Judicial Review — Jurisdictional Fact Doctrine — *Public Service Labour Relations Act* (N.B.) — *Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corporation*

In the last decade the courts have maintained a high profile in reviewing the decisions of administrative tribunals. In the face of privative clauses courts have labelled errors of law as jurisdictional. In England the characterization has become so liberal that one learned author has suggested with concern that,

> if the widest possible effect is given to the reasoning of the House of Lords in the *Anisminic* case, it could be said that every error of law by a tribunal necessarily means that the tribunal asked itself the wrong question or acted on irrelevant considerations; and that therefore every error of law is an excess of jurisdiction.[1]

The recent case, *Canadian Union of Public Employees, Local 963*, v. *New Brunswick Liquor Corporation*,[2] indicates that the Supreme Court of Canada may have turned the tide on this trend in Canada, at least with respect to Labour Relations Boards.

A complaint was laid with the New Brunswick Public Service Labour Relations Board by the Union alleging that during the course of a legal strike the employer was replacing striking employees with management personnel contrary to s. 102(3)(*a*) of the Act.[3] The employer denied that it was contravening the section and countered that the Union was picketing in violation of s. 102(3)(*b*), which provides that:

> 102(3). Where sub-section (1) and sub-section (2) are complied with, employees may strike and during the continuance of the strike
> (*a*) the employer shall not replace the striking employees or fill their position with any other employee, and,
> (*b*) no employee shall picket, parade or in any manner demonstrate in or near any place of business of the employer.

After hearing the complaint, the Board determined that the allegation of the employer, in relation to picketing, was well founded. A cease and desist order was issued. The Board also determined that the Union's complaint was well founded and ordered that the employer also cease and desist. Only the latter finding, with respect to the employer's conduct, was challenged in the courts.

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[1]H. W. R. Wade, *Administrative Law* (4th ed) (Oxford: Clarendon Press, 1977) at 257.

[2](1979), 25 N.B.R. (2d) 237.

[3]*Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25.

Before the Board the employer had alleged that s. 102(3) prohibited an employer only from replacing striking employees with another employee. As it had replaced employees with management it argued that it had not contravened the section. As well, the employer argued that the intent of the section was to keep jobs open for the employees after the strike ended. This being so, the temporary replacement of striking employees with management was not in contravention of the section. The Board rejected both these arguments. The Court of Appeal, while rejecting the first argument, agreed with the second, and quashed the decision of the Board.

The *Public Service Labour Relations Act* contains a privative clause:

> s. 101(1). Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, the Arbitration Tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.
> s. 101(2). No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto*, or otherwise, to question, review, prohibit or restrain the Board, the Arbitration Tribunal or an adjudicator in any of its or his proceedings.

In order, therefore, to quash the finding of the Board, it was necessary for the Court of Appeal to characterize the error as jurisdictional thereby negating the protection afforded by s. 101.

The Court of Appeal did this by a two-fold characterization of the issue.[4] First, the Board, it said, is empowered to inquire into a complaint that an employer has failed to observe a prohibition in the Act. Second, it is not empowered to determine what is prohibited by the Act nor to interpret the Act except insofar as it is necessary to determine its jurisdiction.

By characterizing the issue in this way the Court of Appeal set the framework for determining that the Board's interpretation of what constituted a prohibition under the section was a condition precedent to giving it jurisdiction. It was, therefore, a jurisdictional question to which a wrong determination would give rise to the intervention of the court by way of judicial review. Although the Court of Appeal found that the section "bristles with ambiguities"[5], it concluded that the Board, by misinterpreting the Act, had wrongly assumed jurisdiction.

The Supreme Court of Canada reversed the Court of Appeal and restored the order of the Board. Mr. Justice Dickson, speaking for the full court, held that:

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[4](1978), 2. N.B.R. (2d) 441 (N.B.C.A.).

[5]*Supra*, footnote 2, at 240.

> With respect, I do not think that the language of "preliminary or collateral matter" assists in the inquiry into the Board's jurisdiction. One can, I suppose, in most circumstances, subdivide the matter before an administrative tribunal into a series of tasks or questions and, without too much difficulty, characterize one of those questions as a "preliminary or collateral matter.[6]

His Lordship went on to say:

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

The approach preferred by the Supreme Court of Canada was to determine the Board's jurisdiction at the outset of the inquiry. The court recognized that it was necessary for the Board to determine whether or not the complaint which had been lodged with it was well founded. Certainly the Board had power to embark on this inquiry; this was exactly what the Act contemplated. Therefore, it could be said that the existence of a prohibition was not a condition precedent to the Board's jurisdiction. In this manner, the Supreme Court distinguished the authorities relied on in the Court of Appeal.[7]

As the Board had jurisdiction to embark on the inquiry, the only question remaining for the court was, did the Board lose this jurisdiction in the course of the inquiry by placing a patently unreasonable determination on the construction of the section and thereby embark on an inquiry not remitted to it? If so, it would lose jurisdiction. If not, its decision would be protected by s. 101.

The Supreme Court of Canada observed, as had the Court of Appeal, that s. 102(3) was ambiguous. There could be no right or wrong interpretation. The mere fact that the Board placed on the section an interpretation different from one that the court may prefer did not render the Board's interpretation unreasonable. In order to determine the reasonableness of the interpretation used by the Board, Dickson J., examined the purpose of s. 102.

In a careful analysis of the purposes of the section in the scheme of public service labour relations, His Lordship noted that it was the intention of the legislature to maintain a balance of power between employer and employee: on the one hand, to avoid picket lines outside government buildings, and on the other, to limit the employer's right to replace striking employees. There was a necessary trade-off entailed in limiting the normal right of an employee to picket and this was achieved by limiting the right of the employer to maintain a high level of service.

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[6]*Ibid.*, at 243.

[7]*Re Jacmain* (1977), 18 N.R. 361 (S.C.C.); *Jarvis* v. *Associated Medical Services Ltd. et al.* (1976), 44 D.L.R. (2d) 407 (S.C.C.); *Parkhill Bedding & Furniture* v. *International Molders & Foundry Workers Union of N. America, Local 174* (1961), 26 D.L.R. (2d) 589 (Man. C.A.).

Viewing the section in the context, not of labour relations generally, but in the narrower context of public service labour relations, the court accepted that the interpretation placed on this section by the Board was reasonable. To interpret the section otherwise would cause the sterilization of the right to strike by the employee with no countervailing restriction on the employer. His Lordship concluded that the Board's interpretation was at least as reasonable as the alternative interpretations suggested in the Court of Appeal.[8] Therefore, the Board could not be said to have misinterpreted the provision in question so as to embark on an inquiry or answer a question not remitted to it.

The decision of the Supreme Court of Canada is significant for two reasons. First, it addresses the problem of determining the appropriate relationship between judicial review by the courts and the finality of decisions of specialized administrative agencies. Second, it acknowledges that the court should, before analyzing the actions of a specialized tribunal, be mindful of the purpose of legislation establishing that tribunal and not interpret individual sections by literal canons of construction thereby frustrating the broader purposes of the Act.

Judicial review of the decisions of administrative agencies is concerned with legality of action. It exists to ensure that statutory tribunals do not exceed the authority vested in them by the legislature. Judicial review in these circumstances is based on the principle of *ultra vires*. The only exception to this is the remedy by way of *certiorari* for error of law on the face of the record which enables the court to quash a decision which appears bad on its face. This remedy is available where the error of law is not jurisdictional. However, the existence of a privative clause protects non-jurisdictional errors from review on this ground. Where, therefore, a privative clause exists, the court is restricted to reviewing for *ultra vires* action. That is the situation in the case under discussion. The Supreme Court of Canada recognized the distinction. Dickson J., examined the privative clause, and observed that it was "a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board". He found the rationale for protection of the Board's decisions within jurisdiction compelling "The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations".[9] This is a clear indication that the Supreme Court of Canada intends to maintain the distinction between jurisdictional and non-jurisdictional errors. This decision has been reinforced in at least two other recent Supreme Court of Canada decisions dealing with Labour Relations

[8]*Supra*, footnote 2, at 251. The Court of Appeal was not unanimous in its interpretation.

[9]*Supra*, footnote 2, at 245.

issues.[10] It seems clear that the court will be slow to characterize as jurisdictional that which is dubiously so.

The method of statutory interpretation used by the court also influences the outcome. In the *CUPE* case, the Court of Appeal adopted rather literal interpretations of s. 102. On the other hand, the Supreme Court of Canada showed sensitivity to the purposes of the legislation dealing with labour relations and particularly to the special nature of the balancing of powers required in public service labour relations. Dickson J., drew attention to the fact that the rules normally applicable to conflicts between employer and employee had been altered by s. 102 of the *Public Service Labour Relations Act* and it was therefore necessary to interpret s. 102 in a manner which sustained the altered status of both parties.

An additional point of interest is that His Lordship noted that, before the Board, the Union had taken no jurisdictional objection, nor had the employer.[11] This may suggest that the court will be unsympathetic to technical arguments raised with hindsight to bring matters before the court under the guise of jurisdictional questions.

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[10]*International Union, United Automobile Workers, Local 720* v. *Volvo Canada Ltd.* (1979), 27 N.R. 502 (S.C.C.); *McConnell et al.* v. *Douglas Aircraft Co.* (1979), 29 N.R. 109 (S.C.C.).

[11]*Supra*, footnote 2, at 244.

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