

## Labor Relations Boards Some Elementary Principles

# Quelques principes élémentaires du contrôle judiciaire en relations du travail

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### Résumé de l'article

Parmi les influences qui informent l'application de la politique, il en est une qui semble avoir été passablement négligée par les spécialistes en relations industrielles; c'est celle de l'action judiciaire en vue de reviser et de contrôler l'action des organismes administratifs en relations du travail.

Deux raisons majeures expliquent une telle situation : a) les spécialistes en relations du travail sont encore peu nombreux; b) ceux qui n'ont aucune formation juridique n'osent pas s'aventurer en un tel domaine où la sémantique légale et le raisonnement juridique leur apparaissent comme étant des barrières infranchissables.

L'auteur veut seulement, en tant que profane dans les choses juridiques, indiquer les principaux traits de la revue judiciaire en relations industrielles, tels qu'ils existent présentement.

Une commission des relations du travail peut accomplir des actes purement administratifs, ainsi que d'autres de nature judiciaire ou quasi-judiciaire. Lorsqu'elle pose des actes judiciaires, le contrôle des tribunaux s'applique à de tels actes. Il n'est pas question, ici, d'appels quant au mérite de chaque cas, mais plutôt d'appréciation de la légalité des procédures du tribunal inférieur. Ce caractère « légal » des procédures s'apprécie presque toujours en regard de la compétence conférée à l'organisme administratif par la législature.

Les remèdes, en l'occurrence, sont les brefs de prérogative : *certiorari*, *prohibition*, *mandamus*... Alors que ces « remèdes » ne sont censés s'appliquer qu'aux actes de caractère judiciaire, les tribunaux n'ont jamais bien défini un tel acte et sont portés à étendre sa signification aussitôt qu'un redressement semble devoir s'imposer à la suite d'un acte administratif ou judiciaire d'un organisme public en relations du travail.

Le point saillant à souligner ici, c'est qu'en dépit des textes restrictifs de l'intervention judiciaire, les tribunaux supérieurs de droit commun réussissent encore très souvent à exercer leurs pouvoirs de contrôle et de révision à l'encontre des décisions des organismes administratifs. Cette action s'exerce au moyen de l'interprétation que les tribunaux font de la compétence des corps administratifs. Si ces derniers ont excédé leur compétence il y a recours au *certiorari* ou au bref de prohibition. C'est ainsi que l'appareil judiciaire a pu maintenir une certaine hégémonie à l'endroit des commissions administratives en relations du travail en dépit de la volonté du législateur d'émanciper ces organismes de leurs pouvoirs traditionnels de révision et de contrôle.

# Labor Relations Boards

## Some Elementary Principles

W. B. Cunningham

*In this article, the author exposes a statement of the principles of judicial review of the actions of labour relations boards.*

### I

There are several scholars in Canada interested in Canadian labour relations policy and its effects. These effects depend in part upon the underlying philosophy, the specific objectives, and the administration of the policy, each of which has been the subject of some discussion and research. One influence that seems to have been almost totally neglected is that of judicial decisions rendered when administrative actions are challenged in the courts.

Lawyers commonly discuss such judicial decisions in their professional journals. Most of these discussions deal with intricate legal technicalities as the lawyers pursue their primary interest of determining the effect of the decisions on the existing body of legal principles and precedents. Less often do these writers directly examine the effect on industrial relations and collective bargaining. This is a task for scholars with a specialist interest in these topics.

Labour relations boards are the principal administrative agencies for carrying out our public policy in the matter of labour-management relations. These statutory bodies derive their powers from the legislation that creates them, subject always to the inherent power of review possessed by the superior courts. The legislators have recognized that these boards must have considerable power to do well the job they are expected to do. When some-

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one challenges the actions of a board the courts have an opportunity to define the specific limits to the boards' power. In doing so it is conceivable that the courts could restrict the area of discretionary action by the boards, and thereby make it much more difficult for the boards to carry out the intent of government policy. Indeed there are some indications that this has happened. At the very least one can say that a quashing of board decisions has been common.

There are probably two reasons why students of industrial relations have neglected the influence of judicial review. First, the number of such students in Canada, though growing, is still quite small. The newly-formed Canadian Industrial Relations Research Institute may be a means to increase the number in the future. Second, anyone who is not formally trained in legal studies is often intimidated and discouraged by the very nature of the subject matter with its formidable array of principles, procedures, precedents, rules and jargon. And yet an interest in industrial relations forces such a person to enter the jungle of administrative law if he wishes to pursue his inquiries, or omit altogether a fertile area for research.

It is truly a jungle with a thickly entwined undergrowth obscuring the paths that lead through it. The paths themselves have never been well and fully cleared; even the trained guides for this territory are frequently uncertain about the trails.<sup>1</sup> Fortunately there do exist a few main routes in this jungle. A knowledge of these is both possible and valuable to those who must enter the jungle but who do not intend to become experts in its terrain. What follows, if I may change the metaphor, is a statement of the bare bones of judicial review. It is presented in the belief that it may be useful to those who, like the author, have no formal legal training.

## II

A labour relations board exercises administrative and judicial powers. This combination of powers has given rise to the term «quasi-judicial», a label that could be discarded with little or no loss. When

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(1) An English authority at the University of London was not exaggerating when he said: «In this «highly acrobatic part of the law» an aptitude for verbal gymnastics is obviously of advantage. The usual meaning of words can be stretched, contorted and stood upside down to suit the purposes of the user. The courts have, indeed, shown a remarkable dexterity in adapting their vocabulary to the requirements of particular situations». de Smith, S.A., *Judicial Review of Administrative Action*. London, Stevens and Sons Ltd., 1959, p. 50.

a labour relations board exercises judicial power its decisions are subject to the supervisory review of the courts. A board's exercise of its administrative power is not open to such review. A further comment on this distinction appears below.

### *Appeal versus Review*

A court's supervisory powers of review must be distinguished from a system of appeals. In the words of an authority: « An *appeal* means that some superior court or tribunal has power to reconsider the decision of a lower tribunal on its merits. . . Rights of appeal are given by statute, and unless some statute confers the right it does not exist ». <sup>2</sup> With the exception of the recent legislation in P. E. I., <sup>3</sup> the relevant statutes in Canada do not provide any appeal from the decisions of labour relations boards.

In contrast to a system of appeals: « *Review*. . . is based not on the merits but on the legality of the lower authority's proceedings. At the root of the matter is *jurisdiction*, or, more simply, power. If an administrative authority is acting within its jurisdiction. . . and no appeal from it is provided by statute, then it is immune from control by a court of law. But if it exceeds or abuses its powers. . . then a court of law can quash its decision. . . » <sup>4</sup>

Some countries, notably France, have a separate system of administrative appeal courts. But in Canada the judicial review of administrative action « is just English law imported and applied to particular Canadian statutes ». <sup>5</sup> And England has relied primarily upon the ancient principles and remedies of the common law for its control of administrative power.

Very simply, the general theory of judicial control is the doctrine of *ultra vires*. The question a court must answer is almost always whether the administrative body acted within its jurisdiction, and acted in such a way that it did not create a defect in its jurisdiction. The limits to the power of a labour relations board are determined by the

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(2) WADE, H.W.R., *Administrative Law*. Oxford, Clarendon Press, 1961, p. 42.

(3) In P.E.I. either party may appeal a decision or order of the Labour Relations Board to the Supreme Court. The Industrial Relations Act, S.P.E.I., 1962, c. 18; 1963, c. 20, Sec. 12 (1) (h).

(4) WADE, H.W.R., *op. cit.*, p. 43.

(5) WILLIS, J., « Administrative Law in Canada ». 39 *Can. Bar Rev.* 251.

statute that created the board and, of equal or greater importance, by the principles of construction that the courts apply to the statute. Any act outside the defined limits (*ultra vires*) is an act unjustified by law.

### *Remedies : the Prerogative Writs*

Any party that wishes to challenge a decision of a labour relations board may seek a court order (formerly called a writ) of certiorari, prohibition, or mandamus, or some combination of these. Each of these orders may be defined briefly.

A court issues an order of :

- a) Certiorari — to bring up the record of an inferior statutory tribunal;
- b) Prohibition — to restrain an inferior tribunal from proceeding further with a matter before it; and
- c) Mandamus — to compel the performance of public duties.

Disobedience of these orders is contempt of court and punishable accordingly.

Certiorari proceedings are the most common method by which the courts review the decisions of a labour relations board. Sometimes there will be an application for both certiorari and prohibition — the two orders have common characteristics. The only significant difference is one of timing. A court will not issue an order of prohibition unless something remains to be done by the board that the court can prohibit. If, for example, a board has granted certification to a union the matter is complete and there is nothing for a court to prohibit. But a court may still issue an order of certiorari and by this method bring the actions of the board under judicial scrutiny. If the court finds that the board has exceeded its statutory power the court will quash the order that certified the union. As another example, a court might issue an order of prohibition to restrain a board from proceeding to hold a representation vote, after the board had decided that a vote was desirable but before the vote had been held. Since it is usually the granting (or denial) of certification that an employer (or a union) objects to, a board's action is commonly not challenged until after it decides whether or not to grant such certification. Most commonly, therefore, the judicial review of board decisions is by way of certiorari proceedings.

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(6) See: de Smith, S.A., *op. cit.*, p. 14.

*Judicial versus Administrative Acts*

The authorities agree on the principle that: « The orders of certiorari and prohibition will issue only to statutory bodies which are under a duty to act judicially. »<sup>7</sup> The distinction between a judicial act and a non-judicial act is important, or at least appears to be important. Any authority acting in a judicial capacity must observe the common law rules of natural justice. The rules are « first, that a man may not be judge in his own cause; and secondly, that a man should not be condemned unheard. »<sup>8</sup> A breach of the rules of natural justice may be held to create a jurisdictional defect. There is no need to go into the complexities or ramifications of the sub-principles derived from these two rules. The point to note is that if a labour relations board is not acting in a judicial capacity it is not subject to the orders of certiorari and prohibition, and it is not required to observe the rules of natural justice. But if a board is under a duty to act judicially it must observe these rules or see its decisions quashed by the courts on review.

Under what circumstances does a labour relations board have a duty to act judicially? What are the characteristics of a judicial act? Our system of judicial review requires answers to such questions. Unfortunately this has created problems of definition and of consistency in their use. The courts have not clearly defined the characteristics of a judicial act. They have held, however, that a labour relations board exercises judicial functions. Thus the decisions of the board are subject to judicial review to see that their proceedings are lawful (i.e. within their jurisdiction), and that they have not abused their power through a breach of the rules of natural justice.

On reading the court decisions one can easily develop a cynical attitude. It often seems that the courts decide that a function is judicial and therefore subject to review whenever the courts think that review is desirable. The concept of what is a judicial function has been quite elastic « so that certiorari and prohibition have grown to be comprehensive remedies for the control of administrative as well as judicial acts. »<sup>9</sup> Professor de Smith, an English authority, has expressed the view that : « the classification of a function as 'judicial' or 'administrative' is often nothing more than a rationalization of a decision prompted

(7) *Ibid.*, pp. 34, 274-90.

a non-judicial act is important, or at least appears to be important.

(8) WADE, H.W.R., *op. cit.*, p. 127.

(9) *Ibid.*, p. 99.

by considerations of public policy, (but) there are ... cases in which courts will feel bound by precedent to adopt a particular mode of classification against their own inclinations ... In the tapestry of the law, the juridical norm and the creative discretion of the judge are closely interwoven strands.»<sup>10</sup>

### *The Face of the Record; and Fraud*

There are at least two other grounds on which certiorari will issue to quash the order of an inferior tribunal. If the order has been procured by fraud, collusion, or bad faith a superior court has an inherent jurisdiction to set it aside. This ground has not been significant in the review of board decisions and needs no further comment.

The other ground is formally referred to as «error of law on the face of the record.» There is strong support for the proposition that a statutory tribunal acting within its jurisdiction has the power to make mistakes, mistakes both in law or in fact, and that such errors do not support an order of certiorari.<sup>11</sup> But there is one exception of some importance to this proposition. Certiorari will issue to quash a decision if the error appears on «the face of the record». What constitutes the «record» of a labour relations board cannot be stated with precision and the courts have an opportunity to give a broad or narrow interpretation.

The record includes, beyond doubt, the document that initiates the proceedings, and any written order or decision of the board. Professor de Smith says that the record does *not* include the evidence received by the tribunal, or the reasons for its decision unless are included in (or appended to) the document that gives the decision.<sup>12</sup> What this means, curiously enough, is that a labour relations board is permitted to make mistakes in law provided «the record» does not display them. It gives a board an incentive, when permitted by statute, to issue its orders or decisions without comment, explanation, or reasons. On the

(10) DE SMITH, S.A., *op. cit.*, p. 51.

(11) *Ibid.*, pp. 63, 66-67; WADE, H.W.R., *op. cit.*, p. 73.

(12) DE SMITH, S.A., *op. cit.*, pp. 294-304. In one New Brunswick case, however, the board had sent to the court its complete file on an application for certification. This included, *inter alia*, correspondence, a report of a labour relations officer, three affidavits, and the minutes of the board meeting. Ritchie, J.A., said that in his view «we are free to examine all the material the board has made available to us». *Ex Parte Universal Constructors and Engineers Ltd. V.L.R.B. (N.B.)*, (1961) 27 DLR 423. (Supreme Court of N.B., Appeal Division.)

other hand, the two concepts of « error of law » and « the record » are flexible ones, and the courts do not seem to have difficulty in finding that « an error of law » invalidates a board's jurisdiction.

### *Privative Clauses*

There is one further matter to consider. The Canadian Parliament and the provincial legislatures have included clauses in their labour relations acts purporting to exclude judicial review of the decisions by the labour relations boards. These so-called privative clauses appear to be quite unambiguous. Section 61 of the *Industrial Relations and Disputes Investigation Act* <sup>13</sup> reads, in part, as follows :

- 1) If in any proceeding before the Board a question arises under this Act as to whether
  - a) a person is an employer or employee ;
  - b) an organization or association is an employers' organization or a trade union ;
  - .....
  - h) a person is in good standing of a trade union ; the board shall decide the question and its decision is final and conclusive for all the purposes of this Act.
- 2) A decision or order of the Board is final and conclusive and not open to question, or review...

A similar section appears in most of the provincial acts. Some provinces have reinforced this provision in their attempt to exclude judicial review. Section 80 of the *Ontario Labour Relations Act* <sup>14</sup> is a good example.

No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgement, certiorari, mandamus, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

An even stronger statement is that of Section 17 of the Saskatchewan \*

(13) C. 152, R.S.C. 1952.

(14) R.S.O. 1960, C. 202, as amended to 1962.

\* *Editor's note.* In Québec, the Labour Relations Act contains a similar section when it says at Section 41a that « notwithstanding any legislative provision inconsistent herewith » the decisions of the Board shall be without appeal and cannot be revised by the courts, and that no prerogative writ, neither art. 50 of the Code of Civil Procedure may be invoked against the Board or its members acting in their official capacity.



\* Editor's note.

*Trade Union Act*<sup>15</sup>

There shall be no appeal from an order or decision of the board under this Act, and the board shall have full power to determine any question of fact necessary to its jurisdiction, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari*, *mandamus*, prohibition, injunction or other proceeding whatever.

In view of these expressions of legislative intent, and noting that « the cardinal principle of our system of representative government . . . has been the supremacy of the legislature »<sup>16</sup> a layman is surprised to find not only that the courts review the decisions of these labour boards, but that in addition these reviews are probably more numerous than the reviews of any other administrative body in Canada. How are the courts able to circumvent such clear expressions of the legislative will?

The answer, in brief, is found in the meaning of the term « jurisdiction », referred to by Frankfurter J. as « a verbal coat of too many colours ». <sup>17</sup> The courts have given the term such a wide interpretation that almost any decision of a board can be found to have been made without jurisdiction. If a board has acted without jurisdiction, it has acted outside the powers given to it by the statute. A « decision » made without legal power is not a decision at all; it doesn't exist. Privative clauses that protect the boards' decisions from review by the courts protect only those decisions that the boards are legally empowered to make. So the courts, by finding that a board has exceeded the jurisdiction given to it by the statute, are able to finesse the effects of these privative clauses. <sup>18</sup>

(15) C. 259, R.S.S. 1953, as amended to 1961.

(16) LASKIN, B., « Certiorari to Labour Boards: The Apparent Futility of Privative Clauses ». 30 *Can. Bar Rev.*, 986 at 990.

(17) Quoted by Laskin. *Ibid.*, p. 992.

(18) In addition to Laskin's article, *supra*, see the brief excellent summary by Sutherland, H., 30 *Can. Bar Rev.* 69. Wade, H.W.R., *op. cit.*, p. 113 says: « As interpreted by the courts, it (a finality clause) appears to do no more than bar a non-existent right of appeal ». And de Smith, S.A., *op. cit.*, p. 229 says: « In Canada, where apparently unambiguous privative clauses have often been embodied in legislation setting up administrative boards, restrictive interpretation has been carried so far that they have been rendered almost meaningless ». In the words of a Canadian authority: « The courts have so emasculated their effect already, that their repeal would probably make little difference.. the job was done.. by what amounts to a shameless mininterpretation of their wording ». Willis, J., *op. cit.*, p. 258. In Australia, privative clauses have had some effect: « Australian courts have been rather less blind to the evident intention of parliaments than would appear to have been the case in Canada. Anderson, R., 30 *Can. Bar Rev.* 933.

### III

The foregoing may be summarized in the four following points.

1 — Judicial review is done by a superior court, with the proceedings governed by the procedural rules and principles that apply to the prerogative orders of certiorari, prohibition and mandamus. Of these, certiorari proceedings are the most common method for challenging decisions of a labour relations board.

2 — Only judicial functions of a labour relations board are subject to judicial review. The courts, however, have not defined a « judicial function » with consistency, and have interpreted the term broadly.

3 — A labour relations board that is held to be exercising a judicial function may find its decision quashed on review for one or more of the following reasons :

- a) A defect of jurisdiction
- b) A breach of the rules of natural justice, usually held to create a defect of jurisdiction
- c) An error of law on the face of the record, sometimes held to be a defect of jurisdiction
- d) Fraud or collusion

4 — Legislatures have been unsuccessful in their attempts to shield the decisions of labour relations boards from the effects of judicial review.

## QUELQUES PRINCIPES ÉLÉMENTAIRES DU CONTRÔLE JUDICIAIRE EN RELATIONS DU TRAVAIL

Parmi les influences qui informent l'application de la politique, il en est une qui semble avoir été passablement négligée par les spécialistes en relations industrielles ; c'est celle de l'action judiciaire en vue de reviser et de contrôler l'action des organismes administratifs en relations du travail.

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