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Labour Law: Jarvis v. Associated Medical Services Incorporated [1964] S.C.R. 497

Ross Judge

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ROSS JUDGE*

LABOUR LAW — CERTIORARI — EFFECT OF PRIVATIVE CLAUSE.

There is a present fear among members of the labour bar in Ontario that procedure and substantive law in the labour field is, in the case of the former, becoming too formal and legalistic, and in the case of the latter, being too greatly influenced by the courts and their concept of the law. The result is that too little care is being lavished on the general policy of the Labour Relations Act, the settlement of industrial disputes.

At least three reasons can be presented to explain this state of affairs. Although lawyers are not by any means exclusively used in

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8 *Supra,* footnote 1 at 190.

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this field, there is a very high percentage of them and they tend to apply their craft to the problems they meet.

Secondly, and perhaps more important, the historical background of labour legislation in Ontario influences the present situation. On April 14th, 1943, the Ontario Collective Bargaining Act was enacted and along with it an amendment was made to the Judicature Act providing for a branch of the High Court of Ontario to be known as The Labour Court. Under section 21 of the Collective Bargaining Act rules of procedure were drawn up and although the Court was given some lattitude in this area, it largely retained the character of a judicial forum. No particular judges were appointed to the Court, but a scheme was set up whereby the judges rotated in two week sessions. This system proved to be unsatisfactory, as one can imagine. The judges, some well on in years, were out of touch with the labour situation and out of sympathy with the purposes of the legislation. The formalism of court procedure meant that the process was not nearly as summary as it ideally should have been. The procedures for fact finding in the Court were not well suited to the labour situation. The judges did not sit with the Court long enough to develop any expertise in labour matters. In brief, proceedings before the Labour Court were often a frustrating experience. Bora Laskin foresaw the problem in 1943, writing:

> It might be said, without disrespect, that the novelty of the legislation so far as the judicial art is concerned and unfamiliarity with its underlying assumptions posed a difficult task for many of the judges and a no less difficult one for members of the bar . . . . While one result of the Act has been to give the legal profession a new sphere of action, it will be unfortunate if the strictly legalistic approach stultifies the aim of the Act to establish a regime of peaceful collective bargaining relations in accordance with the wishes of the employees.[1]

The Labour Court was done away with and replaced by the Labour Relations Board but many of the concepts and procedures of the Court were carried into the new organ by personnel who had been with the Court.

Probably the most important legalistic and formalizing influence on the Labour Relations Board is the fear of judicial review by the courts of the Board's decisions. Time and time again the Board has been slapped on the wrist by the courts, and this in the face of a most formidable privative clause.

The general right of the courts to review decisions of the administration was stated by Lord Atkin in *Rex v. Electricity Commissioners:*

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division.[2]

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[1] Laskin, *Collective Bargaining in Ontario. A New Legislative Approach* (1943) 21 Can. Bar. Rev. 500.

[2] *Rex v. Electricity Commissioners* [1924] 1 K.B. 171 at 205.

It does not appear to me that the above quotation implies a right by the court to consider the Board's decision by way of *certiorari* when the Legislature has expressly forbidden the courts to apply *certiorari* to the decision. Ross Anderson put the case very well:

> Parliament is prepared to trust the tribunal to deal with particular sets of circumstances which, in its wisdom, it considers can be better dealt with by the special tribunal than by an ordinary court or by ordinary administrative or legislative processes. Why should it not also trust the tribunal to determine for itself the limits of its jurisdiction in the light of the specific directions given to it by Parliament? If the tribunal does seriously disregard those directions it must be assumed that Parliament itself will soon provide a remedy. This interpretation has the double advantage of avoiding logical difficulties and of avoiding also the creation of a conflict between Parliament and Court, a conflict which particularly in the realm of industrial relations, where finality and expedition of decision are of the utmost importance, may have serious social consequences.[3]

Bora Laskin in referring to the Canadian scene stated:

> . . . there is no constitutional principle on which courts can rest any claim to review administrative board decisions. In so far as such review is based on the historic supervisory authority of superior courts through the use of prerogative writs of *certiorari* or *mandamus*, or their modern equivalents, it must bow to the higher authority of a legislature to withdraw this function from them. The question would then become whether the legislature has used apt words to effect this result.[4]

He goes on to conclude from an extensive review of the cases that no form of words would be sufficient to oust judicial review against the wishes of the courts. He states that jurisdiction has become a "convenient umbrella" under which the courts justify their right to continually intervene. The only way to stop this intervention would appear to be to couch the decisions and conduct the procedure of the Board according to judicial formulas. This is a conclusion that is being drawn more and more and so the Board is becoming inhibited to the point that we might as well give the whole issue back to the courts if they are to persist in their intervention.

The trend in the cases since 1948 when Laskin wrote his article on "The Apparent Futility of Privative Clauses" has not changed as is witnessed by the recent case handed down by the Supreme Court of Canada, *Jarvis v. Associated Medical Services Incorporated.*[5] Initially the Ontario Labour Relations Board decided that Mrs. Jarvis, although a person exercising managerial functions, was entitled to a limited protection under the Ontario Labour Relations Act. The Supreme Court decided that once the Board concluded that she was not an employee as opposed to a person having a managerial function, the Board had demonstrated its lack of jurisdiction and so could not render the decision. Section 80 of the Act reads:

> 80. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made

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3 Ross Anderson (1950) 1 University of Queensland Law Journal 39 at 50.

4 Laskin, *The Apparent Futility of Privative Clauses* (1952) 30 Can. Bar Rev. 986 at 989.

5 [1964] S.C.R. 497.

> or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, *certiorari, mandamus,* prohibition, *quo warranto,* or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

It appears to me quite astounding that in the light of that section, the court could have considered the case at all. It would appear that a privative clause is indeed futile. The theory upon which the court exercises a right to consider these cases was stated in *Bunbury v. Fuller* in 1853.

> Now it is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limits to its jurisdiction depend, and however its decision may be final on all particulars making up together that subject matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decisions must always be open to enquiry in the supreme court.[6]

E. F. Whitmore made reference to this principle and said that *certiorari* will lie even if the error on the collateral issue is not apparent on the face of the record. The decision of the Board loses its impregnability if it relates to a jurisdictional point. A collateral question is a preliminary question that must first be decided before the Board can hear the case on the merits. In this case it was whether Barbara Jarvis was entitled, as managerial staff, to the protection of the Ontario Labour Relations Act.

It appears to me that comments made in the dissenting decisions of Abbot & Judson J.J. completely answer the above argument. Abbot J. reasoned that:

> A board such as the Labour Relations Board, experienced in the field of Labour Management Relations, representing both organized employers, organized labour, and the public, and presided over by a legally trained chairman, ought to be at least as competent and as well suited to determine questions arising in the course of the administration of the Act as a Superior Court Judge.
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> In enacting S. 80, the Legislature has recognized that fact and has indicated in the clearest possible language that the workings of the Board are not to be unnecessarily impeded by legal technicalities. The duty of the Courts is to apply that section, not to attempt to circumvent it.[7]

Judson J. states at page 509 of the report that:

> In enacting S. 80 of the Labour Relations Act the Legislature has recognized that decisions made by the Board may involve what are looked upon by a Court as jurisdictional errors. The Legislature has said that it prefers to have these errors stand rather than have the decisions quashed on *certiorari*. . . . But if the Legislature takes away the remedy of *certiorari,* it must be dealing with this so-called jurisdictional error, for the correction of jurisdictional error is the only purpose of *certiorari.*[8]

Cartwright J. said that in his opinion the construction put on the Statute by the Board was directly opposed to the general policy

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6 *Bunbury v. Fuller* (1853), 156 E.R. 47.
7 *Supra,* footnote 5 at 506.
8 *Id.,* at 509-10.

of the Statute. But surely it is up to the Board, which works with the legislation every day, to decide what its policy is. Surely the Board is more expert in these matters than the court. In this vein Laskin commented:

> If we are to have judicial review, let it be as an open avowal of its desirability. By circumventing the privative clause, courts needlessly and gratuitously involve themselves in issues of policy. It may be urged, with justification, that all judicial work exhibits such involvment, but erosion of privative clauses through specious interpretations and unsupported assumptions is a trespass on the policy functions of another agency . . . In the face of such enactments, 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]

It is sometimes argued that the legislatures enact legislation with privative clauses in the knowledge of the way in which the courts treat them. In this way if the legislature does not change the privative clause after it has been interpreted away by the courts then they imply their agreement with the way in which the courts have treated the clauses. This theory was probably first enunciated by Lord Halsbury in *Webb v. Outrim*[10] and it was adopted by the Supreme Court of Canada in *Street v. Ottawa Valley Power Co.*[11] I only wish to point out that in this case a more likely solution is that the Legislature does not wish to engage in open conflict with the courts. Looking at privative clauses throughout Canada and their history one can see a continual attempt on the part of legislatures to perfect privative clauses and in fact a tension does exist between the courts and the legislatures over who will control the policy of the administrative boards.

It does not appear as if any wording will prevent the courts from reviewing administrative decisions. The privative clause alone does not appear to be sufficient. Probably legislation providing an administrative appeal procedure as well as a privative clause would succeed. It is absolutely necessary that the Labour Relations Board should not be hardened into the court's mold for the great advantage of the administrative agency is that it is less formal, more pliable, and accordingly better suited to the dynamic field of Labour Relations. Formalism will simply result in extra-legal action by labour or management if the result of formalism is undue technicality and time consuming procedure. Again the Board has expertise in labour matters and it often decides cases on the basis of its expertise. It recognizes badges of conduct and is ready to draw inferences from various fact situations. All this will be destroyed by enforced parallelism with the courts.

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9 Laskin, *supra* footnote 4 at 991.
10 [1907] A.C. 81.
11 [1940] S.C.R. 40.