RECENT JUDICIAL CONSIDERATION OF THE PRIVATIVE CLAUSE IN WORKMEN'S COMPENSATION LEGISLATION*

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Lawyers who are unfamiliar with that highly perplexing part of the law dealing with judicial interpretation of privative clauses relating to provincial legislation, and in particular to workmen's compensation legislation, will find no comfort in trying to reconcile recent decisions of the Courts of British Columbia in this field.

Whereas previously provincial *ad hoc* tribunals had only to fear the "want of jurisdiction" restraint by which Superior Courts could examine and quash a board order, now another more serious obstacle arises in the form of a constitutional limitation. The effect of the latter is that the common privative clause is totally ineffective to render an inferior tribunal's decision 'final and conclusive' when it is acting in its judicial capacity, and that section of the provincial Act setting up such a board (which authorizes the Lieutenant-Governor in Council to appoint the members of the board) is *ultra vires*. A discussion of excess of jurisdiction and the effect (if any) of the privative clause is to be found in *Battaglia* v. *Workmen's Compensation Board*[1] while the constitutional orge presents itself in the judgment of Mr. Justice Manson in *Farrell* v. *Workmen's Compensation Board*.[2] I propose first to deal with the *Farrell* case and its implications.

The applicant in the *Farrell* case, the widow of the deceased workman, applied to the Workmen's Compensation Board following the death of her husband, which, according to medical evidence, was accelerated by exertion in the course of his employment. The application for compensation was refused by the Board, and thus the applicant turned to the Court to quash the order of the Board by *mandamus* with *certiorari* in aid, contending that the Board had placed a wrong construction in law upon the word "accident" as defined in the *Workmen's Compensation Act* R.S.B.C. 1948, c. 370, s. 2 (1). However, she found herself confronted with the Act's privative clause, which states:

> Sec. 76 (1) "The Board shall have exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Board thereon shall be final and conclusive and shall not be

*Since the submission of this article to the Alberta Law Review, the judgment of Manson, J. in *Farrell* v. *Workmen's Compensation Board* (1960) 31 W.W.R. 577 has been reversed by the British Columbia Court of Appeal (1960) 33 W.W.R. 433, Des Brisay, C.J. B.C. dissenting in part. The majority in the Court of Appeal held (*inter alia*) that as *Kowanko* v. *Tremblay* (1920) 1 W.W.R. 787 had stood unquestioned for many year, if it is to be overruled, it must be done by a higher court. Therefore the members of the Workmen's Compensation Board are not purporting to exercise a function analogous to that performed by those whose appointments must be made pursuant to S. 96 of the B.N.A. Act, 1867. Regarding the excess of jurisdiction issue, the court held that if the board's decision was incorrect, the error therein did not go beyond a mere mistake in fact or law arising in the course of the exercise of the board's jurisdiction, and thus was not reviewable under *certiorari*.

It has been learned that counsel for Mrs. Farrell has been granted leave from the British Columbia Court of Appeal to appeal the decision to the Supreme Court of Canada. It is understood that the appeal will be based upon the constitutional issues that have arisen.

[1] (1960) 32 W. W. R. 1.

[2] (1960) 31 W.W.R. 577.

> open to question or review in any court, and no proceedings by or before the Board shall be restrained by injuction, prohibition or other process or proceeding in any Court or be removable by *certiorari* or otherwise into any court . . ."[3]

Despite this provision excluding judicial review, however, Mr. Justice Manson, in a somewhat unique judgment, held that

> ". . . the board has been constituted a judicial tribunal analogous to a Superior Court and with the powers of the Supreme Court of Canada to give a final judgment. It follows that its personnel must be chosen by His Excellency the Govenror-General pursuant to the *B.N.A. Act* sec. 96."[4]

The learned Judge arrived at this decision largely through reasoning by analogy with the restriction of free expression found to be the true nature and purpose of the "Padlock Act" of Quebec in *Switzman* v. *Elbling and Att'y. -Gen. for Quebec.*[5] After quoting extensively from the judgment of Abbott, J. he concludes:

> "By analogy of reasoning to that enunciated by Abbott, J. I am unable to differentiate the limitation on the powers of a legislature in the matter of the free expression of ideas by citizens from the ancient right of the subject to have his rights determined by a court of law."[6]

Mr. Justice Manson also sought support from a recent decision of the Supreme Court of Canada, *Att'y.-Gen. of Ontario et al* v. *Victoria Medical Building.*[7] That case decided that the legislature of Ontario was incompetent to confer certain judicial powers upon a master. Then he concluded:

> "The views expressed in the Supreme Court of Canada are binding upon me as against earlier decisions, including those of the Judicial Committee in so far as they are apposite. In my view they are apposite in the case at bar."[8]

One may surmise that the learned Judge had in mind *Saskatchewan Labour Relations Board* v. *John East Iron Works*[9] for, prior to his statement quoted above, he makes it amply clear that the Lawlords of the Judicial Committee were not prepared to pursue the comparison of the Labour Relations Act under consideration with the jurisdiction of a workmen's compensation board. I shall make further reference to Mr. Justice Manson's reluctance to examine the *John East* case presently.

It would not be inappropriate, for the purpose of distinguishing the real problem posed in the *Farrell* case from that which must be taken as settled, to quote from the classic judgment of the late Chief Justice Duff in *In Re Adoption Act. etc.*

> "In point of substantive law, it is not disputed that the matters which are the subjects of the legislation are entirely within the control of the legislatures of the provinces . . . Whatever may be the extent of that jurisdiction, we are not concerned with it here and I mention it only to put it aside. . . The practical problems raised by this reference is whether or not it is competent for the province to invest the officers presiding over these special tribunals, as well as justices of the peace and police magistrates, with the power of summary adjudication conferred upon them by the statute or whether, on the other hand, as is contended by those

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[3]Six other provinces also have similar clauses affording their Boards exclusive and final jurisdiction, while three provinces allow appeals to the Provincial Supreme Court, with permission of a judge of that Court, upon questions of law or jurisdiction. Those in the former group are Alberta, sec. 10; Manitoba. sec. 44; Newfoundland, sec. 33; Ontario, sec. 70; Quebec, sec. 59; Saskatchewan, sec. 24 and 28. Those in the latter group are New Brunswick, sec. 32; Nova Scotia, sec. 24; and P.E.I., sec. 34 (2).

[4](1960) 31 W.W.R. 577 at p. 589.

[5][1957] S.C.R. 285.

[6](1960) 31 W.W.R. 577 at p. 583.

[7][1960] S.C.R. 32, affirming 1958 OR, 759.

[8](1960) 31 W.W.R. 577 at p. 588.

[9]1948 2 W.W.R. 1055.

who attack the legislation, they are disabled in some important respects by Section 96 of the *B.N. A. Act* from taking advantage of his convenient summary procedure which has proved so efficacious."[9a]

Although the argument that provincial appointments of officers or members of a workmen's compensation board is bad because such tribunal exercises a judicial function analogous to that of a Superior Court appointee is not new, to my knowledge it has only appeared twice in the vast preponderance of workmen's compensation cases that have appeared before the courts, and in both cases such an argument was rejected. Its first appearance was thirty years ago before the Manitoba Court of Appeal in *Kowanko* v. *J. H. Tremblay Company Limited et al.*[10] They held (reversing the judgment of Mathers, C.J.K.B. on this point[11]) that the provisions of *The Workmen's Compensation Act,* 1916, c. 125 respecting the appointment of the Manitoba Workmen's Compensation Board members were *intra vires* of the provincial Legeslature, not being in conflict with the powers reserved to the Dominion by ss. 96, 99 and 100 of the *B.N.A. Act.* That Court relied heavily upon a case that was decided in the Ontario Court of Appeal, *In Re Toronto Ry. Co. and City of Toronto*[12] in which it was held that the Ontario Railway and Municipal Board, although it had for some purposes judicial functions to perform, was not a Court but an administrative body having as incidental to the performance of its administrative functions and the exercise of its administrative power, jurisdiction to construe contracts. The Ontario case went to the Privy Council, which allowed the appeal on other ground, but did not question the lower Court's judgment on this point.[13]

The Court in the *Kowanko* case also referred to *C.P.R.* v. *Workmen's Compensation Board*[14] (sometimes called the "Sophia" case) which upheld the dissenting view of Mr. Justice McPhillips in the British Columbia Court of Appeal that it is a legitimate provincial object to secure a scheme of accident insurance for workmen within the province. Thus, as it is uncontroverted that the power to legislate is specifically assigned to the province under sec. 92 of the *B.N.A. Act,* Cameron, J.A. concludes:

"I cannot accede to the contention that the Board, merely because it is given, to a limited extent, certain powers usually exercised by judicial tribunals, which limited powers are necessary for and incidental to the due administration of the insurance scheme contemplated by the Act, is, therefore, a Superior Court . . . That the powers of the Board could be exercised by the Legislature itself cannot be doubted. The executive power of the Legislature is co-extensive with its legislative power. There is nothing to prevent the Legislature delegating its executive power in creating a Board to do what it itself could do within the ambit of its jurisdiction . . . In my opinion the sections of this Act called in question are valid as a due exercise of the power of the Legislature to create a special body or tribunal for the adjustment and determination of matters necessarily and incidentally arising in the administration of the system of insurance which the Legislature intended to create. With that view of the Board's powers and functions it seems to me impossible to bring it within the meaning of the term 'Superior Court' as that term is used in sec. 96."[15]

Dennistoun, J.A. adds:

"It is not conceivable that a tribunal could be created by the province for the purposes named without conferring upon that tribunal some judicial functions. Every scheme of insurance

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[9a][1958] S.C.R. 398 at pp. 402-3.

[10][1920] 1 W.W.R. 787.

[11]*Ante* p. 481.

[12]44 O.L.R. 381, 15 OWN 244.

[13][1920] 1 W.W.R. 755 at p. 761.

[14][1919] 3 W.W.R. 167.

[15][1920] 1 W.W.R. 787 at pp. 802-803.

calls for the exercise of judicial or quasi-judicial powers by certain officials . . . The identification of the claimant as one of the assured, the proof of his right to compensation as one of a class, and the assessment of his compensenation based upon a wage scale, and the extent of his injuries, are ordinary administrative acts which must necessarily be performed; and the adjudication made in respect thereto can be made as well by an inferior as by a Superior Court, and equally as well by a tribunal which is not a court at all"[16]

The second case in which the constitutionality of the board appointments was questioned was *Att'y.-Gen. Quebec* v. *Slavec & Grimstead*.[17] This case is less helpful because it is based on an older kind of workmen's compensation legislation, and also it appears that the *Kowanko* case was not cited to their Lordships. For this reason much of the vigor of the lengthy dissent by Rivard, J. is lost.[18] However, some value may be had by a study of the judgment of Walsh, J. in the Court of Kings Bench, Appeal Side. After referring to the six classical "negative propositions" of Lord Sankey in *Shell Co. of Australia* v. *Federal Comm'r. of Taxation*[19] of what individual elements the presence of which do not by themselves transpose an inferior tribunal's jurisdiction to that of a Court, his Lordship decides that administrative machinery is the Act's main feature.

"The Board are adjusters, named by law to make certain mathematical computations governed by considerations of categories and scales, all predeterminied by law. Unlike other experts whose figures need not be accepted as final by a Judge (who may appoint experts), these Commissioners' computations are declared by law to be final, and must be accepted by the Court, homologating. This finality, if we apply one of the tests given us in *Shell Co.* v. *Federal Comm'r.*, is no indication *per se* of a Court even in matters affecting rights."[20]

It must be taken as beyond controversy that in considering the constitutionality of provincial enactments it is the duty of he Court

". . . to make every possible presumption in favour of such Legislative Acts, and to endeavour to discover a construction of the *British North America Act* which will enable us to attribute an impeached Statute to a due exercise of constitutional authority, before taking up ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it."[21]

Nevertheless, the learned Judge in the *Farrell* case said that the B.C. *Workmen's Compensation Act* purports to create a tribunal which is given power to determine most important points of law. He continued by saying that the procedure to be followed by the Board, especially ss.65-80 inclusive of the B.C. Act, is particularly analogous to that of a Superior Court.[22] The real discrepancy between the approaches taken in the earlier cases and that of the *Farrell* decision is one involving the characterization of the primary function of the Board. Is the Board, in granting and refusing compensation to its applicants, adjudicating in a judicial manner, hitherto exercised by Superior Courts, under the guise of regulating a legislative policy? If this is the case, it is certainly settled that an administrative board "unconstitutionally clothed with a judicial power"[23] shall not be able to maintain such judicial garb, although it is equally settled that not every exercise of a 'judicial function'

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[16] *Ibid.* p.p. 809, 810.

[17] (1933) 2 D.L.R. 289. This Court of Appeal dicision is erroneously reported in the *Farrell* case at p. 587 as *"Slavec* v. *Grumstead"*.

[18] 1933 2 D.L.R. 289, 301 and following. See (1933) 11 Can. Bar Rev. 510.

[19] [1931] A.C. 275 at p. 297.

[20] (1933) 2 D.L.R. 289 at p. 343.

[21] *Severn* v. *The Queen* (1879) 2 Can. S.C.R. 70 at p. 103, flwd. in *In Re Tor. Ry. Co. and City of Tor.*, *supra* at p. 394 (44 O.L.R.).

[22] *Farrell* case at p. 587.

[23] *Labour Relations Bd. of Sask.* v. *John East* 1948 2 W.W.R. 1055.

shall be struck down as being *ipso facto* one which is normally performed by a Superior, District or County Court Judge.[24] Or, on the other hand, is the legislature mainly concerned with the administration of an insurance scheme for workmen, and the board's power to decide disputes between individuals no more than an incident to the running of the scheme?[25] Of this, Lord Simonds in the *John East* case says:

> "It was urged by the respondents that a tribunal whose decisions were not subject to appeal and whose proceedings were not reviewable by any court of law or by any *certiorari* or other proceedings whatsoever must be regarded as a 'Superior' court or a court analogous thereto. But the same considerations which make it expedient to set up a a specialized tribunal may make it inexpedient that the tribunal's decision should be reviewed by an ordinary court. It does not, for that reason, itself become a 'Superior' court."[26]

Many decisions not dealing with workmen's compensation have held that the fact that an inferior court or tribunal performs certain quasi-judicial functions does not convert it into a court, the appointment of whose members must be made pursuant to sec. 96 of the *B.N.A. Act*.[27] I think it may fairly be said that the rationale to be taken from these cases, as well as from those dealing with compensation boards, is that if a province wishes to legislate by setting up a board to carry on duties or functions in whole or in part previously within the jurisdiction of a Superior Court, the pith and substance of the proposed legislation must be based upon policy, expediency or some other characteristic peculiar to an 'administrative board'. It is equally important that each dispute between the parties involved must be incidental to the primary purpose of the board.[28]

It is submitted that Mr. Justice Manson's reasoning with regard to the parallel of limitations placed by a legislature on free expression and the right of Her Majesty's subjects to have their rights determined by courts of law is of questionable value.[29] Of the fomer, Mr. Justice Rand has said:

> ". . . the political theory which the B.N.A. Act embodies is that of parliamentary Government, with all its social implications, and provisions of the statute elaborate that principle in the institutional apparatus which they create or contemplate. Whatever the deficiencies in its workings, Canadian Government is, in substance, the will of the majority expressed directly or indirectly through popular Assemblies. This means ultimate Government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted."[30]

Yet how an analogy may be drawn between what the learned Mr. Justice Rand describes in his most eloquent rhetoric and that judicial exercise performed by an inferior *ad hoc* tribunal entirely escapes me.

As mentioned earlier, Mr. Justice Manson seizes upon the statement made by Lord Simonds in the *John East* case that he was "not prepared to pursue the comparison with the jurisdiction of a Workmen's Compensation Board" in support of his (i.e., Mr. Justice Manson's) proposition.[31] The reason for

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[24]*Reg. v. Coote* L.R. 4 P.C. 599, 42 L.J.P.C. 45.

[25]An excellent discussion of this problem is to be found in (1940) 18 Can. Bar Rev. 517 by Professor Willis.

[26](1948) 2 W.W.R. 1055 at p. 1065.

[27]See *In Re Tor. Ry. Co. etc.* (*supra*); *Spooner Oils Co. Ltd. v. Turner Valley Conservation Bd.* (1932) 4 D.L.R. 750, 764; *Bd. of Public Utility Commissioners v. Model Dairies* (1937) 1. D.L.R. 95, etc.

[28]See also (1940) 18 Can. Bar Rev. 517 at p. 541.

[29]*Farrell* case at p. 583.

[30]*Switzman v. Elbling and Att'y.-Gen. Quebec*, 117 Can. C.C. 129 at p. 151.

[31]It appears that this statement was made in pursuance of argument by counsel for the Att'y.-Gen. Nova, Scotia intervener who cited *inter alia* the *Kowanko* case. See [1949] A.C. 134 at p.p. 139-140.

Lord Simonds' statement seems obvious. It would have been highly inappropriate for his Lordship to have commented on a workmen's compensation board at that time, when review of such a board was not before him. That rigid adherence to deciding *only* the question that is before it is established practice of the Judicial Committee cannot now be denied.

It is submitted that without authority to the contrary so as to restrict Lord Simonds' test in *John East,* and it seems unlikely that the Supreme Court of Canada in the *Victoria Medical Building* case[32] have in twelve short years cast aside such venerable authority as might be suggested in the *Farrell* decision, that the test's application bears direct relation to the Workmen's Compensation Board. That well-known test of whether the jurisdiction conferred by the Act upon the board broadly conforms to the type of jurisdiction exercised by the Superior, District or County Courts[33] can only be answered in the negative and the irresistable conclusion must be the same as was reached in *Kowanko* v. *Tremblay.*[34]

The possible result of the *Farrell* case as it stands should be immediately evident. Despite the provinces' undisputed power to deal substantively with the subject matter of workmen's compensation under the heads of section 92 of the *British North America Act,* yet on the strength of the *Farrell* decision th provinces would seem to lack the necessary procedural authority to implement a policy of a general workmen's insurance scheme through the instrumentality of their own appointees. At first blush one might suggest that earlier writers should very well reconsider their optimism that since the *John East* case the Courts would take cognisance of the necessity of provincial boards to regulate the increasingly complex economic life.

> "In interpreting the curial provisions of the *B.N.A. Act* in a comprehensive and authoritative manner, this latest judgment i.e., the *John East* decision will limit the extent to which section 96 will hereafter restrict the scope and effective operation of provincial boards and tribunals."[35]

A second and much more common method by which the courts have sought review of the workmen's compensation boards' decisions despite seemingly strong privative clauses[36] stating that a decision shall be 'final and conclusive' is by the "want of jurisdiction"route. Again in this 'legislative' field two recent decisions of the British Columbia Court (one a trial decision, the other from that province's Court of Appeal) review those authorities which decide that what are essentially irregularities in procedure of the inferior tribunals are the equivalent of an excess of jurisdiction. The first of these cases was *Battaglia* v. *Workmen's Compensation Board.*[37] There the applicant before the Board applied for compensation for a silicosis injury but was denied relief by that inferior tribunal and thus sought review of the Board's decision by the Courts. After due compliance with the provision dealing with medical examination (s. 54A of the B.C. Act) the Board refused to treat as conclusive

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[32]1960 S.C.R. 32.

[33]1948 2 W.W.R. 1055 at p. 1068.

[34]Since followed in Alberta. See *Haley* v. *Brown, Frazer et al* (1954) 12 W.W.R. (NS) 204 at p. 206.

[35]Shumiatcher: *Sec. 96 of the B.N.A. Act Re-examined* (1949) 27 Can. Bar Rev. 131 at p. 139.

[36]See footnote 3.

[37](1960) 32 W.W.R. 1.

that finding by the medical specialist as the section required. At trial,[38] before Lett, C.J.C.S. where *certiorari* to remove the proceedings to the Supreme Court and *mandamus* requiring the Board to pay compensation or to hear and determine the claim were applied for, the former was refused while the latter was granted. On appeal the Court directed a rehearing to enable the relevant documents (including the medical specialist's certificate) to be produced pursuant to the *certiorari* in aid. The Court of Appeal held (*inter alia*) that the Board's jurisdiction under the Act's privative clause (sec. 76 (1), *supra*) to determine questions of law did not extent to interpretation defining the Board's jurisdiction, and that that Board, in refusing to accept the medical findings, had "entrenched" on jurisdiction assigned exclusively to the specialist.

The 'jurisdiction' fiction has had a long history. As early as 1841 it was held that

> "the test for jurisdiction . . . is whether or not the justices had power to enter upon the inquiry, not whether their conclusions in the course of it were true or false."[39]

Another early leading case on the subject was *Colonial Bank of Australasia* v. *Willan*,[40] which is authority for the proposition that the effect of a privative clause is not to oust entirely the powers of the Superior Court to issue *certiorari*, but to control and limit them. A court may still quash on *certiorari* on two grounds; (1) manifest defect of jurisdiction in the tribunal or (2) manifest fraud in the party obtaining the order of the tribunal. The defect of jurisdiction may be either apparent on the face of the record, or be brought out by affidavit evidence.

At first, between 1910 and 1920, when the 'modern' type of workmen's compensation legislation was passed in many of the provinces of Canada, considerable strength was given to the privative clause. For example, in 1923 Anglin, J. stated in *Dominion Canners* v. *Costanza*:[41]

> "In my opinion, by giving to the Workmen's Compensation Board 'exclusive jurisdiction to examine into, hear and determine' all such matters and questions the legislature intended to oust and did oust the jurisdiction of the ordinary courts to entertain them, and required that they should be examined into, heard and determined solely by the board."
> "In reaching this conclusion I have not forgotten that the jurisdiction of superior courts is not taken away unless by express language in or necessary inference from a statute. *Balfour* v. *Malcolm* (1842) 8 Cl. & F. 485 at p. 500; *Oran* v. *Brearey* (1877) 2 Ex. D. 346 at p. 348. I find here a positive and clear enactment that the jurisdiction of the Board shall be 'exclusive' and nothing to warrant a refusal to give to that word its full effect."[42]

The writer does not pretend to have examined the great wealth of decisions by our Canadian Courts since the *Costanza* case which have denied the privative clause its widest interpretation. Suffice it to say that one case which is representative of the latter decisions in *Re Workmen's Compensation Act and C.P.R.*,[43] a decision of the Manitoba Court of Appeal. The issue with which McPherson, C.J.M. (who gave the judgment for the Court) was faced was whether the Manitoba Workmen's Compensation Board had exclusive jurisdiction to deal with the claim of an applicant whose status as a "workman"

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[38](1960) 22 D.L.R. (2d) 446.

[39]*Reg.* v. *Bolton* 113 ER 1054.

[40]1874 L.R. 5 P.C. 417 at p. 442.

[41]1923 S.C.R. 46.

[42]*Ibid.*, p. 61.

[43][1950] 2 D.L.R. 630; See also *R.* v. *Labour Relations Bd.* [1951] 4 D.L.R. 227; *C'da Safeway* v. *Labour Relations Bd.* [1953] S.C.R. 46.

was itself in issue. The Board, in holding the applicant was a "workman" within the meaning of sec. (2) (l) (r) of the *Workmen's Compensation Act* R.S.M., 1940 c. 239, granted compensation. On appeal the learned Chief Justice held that the

> ". . . Board being of limited jurisdiction cannot give itself jurisdiction by a wrong decision on a point collateral to the merits of the case which the limit of its jurisdicion depends."[44]

Thus, by circumventing the privative clause here, the Courts take unto themselves the task of deciding what are, in essence, issues of policy and expedience, for the decision as to whether an individual is an employee or not is surely a matter of primary jurisdiction or basic fact matter, which I might add is more properly left to the legislature to regulate through it's chosen instrumentality.[45] Of this Professor Laskin adds::

> ". . . the term 'jurisdiction' has become the convenient umbrella under which the provincial courts have chosen to justify their continual assertions of a reviewing power."[46]

I think one may safely conclude that in recent years the privative clause has not given such boards as the workmen's compensation boards any substantial measure of independence in their regulation of schemes of workmen's insurance.

A considerably more practical approach was taken in *Acme Home Improvements Ltd. v. Workmen's Compensation Bd.*,[47] yet I am inclined to believe that those courts which are bound by such a decision are loath to apply it in its entirety.[48] In the case, Davey, J.A. faced the conflict in cases regarding the Board's powers squarely.

> "Is it a power to adjudicate in only those cases in which the relationship of employer and workmen does exist in law and fact or is it a power to adjudicate in any matter arising under Part I of the Act out of an alleged relationship of employer and workmen with, as it was graphically put by one learned judge, the jurisdiction to be wrong?"[49]

The learned judge decides in favour of the latter power and concludes

> ". . . sec. 76 (1) clause (j) expressly confers upon the board exclusive jurisdiction to 'inquire into, hear and determine' finally and conclusively '*whether or not* any person' . . . is a workman within the meaning of Part I of the Act. That means the board is empowered in the course of exercising its exclusive jurisdiction to decide upon the merits, finally and conclusively, that a person is not a workman within the meaning of the Act and consequently that a relationship of employer and workman does ont exist between the persons in question."[50]

The recent decisions discussed in this note, which all cite the *Acme* decision, rather than seeking out from those passages I have quoted a broad basis upon which jurisdictional review shall lie, have contented themselves with quoting another paragraph:

> "The privative provisions of this section . . . will not oust the jurisdiction of the court to quash the assessment on *certiorari*, if the board has assumed a jurisdiction not vested in it by a wrong decision on a collateral question of law or fact upon which the jurisdiction depends."[51]

The implication that this is as far as the case goes seems disastrous and I respectfully submit that such a reluctance to follow the spirit of the *Acme* case is manifested in the decision of Manson, J. in the *Farrell* case.

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[44] *Ibid.*, p. 637. This phrase appeared first in *Bunbury* v. *Fuller*, (1853) 9 Ex. 111 at p. 140.

[45] A good discussion of this and collateral points is to be found in Laskin's article in (1952) Can. Bar Rev. 986, See esp. 992.

[46] *Ibid.*, at p. 990.

[47] (1957) 23 W.W.R. 545.

[48] See the *Farrell* decision at p. 585.

[49] (1957) 23 W.W.R. 545 at p. 548.

[50] *Ibid.*, p. 549.

[51] *Ibid.*, p. 546.

". . . it seems to me there has been rather a wrong approach by the courts to the question in the past. The courts have gone out of their way to uphold tribunals of this kind, despite the fact that their decisions were obviously bad in law . . . . It is quite beyond by understanding why there should be any anxiety on the part of the courts to uphold decisions which are obviously wrong."[52]

The reason why such decisions are upheld is that the correctness of the inferior tribunal's decision or lack of it is immaterial, although, in the latter case, it is regrettable in so far as it works a hardship upon the workman. It is that the provincial Legislature, in its infinite wisdom (and with its own purposes and objects in mind), has denied to the Superior Courts access to review substantive fact matters. As Rand, J. put it in *In Re Labour Relations; Tor. Newspaper Guild* v. *Globe Printing*[53] "is the action or decision within any rational compass that can be attributed to statutory language?"[54] Thus, jurisdiction which is reviewable by the court relates to collateral matters lying aside from the main issues and in that sense extrinsic to them. One learned judge—who was equally as correct—put the point another way by saying that where the matter is not collateral but constitutes part of the main issue before the inferior tribunal, the court is limited to examining the record to determine whether there is any evidence before the inferior tribunal. He hastens to add though that a court can only do that in the absence ofa privative clause.[55] What Mr. Justice Manson deems to be a "wrong approach" is really just the exercise of the independence of the Board, such independence being conferred by statute. Within its jurisdiction the privative clause has given the same privileges to the Board of rendering bad judgment at law as is exercised by the courts.

That the court in *Battaglia* v. *Workmen's Compensation Board* properly reviewed the excess jurisdiction appears manifestly evident, for its seems to the writer that it is equally as incumbent upon the inferior tribunal to treat as "conclusive" that which by statute it must (s. 54A (5) (e) of the B.C. Act) as the courts must respect their limit on review. The difference between an irregularity in procedure and an encroachment beyond jurisdiction is made amply clear by Shepperd, J.A.:

"From ss. (5) and (9) of Sec. 54A it appears that the jurisdiction is divided, that the specialist has exclusive jurisdiction to determine those matters coming within ss. (5) and in respect of such matters his findings 'shall be conclusive as to the matter certified'. The jurisdiction of the Board in review lies outside that particular jurisdiction which is specifically assigned to the specialist. That is, the Board has the general jurisdiction of review exclusive of that assigned to the specialist and therefore tht Board in review must proceed on the basis of the certificate being conclusive as to the matters certified by the acting within the ambits of s.s. (5)."

"When the specialist's certificate is taken to be conclusive, as required by s.s. (5), it still remains for the Board to determine whether the workman has a valid claim under the Workmen's Compensation Act."[56]

Thus it is perfectly true to say that where the legislature entrusts the board with a jurisdiction which includes:

(a) jurisdiction to decide whether a preliminary state of facts exists, and where it does,

(b) jurisdiction to do something more (i.e., grant compensation), then

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[52]*Farrell case* at p. 586.

[53][1953] 2 S.C.R. 18.

[54]*Ibid.*, p. 29. Rand, J. dissented in this case, but this test was not the objection of the majority.

[55]Roach, J.A. in *Re Ont. Labour Relations Bd. Bradley et al*, (1957) O.R. 361 at p. 335.

[56](1960)32 W.W.R. 1 at p. 16. See also judgment of Davey, J.A. at p. 6.

". . . it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all facts, including the existence of preliminary facts on which the further exercise of their jurisdictiton depends . . . ."[57]

However, the decision in *Battaglia* points out the difference between what is in fact an "excess of jurisdiction" (i.e., here 'deciding' upon a finding which by statute was to be accepted as conclusive by the Board) and wrongly deciding the matters of fact and law before them which themselves define the jurisdiction (which, of course, should not be amenable by *certiorari*).[58]

The only question remaining is, if this is the true view, has the distinction been understood and applied? One case (aside from the *Farrell* decision) has had the opportunity to consider *Battaglia* in the light of the 1958 *Acme* decision and, it is submitted, has arrived at the wrong conclusion. This is the case of *Re Ursaki*,[59] a recent decision by Mr. Justice Verchere in the B.C. Supreme Court, Trail Division. In this case the Workmen's Compensation Board rejected a compensation claim by the applicant in 1944 (once again made in respect of a silicosis injury as in *Battaglia*) but allowed the claim at a rehearing some twelve years later. The Board directed a compensation pension to be paid to the applicant from the date on which the diagnosis was established. But by s. 7 (2) of the B.C. Act compensation was in the proper case to be payable from the date of disability. The learned judge held (*inter alia*) that the Board's failure to discharge its statutory duty, not determining the date on which the applicant's disability commenced, amounted to a refusal to exercise jurisdiction. Thus Mr. Justice Verchere decided that *mandamus* would properly be issued to require the Board to carry out its duty, and that sec. 76 (1) of the Act does not oust *certiorari* where the Board acts beyond its jurisdiction.

It is submitted that the learned judge has fallen into a trap common to those whose task it is to review such boards, that is, becoming preoccupied with the merits of the case. The fatal result of this is that, in order to equate a decision in terms that befit the extraordinary remedies, a wrong decision becomes tantamount to an excess of jurisdiction. By the Act (s. 7) the Board must pay compensation where the disability is more than six days' duration from the date of disability. Section 8 (c) provides that the disablement shall be treated as the happening of the accident. In granting the application for *ceriorari* his Lordship said:

"In the instant case, the Board did not determine the date on which the applicant's disability commenced, but instead it determined the date on which it was diagnosed. This I take to be an assumption of a jurisdiction it did not possess, and the jurisdiction of the Court to quash the Board's order on *certiorari* has not therefore been ousted by the privative provisions of sec. 76."[60]

and further:

"The record as produced clearly shows that the applicant *claimed* his total disability commenced November 22, 1944 and that the Board found only the date on which a diagnosis of silicosis was established."[61] Italics are the author's.

It is submitted that on the facts as given, Mr. Justice Verchere concludes

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[57] *Queen* v. *Comm'r's for Special Purposes of the Income Tax* (1888) 21 Q.B.D. 313, 320.

[58] See (1952) 30 Can. Bar Rev. 986 at p. 988.

[59] (1960) 24 D.L.R. (2d) 761.

[60] *Ibid.*, at p. 765.

[61] *Ibid.*

that because the applicant *claimed* the disability twelve years prior to his successful application to the Board when a medical certificate was issued pursuant to sec. 54A of the B.C. Act, the determination of the date of disability by the Board could only have been in 1944 in order for the Board to have been within its jurisdiction. Or, more correctly, the date the diagnosis was established could never be, without more, the date of disablement. But how can that be so in the present case? It is submitted that here the Board, from its conclusive medical finding, could only set the date of disability at the date of diagnosis. This is indicated in the letter from the Board to the applicant:

> ". . . . It has been recommended *that same be now accepted* as a Board responsibility from March 13, 1956, the date on which a diagnosis was established."[62] Former italicizing is the author's, the latter his Lordship's.

For the Board to set any prior date would be guesswork and to choose as the date of disablement as 1944, when the applicant made a similar application, would be sheer folly. One might wonder if the same result would be arrived at had the unsuccessful application preceded the successful one by only a month or two.

A conclusion with a neat rationale to these decisions would be ideal, but it seems impossible. Professor Laskin, upon coming to the conclusion that no privative clause could ever be effective, says:

> "How can irregularities in procedure deprive a tribunal of jurisdiction? That nevertheless is the law and it is not altered by any amount of patient argument to the effect that jurisdiction means power to decide; that power to decide means power to decide rightly or wrongly; that consequently a decision in accordance with irregular mehods of precedure is not a decision given without jurisdiction, but merely a wrong decision given with jurisdiction."[63]

It seems that the only way to deprive the courts from examining a board's decision is specifically to deny to them, in the Act, the right to review for "excess of" or "failure to enter upon jurisdiction". At the very least, one can say that it would be interesting to watch for the reaction of the courts.

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[62] *Ibid.*, at p. 762.

[63] *Administrative Law and the B.N.A. Act* (1939) Harv. Law Rev. 251 at p. 277.