

37 *Re Racial Communications Ltd* [1980] 2 199³⁴ 634 $\geq 6 \times 9 \times \leq 1^3$ 638^{9*} 6³)³ [a]ny error of law ... made by ... [an inferior tribunal] in the course of reaching ... [its] decision on matters of fact or of administrative policy would result in ... the decision ... [being] a nullity". Cf., however, *C.U.P.E., Local 963 v New Brunswick Liquor Corp.* (1979), 25 N.B.R. (2d) 237 (S.C.C.), the Supreme Court holding, reversing the New Brunswick Court of Appeal (21 N.B.R. (2d) 441), that the privative clause in the *Public Services Labour Relations Act*, R.S.N.B. 1973, c. P-25, s. 101 denied the court's power to review. The decision is significant as indicating judicial recognition of the legislative policy in protecting the labour board's autonomy. However, its effect must not be overstated since the court did not impugn the traditional ground for review. E.g., at 245, Dickson J. confined the decision to errors lying "at the heart of the specialized jurisdiction confided to the Board", also confining the court's acceptance of the, legislative policy (above) to "a labour board's decisions *within jurisdiction*" (emphasis added). For discussion, see *Re Hughes Boat Workers Inc. and UAW* (1980), 102 D.L.R. (3d) 661 (S.C.C.) characterizing the question in terms of "reasonableness" (of the board's interpretation of its constituent statute) rather than "correctness".

38 *Supra*, note 34.

39 See now, ss 1(1) (j) and 92(4). For comment, see *Windsor Raceway Holdings Ltd and Windsor Raceway Union, Local 639, et al.* [1979] 2 Can. L.R.B.R. 89 (O.L.R.B.).

40 *Ibid.*, citing *Metropolitan Life, supra*, note 34.

41 Debates, at 397 per the Hon. W.S. King. Cf., the Code, s.36.

42 *Ibid.*

43 As early as 1952, Laskin observed of labour cases that since it falls to courts to construe privative clauses, "they are in a position to interpret (that is, ignore) the legislative direction by simply refusing to give up their supervisory authority"; *supra*, note 8, at 990.

44 For early acceptance, see *Canex Place et al.*, *supra*, note 27, at 271. The Board accepted that a determination as to the extent of its jurisdiction pursuant to s. 33 operated, by virtue of ss.31 and 32(1) (as amended, 1975, c.33, s.8), "to delimit the scope of the court's jurisdiction in respect of ... [the] same matters".

45 Emphasis added.

46 *Quaere* for purposes of the Code "the very logical assumption"; *Re British Columbia Packers Ltd. et al.*, *supra*, note 28, at 609 per Addy J., that "where Parliament has set up a tribunal to deal with certain matters it would be completely illogical to assume that, by the mere fact of inserting a privative clause in the Act constituting the tribunal and outlining its jurisdiction, Parliament also intended to authorize the tribunal to deal with matters with which Parliament had not deemed fit to entrust to it ...". *Contra*, s.33

47 See ARTHURS, *supra*, note 6, at 329-39. See also *Canex Placer Ltd et al.*, *supra*, note 27, at 275, for Board acknowledgment of the "serious constitutional issue" were the Board to claim jurisdiction over breaches of the civil and criminal law perpetrated in furtherance of strikes or lockouts. For judicial notice of the constitutional issue underlying ss. 31, 33 and 34, see *Leon Hotel Ltd v Kauhausen* (1979), 79 C.L.L.C. para 14, 198 (B.C.S.C.), per Fulton J.

48 See section 33.

49 See ARTHURS, *supra*, note 6, at 328.

50 Emphasis added.

51 E.g., see Addy J.'s "very logical assumption", *supra*, note 46.

52 *Metro. Life Insurance Co v Int'l Union of Operating Engineers*, *supra*, note 34. See also, *Forest Industrial Relations Ltd et al v Int'l Union of Operating Engineers, Local 882* (1961), 31 D.L.R. (2d) 319 (S.C.C.), reversing 28 D.L.R. (2d) 249 (B.C.C.A.), affirming that the Labour (B.C.) Board is bound by the rules; *Re N.F.L.D. Assoc. of Public Employees and Carbonear General Hospital* (1978), 87 D.L.R. (3d) 315 (Nfld. T.D.) (affirming, hence, that a labour board has no power to delegate its functions in the absence of statutory authorisation).

53 Debates, at 926-27 per the Hon. A. MacDonald.

54 *Ibid.*, at 927 per the Hon. W.S. King, commenting "[t]he Attorney General has made the point very well"

55 E.g., "[t]he dynamics of labour relations defy the structures of the ancient prerogative writs of the courts, writs originated to meet very different problems from those which are faced today in labour relations;" *ibid*, at 397.

56 Emphasis added.

57 *Canadian Assoc. of Industrial, Mechanical and Allied Workers, Local No. 1 (B.C.) et al.* [1974] 1 Can. L.R.B.R. 22, at 25.

58 *Ibid.*

59 *Ibid.*, at 28. For the conventional right to make representations, see *Re Mars Fine Foods Ltd* (1954), 54 C.L.L.C. para 15, 122 (B.C.S.C.); *Martin and Robinson Ltd v Labour Relations Board* [1954] 2 D.L.R. 622; *Re Canadian Gypsum Co* [1954] 1 D.L.R. 143.

60 Cf., *Int'l Union of Operating Engineers, Local No. 882 et al.*, *Forest Industrial Relations Ltd. et al.* (1961), 28 D.L.R. (2d) 249 (B.C.C.A.), holding under the *Labour Relations Act* (B.C.) that the Board's power to determine its own practice and procedure (see now, the Code, s. 28) did not extinguish the obligation to comply with natural justice.

61 Emphasis added.

62 Emphasis added.

63 See particularly s 32(1), by reference to s.31(a), precluding the court's jurisdiction to review determinations of law or fact made under s. 33.

64 S. 33.

65 [1974] 1 Can. L.R.B.R. 135.

66 *Ibid.*, at 136.

67 *Ibid.*, at 135.

68 s. 35 reads:

“No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, Heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby.”

69 *Supra*, note 65 at 136 (emphasis added).

70 [1976] 6 WWR 185 (B.C.S.C.).

71 [1976] 2 Can. L.R.B.R. 138.

72 *Ibid.*

73 [1977] 5 WWR 296.

74 *Supra*, note 70, at 191 (emphasis added).

75 [1976] 2 Can. L.R.B.R. (dated 7 October 1976), at 386. See also at 382, citing Hutcheon J.’s decision (B.C.S.C., dated 21 July 1976). The matter was first raised by the Board in *Joint Council of Newspaper Unions and Pacific Press Ltd* [1976] 2 Can. L.R.B.R. 324 (dates 12 August 1976), at 346 (though without citing *Pruden*).

76 The initial proceeding is reported 73 D.L.R. (3d) 103 (B.C.S.C.), per Murray J.

77 S.B.C. 1964, c.7, ss.4, 53(1) (6), 55 and 55A.

78 The Code, ss. 6 and 63.

79 *British Columbia Hydro and Power Authority and Int’l Brotherhood of Electrical Workers, Locals 213 and 258; et al.* [1977] 1 Can. L.R.B.R. 115, at 120.

80 *Ibid.*

81 *Supra*, note 76. Murray J. held, quashing the Board’s decision, that Hydro had an unfettered statutory authority to set up and administer the pensionscheme. His Honour believed that it would be anomalous for Hydro to have a concomitant duty to negotiate the same.

82 (1977), 80 D.L.R. (3d) 159.

83 (1977), 77 D.L.R. 283 (reversing Murray J.).

84 *Supra*, note 76, at 104.

85 See *infra*, f. *The Judicial Incursion*.

86 Listed by the Board, *infra*, note 90 at 403.

87 S.B.C. 1973, c. 83.

88 Enacted S.B.C. 1976, c. 23, s.14. Cf., *Health Labour Relations Association v Hospital Employees Union* (1978), 78 C.L.L.C. para 14, 174 (B.C.S.C.), per Murray J., commenting on the ground for decision in *Re Government of British Columbia and Registered Nurses Association of British Columbia* (1977), 78 D.L.R. (3d) 737 (B.C.C.A.). Murray J. accepted that the Court of Appeal’s ruling, that the *Public Service Labour Relations Act*, S.B.C. 1973 (2nd Sess.), c. 144 contained no *mutatis mutandis* clause, was made in oversight of the *Interpretation Act*, s.39A. Murray J. commented that s.39A “makes a *mutatis mutandis* incorporation clause applicable to all legislation such as section 26 of the *Public Services Labour Relations Act* and section 2(2) of the *Essential Services Disputes Act*”.

89 *Supra*, note 70.

90 *Canadian Cellulose Co. Ltd. and Pulp, Paper and Woodworkers of Canada, Local 4* [1976] 1 Can. L.R.B.R. 400.

91 *Ibid.*, *The Collective Bargaining Continuation Act*, S.B.C. 1975, c. 83, s.7, recites its own *mutatis mutandis* clause in language equivalent to the *Interpretation Act*, s.39A. Section 7 reads, “[u]nless inconsistent with this Act, the *Labour Code* of British Columbia applies, with the necessary changes and so far as it is applicable”.

92 *Ibid.*, at 404-405.

93 *Ibid.*, at 403.

94 *Ibid.*

95 *Ibid.*, See also *Squamish Terminals Ltd and Canadian Stevedoring Co. Ltd and Pulp, Paper and Woodworkers of Canada, Local 3* [1975] 2 Can. L.R.B.R. 289, at 293. In *McGavin Toastmaster Ltd and Bakery and Confectionery Workers Int'l Union Local 468* [1976] 1 Can. L.R.B.R. 440, the first application to the Board for an interpretation of the *Collective Bargaining Continuation Act*, the Board did not discuss its jurisdiction other than to comment, “[b]y virtue of s. 7 of that Act, the Labour Relations Board, acting under the relevant provisions of the *Labour Code*, is required to deal with disputes arising under ... [it]”. In *Canadian Cellulose Co. Ltd., et al.*, *ibid.*, at 401, the Board explained that dictum thus:

“... s. 7 of the Act appears to incorporate the *Labour Code* in its entirety and with it the tribunal which is charged (under Part II of the Code) with the task of its interpretation and enforcement. Section 7 explicitly states that ‘the Labour Code applies, with the necessary changes and so far as it is applicable’, and there is no other agency, judicial or otherwise which is provided for”. (Emphasis added.)

96 [1979] 1 Can. L.R.B.R. 33.

97 *Essential Services Disputes Act*, s. 6(1), reads:

“(6(1) Where a fire-fighters’ union, policemen’s union, or health care union and an employer ... have bargained collectively in good faith and fail to conclude a collective agreement or a renewal or revision of it, the trade-union may elect ... to resolve the dispute by arbitration.”

See also s.1, defining a “health care union”.

98 *Supra*, note 96 at 36.

99 *Ibid.*, at 37.

100 *Canadian Cellulose Co. Ltd. et al.*, *supra*, note 90.

101 *Supra*, note 96 at 38.

102 (1978), 78 C.L.L.C. Para 14, 174 (B.C.S.C.), noted by the Board, *ibid.*, at 37-38.

103 *Ibid.*, (observing the pending application to the Labour Relations Board “in which section 34(1) (c) and (g) of the *Labour Code* are invoked”).

104 *Ibid.*, affirmed in *Ladner Private Hospital Ltd. et al.*, *infra*, note 106 (B.C.L.R.B.).

105 *Ibid.*, *Contra*, *Canadian Cellulose Co. Ltd. et al.*, *supra*, note 90.

106 [1979] 2 Can. L.R.B.R. 181.

107 *Ibid.*, at 187.

108 *Ibid.*, at 188.

109 *Ibid.*, at 189.

110 *Canadian Cellulose Co. Ltd. et al.*, *supra*, note 90.

111 [1977] 5 WWR 296, at 299.

112 *Ibid.*

113 Affirming [1976] 6 WWR 185, 69 D.L.R. (3d) 713 (B.C.S.C.).

114 Cited *supra*, notes 76, 79, 82 and 83.

115 Council conceded that “apart from s.55(1) [of the *British Columbia Hydro and Power Authority Act*, S.B.C. 1964, c. 7], pension plans would be a proper subject-matter of collective bargaining under the ‘good faith bargaining’ requirements of s. 6 of the *Labour Code*”; per the Board, *supra*, note 79, at 120.

116 *Supra*, notes 82 and 83.

117 [1978] 1 Can. L.R.B.R. 431.

118 *Ibid.*, footnoted at 432.

119 *Ibid.*, (emphasis added).

120 Cf., *supra*, note 114.

121 Cf., *Interpretation Act*, s. 7(1), specifying that “[e]very enactment shall be construed as always speaking”.

122 See *Cozens v Brutus* [1973] AC 854 (H.L.), discouraging attempts to define ordinary words of enactment not used in an unusual sense.

123 Cf., *Interpretation Act*, s. 8, *supra*, A. Introduction.

124 S.33 (emphasis added).

125 [1976] 2 Can. L.R.B.R. 374, discussing Hutcheon J.'s decision, *supra*, note 70. See also *Joint Counsel of Newspaper Unions and Pacific Press Ltd* [1976] 2 Can. L.R.B.R. 342, 346: the Board has "not only the responsibility, but also the duty" to consider external legislation "insofar as it impinges on disputes coming before us under the *Labour Code*".

126 *Ibid.*, at 385. See also at 381, commenting that the *Labour Code* does not exist "in an insulated legal vacuum".

127 *Ibid.*

128 *Ibid.*, at 386.

129 (1968), 67 W.W.R. 38 (B.C.S.C.).

130 *Supra*, note 125.

131 *Supra*, note 129, at 48.

132 (1961), 34 WWR 13 (Man. C.A.), affirming (1960-61) 33 WWR 176.

133 *Supra*, note 129 (emphasis added). *Quaere*, whether the "external law" issue in *Association of Commercial and Technical Employees, Local 1728 and McGeer, et al.*, *supra*, note 117, was "so unassailable as to achieve little prominence in the inquiry".

134 *Supra*, corresponding to notes 111 and 112.

135 *Supra*, note 125.

136 See *Canadian Cellulose Co. Ltd. et al.*, *supra*, note 90.

137 [1979] 2 Can. L.R.B.R. 181.

138 *Ibid.*, at 191 (emphasis added).

139 Namely, under s. 65(1), seeking a s.28 order directing the Hospitals to comply with the terms of the arbitrated agreement.

140 *Supra*, note 137, at 187. See, e.g., *Kelder Construction Ltd.*, Letter Decision, dated 27 September 1978, at 4 per B.C.L.R.B. (quoted, *Brunswick Masonary Contractor and Construction and General Labourers' Union, Locals 602, 1070 and 1093 et al.* [1979] 2 Can. L.R.B.R. 291 (B.C.L.R.B.), at 295):

"The parties should realize that the answers to intensely legal questions do not necessarily dictate the outcome of cases of this kind. Section 34(1) (g) gives the Board a discretionary jurisdiction as to whether a particular document will be given the force of a collective agreement under the Code at any particular moment in time."

See also, *John Inglis Co. Ltd. and Int'l Brotherhood of Electrical Workers, Local 213* [1974] 1 Can. L.R.B.R. 481 (B.C.L.R.B.); *Canadian Cellulose Co. Ltd et al.*, *supra*, note 90.

141 *Ibid.*, per the Board.

142 *Ibid.*, at 191, the Board noting "the mounting frustration of these employees ... which has already generated some job action — to be understandable".

143 Debates, *supra*, note 3.

144 *Ibid.*

145 E.g., see the Opposition speeches, Debates, *supra*, note 7.

146 *Supra*, notes 70 and 73.

147 Debates, at 935 per G.H. Anderson (kamloops).

148 See e.g. B. BERCUSSON, *One Hundred Years of Conspiracy and Protection of Property: Time for a Change* (1977), 40 M.L.R. 268.

149 *Transport Labour Relations and General Truck Drivers*, *supra*, note 75.

150 But not with respect to the 'external law' ground for review under labour statutes incorporating the Code.

151 *Supra*, note 8, at 1002.

¹⁵² *Re Hughes Boat Workers Inc. and UAW* (1980), 102 D.L.R. (3d) 661 (S.C.C.), at 665-6 per Reid J. delivering judgment of the Court.

¹⁵³ *Supra*, note 10.

¹⁵⁴ H.W.R. WADE, *The Basis of Legal Sovereignty* [1955] C.L.J. 172, at 187 (see the introductory quotation, *supra*).

¹⁵⁵ *Ibid.*, at 188.

La solution administrative aux conflits du travail. L'expérience de la Colombie Britannique

«Les cours de justice ne peuvent vraiment avoir qu'une vue sommaire de l'ensemble des problèmes du travail. Leur intervention dans le passé n'a été que sporadique et fortuite. Les juges ne connaissent pas en profondeur le processus dynamique des relations professionnelles et de la négociation collective. Pour ces raisons, le nouveau *Code du travail* a écarté la compétence des cours en matière de conflits du travail. La nouvelle loi recherche une solution administrative plutôt que judiciaire aux conflits du travail».

C'est ainsi que s'exprimait le ministre du Travail de la Colombie Britannique au cours d'un débat en 1973.

Rechercher «une solution administrative plutôt que judiciaire aux différends du travail» est, pour s'exprimer en termes généraux, une politique qui est commune dans la législation canadienne en matière de négociation collective. Cependant, ce qui est propre au *Code du travail* de la Colombie Britannique, ce sont les moyens par lesquels le *Code du travail* de cette province cherche à mettre au point la solution administrative «Nouvelle, controversée, discutable au point de vue constitutionnel». Telle est la façon dont un commentateur a décrit cette disposition qui se lit ainsi: «33. La Commission a et exerce compétence exclusive pour déterminer les limites de sa compétence en vertu de cette loi, d'une convention collective et de règlements et pour connaître de tout fait ou question de droit qui sont essentiels à l'exercice de sa compétence et pour déterminer si elle exercera ou non sa compétence et de quelle manière elle l'exercera.». L'arrière-plan de la désobéissance judiciaire à la clause privative dans la législation du travail au Canada fait voir pourquoi la législature de la Colombie Britannique a conféré cette compétence nouvelle à l'organisme chargé d'appliquer le *Code du travail* dans cette province. À une date aussi reculée que 1952, le professeur Bora Laskin (fonction qu'il occupait alors) faisait observer «l'apparente futilité» des efforts variés faits dans l'après-guerre pour écarter la juridiction de la cours des questions attribuées aux commissions de relations du travail. «Face à de tels textes législatifs, notait Lakin, la persistance des cours à exercer un pouvoir de

révision ne comporte une attribution d'autorité que sur le fondement d'un principe constitutionnel (et un tel principe n'existe pas) et sur la base de quelque théorie «élitique» de connaître ce qui est préférable pour tout le monde».

Le concept qui sous-tend l'intervention des cours en matière de clauses privatives, qui enjoignent à ces cours de ne pas intervenir, n'existe pas qu'au Canada. Notez la clause privative ordinaire écartant du pouvoir de révision judiciaire «toute décision, ordre, directive ou réglementation du tribunal administratif» en question. Puisqu'une «décision, un ordre ... ou une réglementation» outrepassant les pouvoirs statutaires du tribunal (c'est-à-dire sa compétence) n'est en réalité ni une «décision», ni un «ordre», ni un «règlement», ils ne sont pas protégés par la clause privative. Donc, le plus que ces clauses ont signifié, c'est d'exclure l'intervention de la cour, là où l'erreur d'une commission, qu'elle soit de fait ou de droit, n'en n'est pas une relative à sa compétence.

C'est en vue de donner des dents à la clause privative du Code, contenue à l'article 34(2) que l'Assemblée législative de la Colombie Britannique a adopté l'article 33. En résumé, conformément à l'article 33, la Commission est autorisée à fixer les limites de sa propre compétence — y compris à cette fin le pouvoir de connaître de tout fait et de toute question de droit qu'il lui faut trancher pour établir sa compétence — d'où il découle que toute erreur que la Commission commet n'entache pas sa compétence et se trouve dans les limites de la clause privative.

Cependant, on peut prévoir que, malgré l'article 33 du Code, les cours aient l'intention de réclamer juridiction. L'article étudie quatre de ces arguments. Deux autres, qui se rapportent à l'aspect constitutionnel de la compétence de la Commission, touchant à la question du partage des pouvoirs entre le gouvernement fédéral et les provinces du Canada, ne sont pas étudiés. Bien qu'il ne s'agisse qu'une question de temps avant que ces arguments d'ordre constitutionnel soient vérifiés judiciairement au Canada, la jurisprudence sur laquelle ils se fondent a été examinée dans d'autres instances. Des quatre autres arguments, on peut dire qu'ils se rapportent à la solution administrative des différends du travail et à l'habileté des cours à retirer sa compétence à l'organisme administratif.

La conclusion à laquelle on en arrive, c'est que le Code de la Colombie Britannique, grâce à l'interaction de l'article 33 et des autres dispositions de la loi relatives à la compétence fait obstacle à la justification ordinaire de la cour pour excéder ou contourner la clause d'exclusion. Cependant, ce n'est pas toutes les affaires que les cours de la Colombie Britannique l'ont accepté. L'affaire *Pruden contre Assessment Authority of British Columbia* a établi que, là où, aux fins d'établir sa juridiction, la Commission de cette province doit interpréter une loi autre que le Code, il y a matière à révision de sa décision par les cours en la manière habituelle. Le présent article met en doute cette conclusion eu égard à la compétence exclusive de la Commission non pas simplement de déterminer elle-même les limites de sa compétence, mais aussi de «connaître de tout fait ou de toute question de droit nécessaire pour établir sa compétence». Il suffit de noter que les mots «toute ... question de droit» ne sont pas qualifiés; ils ne se lisent pas toute ... question de droit *décollant de la loi*, (c'est-à-dire du Code).

Là où la Commission administrative se trouve ainsi en présence de questions d'ordre juridique préliminaires à son rôle essentiel — questions au sujet desquelles elle n'a pas de qualification spéciale — on peut penser que le maintien de la compétence des tribunaux de décider en dernier ressort est souhaitable. Mais le principe que l'affaire *Pruden* a posé n'est pas aussi limité qu'on peut le croire. À la suite de cette affaire, les tribunaux de la Colombie Britannique ont élargi le critère de «la loi externe» aux fins de révision des décisions de la Commission au-delà de la loi générale de façon à inclure plusieurs lois spéciales du travail qui comprennent «les définitions, les dispositions et les règles de procédure du *Code du travail*». L'inclusion des dispositions légales du Code au moyen de clauses générales d'incorporation à ces lois avait pour objet comme le signalait la Commission, d'éviter une situation «où les parties à un conflit découlant du *Collective Bargaining Continuation Act* seraient obligées de faire la navette entre les tribunaux et la Commission au fur et à mesure que se révéleraient les ramifications légales du différend». Et la Commission ajoutait ce qui suit: «Il serait contraire à un principe législatif fondamental d'avoir recours à deux tribunaux pour administrer un ensemble de législations du travail. Le thème principal des réformes de 1973-74 était l'établissement de la Commission des relations du travail comme l'organisme responsable de toutes les questions de relations du travail en Colombie Britannique. En plus de ses fonctions dérivées du *Code du travail*, la Commission s'est vue confier un mandat en vertu de cinq autres lois ...».

En fait, le maintien du droit de réforme des tribunaux non seulement va-t-il à l'encontre de la politique législative appuyant les réformes en Colombie Britannique, mais aussi des effets que l'on recherchait par l'introduction des clauses d'incorporation. Comme celles-ci incorporent aux fins de chaque pièce de législation l'article 33 du *Code du travail* la compétence exclusive de la Commission de «déterminer les limites de sa compétence en vertu de la loi» ne réfère pas en pareil cas au Code, mais à la loi dans laquelle a été incorporé l'article 33, ce qui ne laisse par conséquent aucune place à l'approche fondée sur le concept de «la loi externe».

La question posée est loin d'être nouvelle cependant. Car, en remontant aussi loin que 1952, le professeur Laskin se demandait «pourquoi les tribunaux, en tant qu'agences de l'État, ne respectaient pas l'autorité et la responsabilité d'une autre agence, la législature, dans les matières où ne repose aucune question relative au partage des pouvoirs législatifs». Si, comme on le croit, l'intention du législateur de créer une commission du travail indépendante et autonome sert l'intérêt public en minimisant le désordre dans le monde du travail, alors quelle justification y a-t-il à cette aversion pour la clause privative?