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Administrative Law – Jurisdiction of Provincial Supreme Court to Review Acts of Federal Administrative Agency – The Perambulating Plaintiff in Search of a Federal Forum

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ADMINISTRATIVE LAW—JURISDICTION OF PROVINCIAL SUPREME COURT TO REVIEW ACTS OF FEDERAL ADMINISTRATIVE AGENCY—THE PERAMBULATING PLAINTIFF IN SEARCH OF A FEDERAL FORUM.—Is the supreme court of a province the proper forum for a citizen who seeks to challenge the actions of a federal administrative agency or its officers?

As the result of an inquiry by the Director of Investigation and Research under the Combines Investigation Act¹ into an alleged conspiracy to enhance the price of raw fish in British Columbia, the Restrictive Trade Practices Commission (a federal agency) determined that it would hold a hearing in Vancouver. The Chairman of the Commission, to ensure what he considered a fair hearing, proposed to disclose certain evidence to parties participating in the proceedings. Other persons under investigation, who objected to this action as not authorized by the statute, sought an injunction to restrain the Commissioners from permitting the disclosure of this evidence. An action was commenced in the Supreme Court of British Columbia which failed on the merits at trial on April 11th, 1961.² Meanwhile, a second action was

per Atkinson J.; and two American cases, *Anderson v. N.V. Transandine Handelmaatschappij et al.* (1942), 43 N.E. 2d. 502; and *State of the Netherlands v. Federal Reserve Bank of New York* (1953), 201 F. 2d. 455; see also (1951-52), 65 Harv. L. Rev. 1463. But clear authority against the proposition is *Bank voor Handel en Scheepvaart N.V. v. Slatford*, [1953] 1 Q.B. 248; and see also Dicey, *op. cit.*, footnote 17, p. 14; Cheshire, *op. cit.*, footnote 16, pp. 149-151; and F. A. Mann, (1962), 11 Int. and Comp. L. Q. 471, at pp. 477-478.

⁷⁶ Since the above was written it has been learned that the case has now been settled.

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¹ R.S.C., 1952, c. 314, as am., by 1953-4, c. 51 and 1960, c. 45.

² *Canadian Fishing Co. Ltd., et al. v. Smith et al. (and four other actions against the same defendants)* (1961), 28 D.L.R. (2d) 41 (B.C.S.C.), aff'd (1961), 30 D.L.R. (2d) 581 (B.C.C.A.), revs'd in part (1962), 37 W.W.R. 625 (S.C.C.).

begun by the same plaintiffs against the same defendants (together with the Director) claiming the same relief in the Supreme Court of Ontario—with the opposite result. An injunction was granted at trial by the Ontario court on May 30th, 1961.³ These two virtually identical actions were both disposed of (differently) on the merits without regard to the duplication of proceedings.⁴ Basically, this unseemly divergence between the British Columbia and Ontario views of a federal statute and the conduct of federal officials reveals a jurisdictional market-place in which a perambulating plaintiff may shop for his remedy.

It is apparent that both the Ontario and British Columbia courts assumed jurisdiction on the basis of the physical presence of the defendants within the confines of those provinces. No doubt, physical presence as a practical matter does render persons amenable to the process of the courts of any province in which they happen, permanently or temporarily, to be.⁵ It is upon this basis that courts have traditionally enjoined parties within their jurisdiction from pursuing concurrent legal proceedings abroad.⁶ To this extent, the Director and Commissioners (whose base of operations is Ottawa, Ontario) proceed at their peril in disobedience of the Ontario injunction, even though they do so in British Columbia whose courts have expressly sanctioned their actions. Indeed, the test of personal amenability to process has been applied in most of the cases in which federal officials have successfully challenged the jurisdiction of provincial courts to regulate the federal administrative process.

In *McGuire v. McGuire and Desordi*,⁷ the Ontario courts declined to issue a writ of *habeas corpus ad testificandum* directing the warden of a federal penitentiary in Quebec to produce a prisoner at the trial of a divorce action in Ontario. Laidlaw J.A. held:

[N]o provincial legislature has any power to pass laws having any

³ *British Columbia Packers Ltd. et al. v. Smith, Mac Donald and A.G. Canada* (1961), 28 D.L.R. (2d) 711 (Ont. H. Ct.).

⁴ That the two actions were, in fact, identical appears from the Report of the Director of Investigation and Research, for the year ended March 31st, 1961, pp. 15-16. Reference to the duplication of proceedings is also found in the Supreme Court of Canada decision, *supra* footnote 2, at p. 45.

⁵ See, for example, *Battle Creek v. Kellogg* (1922), 22 O.W.N. 308, *per* Middleton J.: "In the nature of things, the court cannot grant an injunction having any extra-provincial operation, *save where it has jurisdiction over the person of the defendant*." Emphasis added. See also *Bloomfield v. Brooke* (1875), 6 P.R. 264 (Ont.).

⁶ However, the substantive test applied is whether the duplication of proceedings is vexatious, or an abuse of the process of the domestic court. See Castel, *Private International Law* (1960), pp. 251-2; Cheshire, *Private International Law* (5th ed., 1957), p. 122.

⁷ [1953] O.R. 328.

operation outside its own territory and no tribunal established by provincial legislation can extend its process beyond its own territory so as to subject either persons or property to its decisions.⁸

Similarly, in *In Re Bence*⁹ the Supreme Court of British Columbia refused to issue a writ of prohibition against the Restrictive Trade Practices Commission which had held hearings in British Columbia but, prior to the application, had retired to Ottawa for the purpose of deliberations. Davey J. (as he then was), relying on the *McGuire* case, held:

Under these circumstances, I cannot see how they [the Commissioners] can be reached effectively if I should issue a writ of prohibition and and they should disregard it.

On the contrary I am satisfied that they are within the jurisdiction of the Courts of Ontario I think that judicial comity, if nothing else, required me to recognize and respect the jurisdiction of the Ontario courts.¹⁰

The inconvenience of the test of amenability to process as the basis of jurisdiction was most recently demonstrated in the *Vantel Broadcasting* case,¹¹ in which an employer unsuccessfully sought certiorari in the British Columbia courts to quash certain orders of the Canada Labour Relations Board.¹² All persons affected by the Board's order were within British Columbia; all relevant facts arose there; and the Board acted upon information received from its local officer. Nonetheless, the fact that the Board sat in Ottawa, Ontario, to issue its orders sufficed to deprive the British Columbia court of jurisdiction.

That *McGuire*, *Bence* and *Vantel Broadcasting* are founded upon an unsatisfactory and unworkable jurisdictional basis was pointed out by Aylen J. in the course of interlocutory proceedings in the British Columbia fish inquiry litigation:

I have doubts as to the jurisdiction of the Ontario Courts to deal with this matter at all. The inquiry was held in British Columbia and the hearing before the Commission will take place in that Province. All of the parties are of British Columbia except the defendants and the Courts of that Province will have effective control over whatever proceedings are taken. The only fact which may give this Court jurisdiction is the fact that the Government officials named as defendants must of necessity live in the capital city of Ottawa, Ontario. If that

⁸ *Ibid.*, at p. 334.

⁹ (1953), 22 C.P.R. (pt. 2) 1 (B.C.S.C.).

¹⁰ *Ibid.*, at pp. 2-3.

¹¹ *Re Industrial Relations and Disputes Investigation Act (Can.), Re National Association of Broadcast Employees and Technicians and Vantel Broadcasting Co. Ltd.* (1961), 37 W.W.R. 345 (B.C.S.C.).

¹² See Industrial Relations and Disputes Investigation Act, R.S.C., 1952, c. 152.

fact alone gives jurisdiction, it follows that the Ontario courts have jurisdiction on all matters in which Federal officials are concerned. As to that I have grave doubts. The question of jurisdiction was not raised before me, however, and I will not deal with it. I mention it so that it may be given consideration before this action is finally disposed of.¹³

Aylen J.'s pointed remarks went unheeded both by Parker J., when the matter came to trial,¹⁴ and (although quoted) in *Vantel Broadcasting*¹⁵ as well.

The amenability to process doctrine seems to confront us with a choice of absurdities. We must either run the risk of conflicting decisions, as in the British Columbia fish inquiry litigation, or concede a virtual monopoly in federal administrative law to Ontario courts and Ontario lawyers, as in the *Vantel* case.¹⁶ To some extent, the former choice may be the lesser evil since the Supreme Court of Canada (whose process runs *a mari usque ad mare*) remains as a final adjudicator of any conflict between provincial courts.¹⁷ Such a role was forecast for the Supreme Court of Canada when the Judicial Committee of the Privy Council wrote its own obituary in *A.G. Ontario v. A.G. Canada*.¹⁸ Their lordships feared:

. . . a state of affairs in which an important Dominion Act might be finally interpreted in one way by the Supreme Court for a province which did not admit appeals to his Majesty in Council and in another way by the Judicial Committee for a province which did admit such appeals, neither tribunal admitting the authority of the other. But it is the possibility of such conflict, creating a different law for different provinces out of the same Dominion Act, which points the way to a truer interpretation of the British North America Act in the light of the Statute of Westminster. It is, in fact, a prime element in the self-government of the Dominion, that it should be able to secure through its own courts of justice that the law should be one and the same for all its citizens. This result is attainable only if s. 101 now authorizes the establishment of a court with final and exclusive appellate jurisdiction.¹⁹

¹³ *British Columbia Packers Ltd. et al. v. Smith et al.* (1959), 22 D.L.R. (2d) 156, at p. 160 (Ont. H. Ct.).

¹⁴ *Supra*, footnote 3.

¹⁵ *Supra*, footnote 11, at p. 347.

¹⁶ For a recent example of a contest in the Ontario courts between two Saskatchewan litigants competing for a satellite rebroadcasting station licence in Saskatchewan calling in question a decision of the Board of Broadcast Governors, see *The Queen v. Board of Broadcast Governors, and the Minister of Transport, Ex parte Swift Current Telecasting Co. Ltd.* (1961), 31 D.L.R. (2d) 385 (Ont. H. Ct.), rev'd on appeal but not yet reported.

¹⁷ In fact, the British Columbia fish inquiry litigation was ultimately appealed to the Supreme Court of Canada from the British Columbia Court of Appeal, *supra*, footnote 2.

¹⁸ [1947] A.C. 127.

¹⁹ *Ibid.*, at p. 154.

But while the Supreme Court of Canada functions at the appellate level to secure the uniform administration of federal legislative policy, it does not meet the need for a convenient federal forum of first instance as the battleground between the citizen and the administration. To ask whether the federal official is personally amenable to provincial process is to mis-state the issue. The true question is: "What forum could most appropriately adjudicate litigation arising out of the federal administrative process?" This issue was squarely raised and neatly finessed in *Re Imperial Tobacco and McGregor*²⁰ where certiorari was sought in the Ontario courts to quash an investigation, by a Commissioner appointed under the Combines Investigation Act,²¹ into the distribution of tobacco products in Alberta:

As to the jurisdiction of this Court in the premises, it is argued for the respondent that a Federal administrative officer, even though he determines questions affecting rights of subjects is not subject to certiorari by provincial courts and, even if the Commissioner be considered a court, it must be constituted under sec. 101 of The British North America Act, and is not inferior to this court, and the jurisdiction of a Commissioner is territorially broader, being throughout Canada, and unless there is specific statutory jurisdiction conferred upon this court to supervise his acts by certiorari, there is no inherent jurisdiction.

On the other hand, the appellants submit that the acts of such officers must be, and are, subject to control by prohibition and certiorari in this court

However, in view of the conclusion at which I have arrived on other points, I do not feel it necessary to express any opinion on this point.²²

It is submitted that in the existing state of the case law the course adopted by Gillanders J.A. in the *Imperial Tobacco* case was the course of wisdom, and that the only appropriate answer is legislative. The federal administrative process affects us all as Canadian citizens. Its procedural adequacy is measured for all by the yardstick of the Canadian Bill of Rights.²³ The matters regulated are of national concern: a conspiracy to restrict competition in British Columbia affects consumers in Manitoba; labour strife of apparently local concern may interrupt the flow of inter-provincial commerce. A citizen who invokes the protection of the courts against administrative abuse is entitled to protection effective not merely within a province but throughout the Dominion.²⁴

²⁰ [1939] O.R. 627.

²² *Supra*, footnote 20, at pp. 646-7.

²⁴ *In In Re Norton*, [1918] 2 W.W.R. 865 (Alta. C.A.) a writ of habeas

²¹ R.S.C., 1927, c. 26.

²³ S.C., 1960, c. 44.

That the dimensions of the problem and of the solution are nation-wide was, in fact, indicated in the *Vantel Broadcasting* case:

This is . . . a case involving matters within the jurisdiction of the Parliament of Canada and it may very well be that Parliament could empower a court such as the Exchequer Court to exercise exclusive jurisdiction in that regard. I make no pronouncement as to whether or not there is such jurisdiction in the Exchequer Court. I mention this to show what might be an answer to the prosecutor's complaint that it ought not to be forced to litigate a British Columbia matter in the courts of Ontario.²⁵

Whereas the provincial courts have a residual jurisdiction to entertain actions that otherwise lack a forum,²⁶ the Exchequer Court's jurisdiction is purely statutory.²⁷ The Exchequer Court Act²⁸ does not presently confer jurisdiction upon that court to review federal administrative action, although there seems to be no constitutional barrier to such an arrangement.²⁹ The most significant barrier to conferring this jurisdiction upon the Exchequer Court is the practical difficulty presented by the court's relative inaccessibility—it sits regularly in Ottawa and only rarely travels on circuit—which would frustrate convenient redress of administrative abuse. This inaccessibility is the product of practice and not of statute. The court has power to “sit and act at any time and at any place in Canada”³⁰ and provision is made for the appointment of deputy judges³¹ who might be provincial supreme court judges enlisted to assist the Exchequer Court locally between its regular visits on circuit. At least two other precedents exist in the Admiralty Act³² and the Bankruptcy Act³³ for utilization of “provincial” judicial resources in a purely “federal” court system.

corpus issued by the Alberta courts, designed to free certain wrongfully-conscripted soldiers, was frustrated by their removal to another province. For a fascinating account of this incident, see Bowker, *The Honourable Horace Harvey*, Chief Justice of Alberta (1954), 32 Can. Bar Rev. 933.

²⁵ *Supra*, footnote 11, at p. 348.

²⁶ *Board v. Board*, [1919] A.C. 956 (P.C.).

²⁷ *Bow, McLaughlin & Co. v. The "Camosun"*, [1909] A.C. 597 (P.C.).

²⁸ R.S.C., 1952, c. 98.

²⁹ *Kellogg Co. v. Kellogg*, [1941] S.C.R. 242; *A.G. Ontario v. A.G. Canada*, *supra*, footnote 18; *Nanaimo Community Hotel v. Board of Referees*, [1945] 2 W.W.R. 145 (B.C. C.A.).

³⁰ *Supra*, footnote 28, s. 33.

³¹ *Ibid.*, s. 8.

³² R.S.C., 1952, c. 1. A superior court judge may be appointed a district judge in Admiralty of the Exchequer Court (s. 4), and shall thereupon “within the Admiralty District for which he is appointed, have and exercise the jurisdiction, and the powers and authority relating thereto, of the Exchequer Court in respect of the Admiralty jurisdiction of such Court” (s. 6).

³³ R.S.C., 1952, c. 14. The various provincial supreme courts “are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy”

No doubt the expansion of the Exchequer Court structure by the creation of a system of local judges would itself pose a host of problems involving the interrelationship of the local courts. In solving these problems, we are fortunate in having as a working model the intricate federal district court system of the United States. While the appropriate forum for review of federal administrative action is designated in many regulatory statutes,³⁴ in the absence of such designation review is committed by the federal Administrative Procedure Act to "any court of competent jurisdiction".³⁵ The citizen may thus seek his redress in a federal district court, the choice of district being determined by the official residence of the officer or agency whose action is challenged.³⁶ "For the convenience of the parties and witnesses, in the interests of justice", however, a change of venue may be sought.³⁷ A district court, moreover, has jurisdiction to restrain proceedings subsequently begun in another district involving the same issues and the same parties.³⁸ Thus, the American federal district court system can avoid the embarrassment produced in Canada by the British Columbia fish inquiry litigation and by the *Vantel Broadcasting* case. For Canadian purposes these statutory refinements are important only in that they demonstrate the potential for creative solution of difficult jurisdictional problems within a truly federal court system. Only such a system can effectively and on a national basis oversee the federal administrative process.

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(s. 140), one or more judges of each court being designated by the Chief Justice to exercise such jurisdiction (s. 142).

³⁴ For an illustrative list of such statutes, see Barron & Holtzoff, *Federal Practice and Procedure* (Wright ed., 1960), s. 85, p. 403 *et seq.*

³⁵ (1946), 60 Stat. 237, sec. 10(b).

³⁶ Barron & Holtzoff, *op. cit.*, footnote 34, s. 77, p. 379. This right, however, may be illusory. See Byse, *Proposed Reforms in Federal "Non-statutory" Judicial Review* (1962), 75 *Harv. L. Rev.* 1479.

³⁷ 28 U.S.C.A., sec. 1404(a); Barron & Holtzoff, *op. cit.*, *ibid.*, s. 86, p. 406 *et seq.*

³⁸ Barron & Holtzoff, *op. cit.*, *ibid.*, s. 46, p. 232.

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