SEMINAR DISCUSSION: KUTTNER

Chair: Ann Condon*

Mr. Robert Breen (Barrister): I practise in the labour field. I am not certain that I have the new-found religion that you referred to. Your rejectionist theories fails to give consideration to a specific provision that is found in all of the labour acts and is that the board is mandated to "determine all questions of law and fact that arise before it." It would seem to me that your rejectionist thesis is based on the thought that while the board shall consider all questions of law, it shall not consider what s. 52 of the *Charter* speaks as to the supreme law of Canada. I don't know how you can rationalize that. It would seem to me that surely the Board must - in fact it is mandated to consider the supreme law of Canada. Where is the loss in the board considering the issue in the first instance, particularly if you also give rise to the flexibility of the Board with respect to procedure and admissibility of evidence. It is that one provision that is in all labour acts that shall determine all questions of law that I have some trouble with.

Professor Kuttner: My answer to that is that you are a follower of Kelsen and his positivism in which he says that every law applying organ has the power of refusing to hear constitutional issues but also says that this power is premised subject to whether or not there is an explicit rule to the contrary. My whole thesis is that there is. The *Constitution* itself is the explicit rule to the contrary, namely, the judiciary. That is a judicial function and I point out in the paper that s. 52 doesn't say the *Charter* is the supreme law - it says the Constitution of Canada is the supreme law. The *Constitution* embraces what I have been talking about, this division and balance of power. Labour boards have always been able to determine questions of law but never, in fact, have they expressly refused to permit attacks on their legislation under the federal principle. The Ontario Board was asked years ago to make a finding of unconstitutionality of a provision of the *Ontario Labour Relations Act* based on the federal principle in the transportation section and the Board said we do not have that jurisdiction. What we can do is make determinations of what I call constitutional fact. We can look at the facts in front of us and determine whether they fall within the jurisdiction of the Ontario Labour Relations Board. But even there, they are now getting too close to what I call the critocracy - the judges don't like this and they have always said that whatever decision you make, the OLRB is owed no deference whatsoever because only we, the courts, can ultimately make these determinations. Never has the Ontario Labour Relations said that we will actually determine what the legislature said is lawful. That happened right here in New Brunswick because one of the arguments made in the fishing industry board was that only Parliament could control col-

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lective relations in the fishery. I'm not going to start striking down the fisheries act of New Brunswick on the basis of federalism. That is not my function. You can argue about whether these particular fisherman, for a variety of reasons, actually are federal - that's fine and I might be able to make that finding, but I can't say that the statute can be struck down. That is the approach all American administrative tribunals take. To determine law, I say it is something different from determining constitutionality.

Mr. Breen: But isn't it possible to draw the distinction between the authority of the board to consider s. 52 and yet not be a court of competent jurisdiction?

Professor Kuttner: Section 52 says nothing different than what has always been true. The *Constitution* has always been the supreme law of the land and any law inconsistent has been always of no force and effect and that is what one hundred years of jurisprudence coming under federalism is all about. It was unconstitutional for the Ontario Labour Relations Board to have taken jurisdiction in the telecommunications field - which it did - but it didn't make that determination. That was made 15 years later by the Supreme Court of Canada when someone challenged it. And, when they challenged it in front of the Board the Board said, "We have been doing this for years - go somewhere else."

Professor Kaplan: I have a very practical question to ask you. The *Charter* was sold to the Canadian people as a peoples' packet, notwithstanding that Professor Sheppard and others have described it as an 18th Century document and this is the 20th Century and we should be looking forward and not backwards. We have these *Charter* rights and according to the formulation which you have just given us, and the theory which you have just presented to us, these administrative tribunals should not be applying the *Charter* and giving *Charter* remedies. Well my question is, what about the results of that formulation? Namely, people who are in a dispute with the state over social assistance and welfare rights and the ordinary course of their dispute with the statement they carry before an administrative tribunal, they won't be allowed to claim their *Charter* rights. What you are saying, in effect is only the people who can afford to go to court to seek remedy can have one. For everyone else they won't get their *Charter* remedies before the tribunals which have been established by Parliament to provide benefits and other things for them. I am disturbed by the consequences of that - namely that it reserves the *Charter* to only a small segment of governmental action in Canadian society when, in fact, most people in Canadian society are regulated by administrative tribunals and not by the courts - with the exception of course, criminal contact.

Professor Kuttner: That argument is a standard argument that's made and I think it is a false argument because every case that I have ever seen

where a board has given a *Charter* remedy, it has gone to court anyway. I think the reality is that once you start to touch the centrality of our *Constitution* - actually claiming that Parliament has overreached - its inevitable that you are going to go to court over that because people are not satisfied with what a mere tribunal says about that. The person who is particularly dissatisfied will be the Attorney General. The other theory I have which I didn't put down here is that I think there is a constitutional duty to uphold the legislation if it is challenged for a point in fact. They can actually ignore the *Charter* challenge and just do what we have always been doing - which is furthering the legislative policy as we see fit. In doing that, my theory is that we are doing the very thing that the courts will ultimately look for, which is, what is the s. 1 justification? The beauty of having tribunals is, unlike Parliament, it cannot explain what it means. But the boards actually do. They interpret the parliamentary act and so the courts will naturally look to see well what does it mean. Why does Parliament do this by just looking at the board jurisprudence. This is a function they do totally removed from s. 1 - this is what they have been doing since they were created, furthering a particular governmental policy. I don't really think that any sort of close analysis would withstand scrutiny in terms of access. I don't really believe that. Now that is my reaction, I think one would have to look at that.

Professor John McEvoy (Law, University of New Brunswick): In s. 96 terms, we have the provincial court system and the ability of the province to confer judicial power upon provincial courts and statutory-based courts, can't that power also be conferred upon the administrative tribunal? Isn't that the real problem that exists, the model of the provincial court?

Professor Kuttner: Maybe I can read you what I have to say about that - because that was the fly in the ointment for me. I said: "How is the newly articulated jurisprudence touching a court of competent jurisdiction?" That is the *Mills* case, to be integrated into the theory I have just propelled it. It clearly recognizes an inferior court's exercising a criminal law making power the right to restraint democratic parliaments by application of constitutional norms. Then the next sentence is my understatement. The devolution of superior court jurisdiction in criminal law matters to inferior provincial courts is a subject of some complexity, as you well know Professor McEvoy. Great as it has been, we know that it cannot be absolute - that it is so folsome as to include the deeply constitutional role to restrain democratic power I say can only be explained by the degree of independence that provincial court judges enjoy. This is in the *Valente* case in which we see that provincial court judges, although not as independent as high court, do exercise a certain degree of all these elements of independence which no administrative tribunal has. They can't be dismissed at will. When the liberty of the subject is at stake, the decision maker must have the fullness of constitutional powers to deal with that issue. I say again, administrative tribunals just are not dealing with that subject. Finally, in a footnote, I say for this reason I think that the B.C.

Court of Appeal was mistaken that a provincial court judge, not in a criminal law setting, but in just a normal welfare case setting, struck down provisions of the B.C. welfare-type statute, I think is wrong because it was outside of this area. Now that is just my own theorizing. Maybe they will always have this right in any area. But, I think that one can distinguish criminal law cases from any other type of decision-making on the basis of the liberty of the subject.

Professor D. Townsend: I have two practical questions. First, when Justice McLaughlin gave her talk last night she described the challenge ahead in the *Charter* period for all judges, a tremendous challenge when you consider the amount of staffing resources available to the justices generally, the resource of their legal education, the quality of argument by counsel, it really is one heck of a challenge. Aren't you really denying the court the ability to stand on the shoulders of what this labour board has decided when we are going to take it off the court at first instance, when it might be a tremendous assistance to the court if there had been a decision already?

Professor Kuttner: Well, the way I look at that David is, I agree with you. Initially I had this idea that when there is a challenge, you immediately find it constitutional and give s. 1 reason. Then I realized that I don't really need that. The way I see it, the labour board is constantly articulating the rationale for whatever Parliament has done. The way that the courts can get to that is by exercising the same deference that it always has now in just normal judicial reviews. For instance, the Ontario divisional court has said it will refuse to hear an application for prohibition whatsoever coming from the board. There is always one little exception, because they want to hear the board's views and determination first. All challenges should come after the board has dealt with the substantive matter. I think that in constitutional matters perhaps the same approach could be taken, that the court would say: "We aren't interested in hearing the constitutional argument until we have seen the labour board come down with this labour law decision on whatever and then we will let someone challenge that decision and we will have" - that's my theory - whatever the board has decided is it s. 1 values. Now, this puts boards in a hard position, for instance, the Ontario Labour Relations Board would love to strike down the agricultural exclusion because it doesn't fit with labour relations and collective bargaining theory. But, I don't think it has the right. What it can say is all sorts of things about that exclusion and ultimately try and give what the rationale was because there is a rationale - and it might be a very weak rationale. When the court looks at it, the court will say well, forget that - that was the rationale for the agricultural workers exclusion - we are not interested in that - we are going to strike it down. On the other hand, the closed shop, the Rand formula - there are very strong rationales for those and labour boards have articulated them and explained them in many, many cases."

Professor D. Townsend: The second part may be far more of a comment. But labour relations is a minuscule aspect of the statutory decision-making that goes on and my observation of statutory decision-makers indicates that they make accommodations all the time at an informal level. It may well be that they will not be making formal declarations of law, they may be making accommodations on a regular basis based on the arguments of counsel.

Professor Kuttner: I am not sure what the answer is to that.

Professor Myron Gochnauer (Law, University of New Brunswick): Tom, I would like to be very impractical, to go back to the ancient term in it, in sort of the general scheme of what you are talking about, kind of the deep logic of it, where do you see administrative tribunals fitting? Are they in the sort of democratic side linked with persuasion and rhetoric or are they are on the critocratic side of whatever it is concerned with dialectic, platonic truths. Where do these boards fit? Clearly the court, in your vision, is on the side of Plato and kind of abstract truths and the legislatures are on the side of rhetoric and speech and persuasion. Where do your boards fit?

Professor Kuttner: I think the boards are on the side of the legislatures, because the legislature doesn't have time to explain why it created collective bargaining and so it says here, you do it, this is the formula. Explain why it is and make sure that it works. So, the boards have a mission. I don't think the judges have a mission. Judges are to apply law - I know this is very schematic but they do not have a mission to further the Parliament's will in the same way as boards do. They have a mission to ensure that the law really does reflect what Parliament wanted. You test Parliament against all sorts of things. Labour boards look at it as - I say the basic principle is to join free trade unions. In my view, this is what Parliament wants and by God I am going to see that it happens. I don't care that anybody that tries to put up barriers against it, we will strike them down. If it is a barrier of free speech, we will strike it down. There is no such thing, in reality, as employer free speech under the labour law jurisprudence. The minute an employer opens up his mouth, he is engaging in unfair labour practices by our theory, whereas by a judge's theory, he is expressing commercial free speech. I don't think I can agree that with a union shop there is commercial free speech, if a sign in English is commercial free speech, but it is intimidation of workers by jurisprudent labour boards and thankfully courts have said: "We are not too expert on employer free speech under labour legislation, so we'll let the boards, even if we don't agree with it, its rationale and, therefore, we let it stand." I prefer to stay on that type of relationship with courts.

Madame Justice McLachlin: I hesitate to toss a question at this learned gentlemen. I wonder if the issue has to be black or white. Doesn't s. 24 talk about, in English, court of competent jurisdiction and the other version

tribunal. Why must it be either court or tribunal that has the jurisdiction. Why can't it be a tribunal designed to deal with an issue that has a problem.

Professor Kuttner: Well, as I said, I still think there is this constitutional fact idea - they see the shape of what the issue is before them. But the reason I think it is either/or is really what my paper is about. This has been a true revolution in our constitution which is much further than the Americans ever went to with their entrenched bill because no American tribunal touches *Bill of Rights* questions. The LNRB said in 1946, they didn't even discuss it - they put in a footnote, as being so obvious that they couldn't attack the *Wagner Act*, its not worth even arguing about. Is the *Charter* a complete usurpation of our constitution or do we still have a constitution similar in principle to that of the United Kingdom? I say that if we allow this, we have diverted from a constitution similar in principle with the United Kingdom because we have now conferred one of the central features of the judicial power on anyone. Actually, Madame Justice McKinley said that actually anybody who has to deal with any legislation can ignore it, any actor. Of course she might be wrong but my theory on that is that she has just elevated civil disobedience into a kind of principle of constitutional acting. But the whole theory of civil disobedience is that you come to that as kind of a final ultimate last resort. It is not the sort of thing a guy handing out motor vehicle licenses decides. If he says: "I don't like it - I don't think there should be a Nouveau-Brunswick on the license plates - therefore I refuse to issue them on that" and starts to stamp them out. Civil liberties go to the citizen - not to a branch of government or an arm of the government in the exercise of its own jurisdiction. One should resign ultimately, but I don't think that you can elevate a theory of civil disobedience to a principle of administration of the welfare state - it just wouldn't work. Everybody would be disagreeing with everything. We know civil servants don't like bilingualism, but if we allow them then to exercise their civil liberties, there might be chaos.

Madame Justice McLachlin: Just to follow up on the questions referring to whether or not the boards are exercising the judicial function. You suggested it might be legislative - the comments you make just now suggest to me it might be executive. Many of these boards are carrying out the design of the legislature in an executive sort of way. Would you accept that?

Professor Kuttner: I would agree with that. That's just the problem of our constitution. I think that the executive exercises power only when Parliament has said they cannot. So they come out of both the legislature and the executive. Actually Justice Marseau addresses this issue. He doesn't put it this way but essentially he says: "These English judges reading what tribunal means in French - they are not equipped to even understand it." "Tribunal and the use of tribunal," he says, "has nothing to

with administrative tribunals." I am just giving you his interpretation. He has written reams on this in his decisions. *Farrier* is his most recent decision in which he totally rejects the use of the French side to do what he considers to be a totally usurpation of the constitution.

Mr. Rubin: If I may go back, Professor Kuttner, to what Dr. Kaplan raised earlier. I agree with the logic of what you are saying and the grounds for holding that administrative boards are not competent jurisdiction and particularly with respect to those boards that are made up of individual people, none of whom have any legal training. However, there are purely administrative boards and then there are quasi-judicial boards. I think that it must be left open to individuals appearing, especially before the quasi-judicial boards to raise certain *Charter* arguments. The weight and value of those arguments for purposes of precedent are of no value, but they are important in value to the party appearing before the Board at that particular time. Your response to Dr. Kaplan's remarks were exactly that you are not aware of any *Charter* argument raised before an administrative board that hadn't gone on to the court. One of the board's Dr. Kaplan referred to was a board that might be landlord & tenant or whatever. I think you will find that very few *Charter* arguments raised before boards of that nature will end up in the courts. The parties are not of the same nature financially or otherwise or sophistication as the parties who normally appear before a labour relations board. Therefore, if the parties appearing before an administrative board are not allowed to raise a *Charter* argument for purposes of their case only, then I think the efficiency and effectiveness of the board itself is infringed upon.

Professor Kuttner: This comes back to my view that I think they can discuss the *Charter* in what I call the climate idea. They can say to those residential tenancies board when you are looking at this issue of the securities deposit. I think that board can say: "Fine, we'll hear you out" and it can help in terms of getting this climate idea. The person is trying to give them the *Charter* climate that they should be looking at their own legislation in; I think that is fine. It is different when you interpret what the legislation is or what you can do with it. Remember what Justice Beetz said about *Charter* relief, that we are not in a totalitarian society contrary to the views of Chairman LaPointe. LaPointe gave what I tell my students is the Mao Tse Tung relief, he made the President of the Bank of Commerce write a letter apologizing saying how sorry he was for having breached the *Act*. Beetz said this was totalitarian. I don't think you can say to the board please ignore s. 2(b)(c) of the statute - its of no force and effect. My view on that is if you say that, I have no competence whatsoever to do what you say. I do have competence to determine what this means within the setting of our entire law just as I do in terms of common law. I look at rules of evidence when I make an evidentiary finding.

[Unidentified]: Is there a danger important questions may not get to the courts if we don't allow them to be raised before a tribunal?

Professor Kuttner: I don't think so. I think important questions bubble to the top.

[Unidentified]: Well, we see what comes but perhaps there are constitutional questions under landlord tenant acts which may never get to the courts if they are not raised below. This is something that concerns me. The other mechanism, I suppose, is a reference but who is going to bring the reference to the Supreme Court or maybe there are other mechanisms that you can think of that may answer my questions.

Professor Kuttner: I havn't thought about that but to tell you the truth, even if there is that danger, I don't think the desirability of determining the constitutionality of a particular act of the legislature is important enough to overthrow the entire constitutional structure that we have created for the determination of those questions. I think that is what I would say and those two - the lesser evil would mean that that one question isn't determined not that we usurp the structure of the state. There is a statement by Justice McIntyre who says something in *Dolphin Delivery*: "Let us remember the *Charter* didn't completely revolutionize our entire legal and constitutional system." It still is the same system and I think that this is part of it and to do what the Ontario board is doing and the Ontario court says it can do, I think is revolutionizing our entire constitutional structure and I don't think the people of Canada that's what they wanted. They just wanted an entrenched *Bill of Rights*.