THE UNCERTAIN CONSTITUTIONAL POSITION OF CANADA'S ADMINISTRATIVE APPEAL TRIBUNALS

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I. INTRODUCTION

Now that the Law Society of Upper Canada permits lawyers to advertise their practices as limited to certain areas of specialty, there are rumours of one practitioner restricting herself to cases "involving section 96 of the Constitution Act". While this story is almost certainly apocryphal, the continuing flow of constitutional litigation concerned with this provision suggests that it might be a lucrative way of making a living, providing one secured the relevant briefs. Indeed, the stimulus to litigation provided by the recent spate of successful invocations of the section as a basis for striking down legislation may ensure that there are

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more than enough opportunities for those sufficiently interested.[1] On the other hand, life with section 96 would be the ultimate in frustrating experiences. One hundred and fifteen years into Confederation and over one hundred and fifty judicial interpretations later,[2] its ambit is just as unclear as it ever was. Or, perhaps more accurately, as soon as old problems seem laid to rest, new ones constantly emerge, and this despite an average of one Supreme Court of Canada pronouncement a year on the matter for the last eight years.[3]

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[1] In addition to the Supreme Court of Canada decisions noted in this comment, other recent attacks on the basis of s. 96 at the lower levels include Reference *re* Establishment of a Unified Criminal Court of New Brunswick, 62 C.C.C. (2d) 165, 127 D.L.R. (3d) 214 (N.B.C.A. 1981) (unsuccessful); Gray Line of Victoria Ltd. v. Chabot, 29 B.C.L.R. 168, 125 D.L.R. (3d) 197 (S.C. 1981) (unsuccessful attack on the appellate powers of Lieutenant Governor in Council with respect to decisions of the British Carrier Commission); Concerned Citizens of B.C. v. Capital Regional Dist., 25 B.C.L.R. 273, 118 D.L.R. (3d) 257 (C.A. 1980) (successful attack on the appellate powers of the Lieutenant Governor in Council with respect to decisions of the British Columbia Control Board); *Re* Mudry and the City of Toronto, 57 C.C.C. (2d) 377, 118 D.L.R. (3d) 304 (Ont. Div'l Ct. 1980) (unsuccessful attack on authority of non-section 96 judges to issue prohibition orders against future breaches of municipal by-laws); Kasper v. Employment Standards Div., Dept. of Lab., [1981] 1 W.W.R. 522, 115 D.L.R. (3d) 737 (Man. Q.B. 1980) (unsuccessful attack on unpaid wages jurisdiction of Director of Employment Standards); *Re* Kleinsteuber and Kleinsteuber, 29 O.R. (2d) 360, 113 D.L.R. (3d) 142 (Prov. Ct. Fam. Div. 1980) (unsuccessful attack on jurisdiction of non-section 96 court judges to order cessation of one spouse harrassing another); *Re* Aamco Automatic Transmissions Inc. and Simpson, 29 O.R. (2d) 565, 113 D.L.R. (3d) 650 (Div'l Ct. 1980) (unsuccessful attack on cease and desist powers of the Director of Consumer Protection Division in relation to unfair business practices); A.G. N.S. v. Gillis, 39 N.S.R. (2d) 97, 71 A.P.R. 97, 111 D.L.R. (3d) 349 (C.A. 1980) (successful attack on jurisdiction of Commissioners to hear applications with respect to certificates of title to ungranted lands in Nova Scotia); Public Service Comm'n of Halifax v. County of East Hants, 33 N.S.R. (2d) 451, 57 A.P.R. 451, 103 D.L.R. (3d) 633 (S.C. 1979); Cohen v. Dhillon, 13 B.C.L.R. 334, 102 D.L.R. (3d) 589 (Cty. Ct. 1979) (unsuccessful attack on excessive rent jurisdiction of Rent Review Commission); Pepita v. Doukas, 16 B.C.L.R. 120, 101 D.L.R. (3d) 577 (C.A. 1979) (unsuccessful attack on authority of British Columbia rentalsman to make orders for possession of rented premises); Reference *re* Proposed Legislation Concerning Leased Premises and Tenancy Agreements, 89 D.L.R. (3d) 460 (Alta. C.A. 1979) (unsuccessful attack on proposed Alberta tenancy tribunal).

[2] I have not counted the number of decisions myself. Rather I have relied on the estimate by Gilles Pépin in the course of his comment on A.G. Que. v. Farrah, [1978] 2 S.C.R. 638, 86 D.L.R. (3d) 161 found in 38 R. DU B. 818, at 819 (1978).

[3] *See* Tomko v. Labour Rel. Bd. (Nova Scotia), [1977] 1 S.C.R. 112, 69 D.L.R. (3d) 250 (1975); Jones v. Edmonton Catholic School Dist. No. 7, [1977] 2 S.C.R. 872, 70 D.L.R. (3d) 1 (1976); A.G. Que. v. Farrah, *id.*; City of Mississauga v. Municipality of Peel, [1979] 2 S.C.R. 244, 97 D.L.R. (3d) 439; *Re* Residential Tenancies Act of Ontario, 37 N.R. 158, 123 D.L.R. (3d) 558 (S.C.C. 1981); Massey-Ferguson Industries Ltd. v. Saskatchewan, 39 N.R. 308, 127 D.L.R. (3d) 513 (S.C.C. 1981); Crevier v. A.G. Que., 38 N.R. 541, 127 D.L.R. (3d) 1 (S.C.C. 1981); Reference *re* Section 6 of the Family Relations Act, 131 D.L.R. (3d) 257 (S.C.C. 1982). Also of recent significance is Séminaire de Chicoutimi v. A.G. Que., [1973] S.C.R. 681, 27 D.L.R. (3d) 356 (1972).

In the last twelve months there have been four such incursions by our highest court, to the despair of provincial legislators. For administrative lawyers the most important of these decisions is *Crevier v. A.G. Que.*[4] The victim this time was the Quebec Professions Tribunal, a body created by the 1973 Professional Code[5] and acting as a general appeal authority from all the statutory disciplinary committees of the thirty-eight professions recognized and regulated by that Code. This legislation represented an innovative attempt by the province of Quebec to regulate professions in the public interest and to ensure a degree of uniformity in approach to problems common to various vocations designated as professions. To quote Professor Pierre Issalys, an early observer of the development and purposes of the statute:

> The case for stronger public law features in the regulation of professions rested on a number of concerns. The increasing involvement of the community in what had been a purely bilateral and individual relationship between the professional and his client called for institutional recognition through some form of participation by the public and its representatives in the regulation of professional activity. A new philosphy of professional organization was emerging, emphasizing the protection of the public rather than the promotion of sectional interests. Finally, it became increasingly clear that a measure of direct State involvement and the establishment of close links between the Government and the existing organizations were the surest ways to rationalize the existing institutions in the professional field. All these ideas were expressed in the *Castonguay-Nepveu Report* and served as inspiration for the draftsmen of the *Professional Code*.
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> At the same time, the specific character of professional organizations, especially with respect to the control of ethical conduct among members of the professions, was recognized as legitimate. It was readily acknowledged that an increased subjection of professional corporations to public law should not lead to the elimination of that specific character. The autonomy of corporations might be reduced, but not to the point where their disciplinary law would cease to exist as a distinct branch of the legal system.
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> Ultimately, the most valuable concepts derived from the public law character of professional organization — a unified source of policy, a code of standard procedures for all professions, a centralized appeal structure — combine to reinforce the unique character of the disciplinary law of professions. The *Professional Code* has given that branch of our legal system a definite legislative framework with a set of stable institutions and a capacity for orderly growth.[6]

This comment has three purposes; first, to assess the bases upon which the Supreme Court of Canada invalidated the relevant appellate structure in the Code in order to see whether they accord with any valid policy objectives behind section 96 of the Constitution Act, second, to consider where the decision leaves the status of statutory administrative appeal tribunals in Quebec and the other provinces, and finally, to speculate as to whether the decision has any ramifications for the

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[4] *Supra* note 3.

[5] S.Q. 1973, c. 43 (*as amended by* R.S.Q. 1977, c. C-26).

[6] *The Professions Tribunal and the Control of Ethical Conduct among Professionals*, 24 McGILL L.J. 588, at 626 (1978).

constitutional authority of the federal Parliament, as well as that of provincial legislatures, to restrict judicial review of administrative action or to create administrative appeal tribunals.

II. THE BACKGROUND AND THE JUDGMENTS BELOW

Perhaps surprisingly, the applicant for relief in *Crevier* was not a disciplined professional seeking to avoid sanctions imposed by the Professions Tribunal. Rather, evocation was sought by the "prosecutor" of the optometrists' professional corporation and the fact that an officer of the corporation was seeking judicial review on the basis of alleged unconstitutionality of the Tribunal's jurisdiction speaks to some dissatisfaction, at least on the part of the optometrists, with the province's regulatory scheme.[7]

At first instance, the optometrists' discipline committee had convicted two optometrists of an offence but this verdict was reversed on appeal by the Tribunal. Thereupon, the *syndic adjoint* sought judicial review of the Tribunal's decision in the Quebec Superior Court. Given that the basis of this challenge was the alleged constitutional invalidity of the Tribunal's appellate jurisdiction, the effect of a totally successful challenge would not only be to restore the discipline committee's original decision but also to immunize it from further appeal to the Tribunal. Of course, such an outcome would not necessarily preclude the two optometrists from thereafter challenging the original convictions by the discipline committee by way of evocation in the Quebec Superior Court. Given the limited scope for court interference with the merits of decisions on judicial review, this would not, however, be the same as an appeal on the merits to the Tribunal.

The constitutional challenge to the authority of the Professions Tribunal raised two aspects of the Tribunal's jurisdiction; first, a privative clause which potentially had the effect of immunizing the decisions of the Tribunal from review even for jurisdictional error;[8] and second, the Tribunal's authority as part of a general appeal jurisdiction to reverse or quash the decisions of a discipline committee for errors of law, including jurisdiction, as well as errors of fact.[9]

It was possible in this context for the Court simply to strike down the privative clause or hold that it did not apply to jurisdictional error, leaving the rest of the Tribunal's jurisdiction intact. The effect would

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[7] According to Issalys, *id.* at 594, while the professions were critical of the proposed regulatory scheme in general at the time of its passage through the Assembly, the professional disciplinary provisions did not generate much controversy.

[8] *See* Professional Code, R.S.Q. 1977, c. C-26, ss. 194-96, purporting to exclude recourse to the QUE. CODE OF CIVIL PRO. In particular s. 194 excluded art. 846 which provides for review for want or excess of jurisdiction.

[9] S. 175.

have been to leave the Tribunal free to hear appeals but subject to the superintending jurisdiction of the Quebec Superior Court, at least on questions of jurisdiction. In fact, this avenue was not really explored in any of the three courts, at least as a matter of constitutional validity as opposed to one of statutory interpretation.[10]

In the Quebec Superior Court,[11] Poitras J. sustained the argument that the legislation creating the Professions Tribunal was contrary to section 96. He held[12] that the function exercised by both the discipline committee and the Professions Tribunal was of a judicial nature, thereby meeting the first criterion for a successful section 96 argument laid down by the Judicial Committee of the Privy Council in the seminal case of *Labour Relations Board of Saskatchewan v. John East Ironworks Ltd.*[13] The test was whether the body "a le pouvoir, par sa décision de porter atteinte aux droits des parties et a le devoir, sans aucune discrétion de sa part, de décider dans un sens ou dans l'autre".[14] This is not surprising as professional disciplinary bodies are the criminal courts of the professions and it would seem unrealistic to argue otherwise.

The second and ultimate question under the *John East Ironworks* test is by far the more difficult one to determine, "si le *Code des professions* a conféré au Tribunal des professions une juridiction analogue à celle exercée par une cour supérieure".[15] For these purposes, Poitras J. considered the position of those Quebec professions subject to statutory regulation at the time of Confederation. This survey indicated that there were internal disciplinary committees at that time and that in the case of the medical profession, persons practising without a licence were subject to the jurisdiction of the Justices of the Peace.[16] Nevertheless, even in 1867 "il [était] clair que seule une cour dont les membres étaient nommés par le Gouverneur général en Conseil pouvait se prononcer en tout dernier ressort sur une décision prise par un comité ou un conseil ou même un membre exécutif de cette corporation".[17] In other words, whatever the particular statutory arrangements, judicial review through the prerogative writs and the Court of Queen's Bench was always available as an ultimate resort.

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[10] In the Quebec Court of Appeal decision, [1979] C.A. 333, it was held as a matter of interpretation, as opposed to constitutional law, the privative clauses were not effective in excluding review for jurisdictional error: at 337 *per* Paré J.A., and at 338 *per* Jacques J. (*ad hoc*). By way of contrast, Laskin C.J.C. (delivering the judgment of the Supreme Court of Canada) was of the view that such a result was not possible as a matter of interpretation: *supra* note 3, at 552, 127 D.L.R. (3d) at 8. *See* text accompanying note 36 *infra*.

[11] [1977] C.S. 324.

[12] *Id.* at 330-31.

[13] [1949] A.C. 134, [1948] 3 D.L.R. 673 (P.C. 1948) (Can.)

[14] *Supra* note 11, at 330.

[15] *Id.* at 331.

[16] *Id.*

[17] *Id.* at 333-34.

Yet by itself, all this would seem to establish is the invalidity of the privative clause and its restrictions on judicial review; it does not necessarily invalidate the appellate jurisdiction of the Professions Tribunal. Nevertheless, as was later the case with the judgment of the Supreme Court of Canada, Poitras J. seemed to see the legislation as an attempt to give the Professions Tribunal the powers of a superior court on judicial review. The judge emphasized not only that the tribunal could "confirm, modify or quash" disciplinary committee decisions (the last a review term)[18] but also that this could be for errors of law and jurisdiction, as well as fact, once again the first two being review grounds.[19]

In so doing, Poitras J. contrasted this legislation with that in issue in *Procureur général du Québec v. Farrah*.[20] There the Quebec Court of Appeal had struck down paragraph 58(*a*) of the Transport Act[21] conferring appeal jurisdiction with respect to questions of law on the Quebec Transport Tribunal. "La juridiction d'appel conférée par le *Code des professions* au Tribunal des professions est plus large encore que celle attribuée au Tribunal des transports."[22] It is on this point however, that the reasoning of Poitras J. apparently breaks down for subsequently, in the Supreme Court of Canada decision in *Farrah*,[23] it was the *narrowness* of the power conferred by paragraph 58(*a*) that condemned the section. To confer jurisdiction on a statutory appeal tribunal simply to decide appeals on questions of law was to make that aspect of the tribunal's jurisdiction too much like a judicial review function, at least where that jurisdiction was protected by a privative clause. "Make the appellate jurisdiction general and it will be secure" seemed to be the message. At least, this is what Laskin C.J.C., in one of the three judgments, appeared to say:

> I begin this assessment with two propositions which, in my opinion, admit of no challenge. First, it is open to a Province to endow an administrative agency, which has adjudicative functions, with power to determine questions of law in the exercise of its authority under a valid provincial regulatory statute such as the one involved in the present case. Indeed, it is difficult to appreciate how such an agency can operate effectively if it is precluded from interpreting and applying the statute under which it exercises its jurisdiction. Second, it is also open to a Province to establish an administrative tribunal of appeal as part of a valid regulatory statute and to invest such a tribunal with power to make decisions on questions of law in the course of exercising an appellate authority over decisions of the primary agency.[24]

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[18] *Id.* at 334.
[19] *Id.*
[20] [1976] C.A. 467.
[21] S.Q. 1972. c. 55.
[22] *Supra* note 11, at 334.
[23] *Supra* note 2.
[24] *Id.* at 642, 86 D.L.R. (3d) at 164.

Alternatively, to paraphrase Pratte J., it is impermissible both to abolish by way of privative clause judicial review for error of law *and* to create or leave that same power in an administrative appeal tribunal.[25] On either theory, however, while the privative clause in *Crevier* should be struck down, the jurisdiction of the Tribunal itself would be safe.

Operating with the benefit of the now delivered Supreme Court of Canada judgment in *Farrah*, the majority of the Quebec Court of Appeal in fact accepted this as the principal distinguishing feature between paragraph 58(*a*) of the Transport Act and the Professions Tribunal's jurisdiction.[26] The majority also noted that the trial judge had overlooked the fact that the Quebec legislation of 1866 with respect to at least one of the professions, notably the Bar, had created an internal appeal body on disciplinary matters.[27] By way of contrast, under the predecessor of paragraph 58(*a*) of the Transport Act, appeals on questions of law had gone to the Quebec Court of Appeal.[28] In addition, the majority adopted the traditional "interpretation" approach to privative clauses: unless they expressly exclude review for jurisdictional error, such review survives. According to Paré J.A.:

> En conséquence, les clauses restrictives des articles 188 et 189 n'opèrent que dans les limites que lui fixe une jurisprudence reconnue et n'altèrent en rien les pouvoirs de la Cour supérieure en matière de compétence et de juridiction sur les agissements du Tribunal des professions.[29]

Given this apparently convincing justification for reversal of the trial judgment and sustaining of the legislation, the unanimous restoration of that trial judgment by a nine-judge Supreme Court of Canada was surprising.[30] Perhaps even more surprising was that the judgment of the Court was delivered by Laskin C.J.C., who in *Farrah* had indicated considerable sympathy for the status of administrative appeal tribunals exercising a general appeal jurisdiction. As a result, the judgment in *Crevier* deserves careful consideration to assess whether it poses a threat to all administrative appeal tribunals or whether there were certain

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[25] *Id.* at 655-56, 86 D.L.R. (3d) at 178.

[26] *Supra* note 10, at 336 (*per* Paré J.A.) and 338 (*per* Jacques J. (*ad hoc*)).

[27] *Id.* at 336 (*per* Paré J.A.).

[28] *Id.* at 337. *Quaere* how much can be made of this particular argument for invalidity in *Farrah*, *supra* note 2. The jurisdiction of the Court of Appeal to hear appeals on questions of law in transport matters was not a pre-Confederation authority. Rather, it was first conferred by s. 41 of the Provincial Transportation and Communication Board Act, S.Q. 1939, c. 16. Carried to its extreme, such an argument would prevent any appellate authority conferred after Confederation on a superior or s. 96 court ever being withdrawn and reposed in a non-section 96 authority (at least absent a radical reformation of the relevant substantive law: *Tomko*, *supra* note 3). This is an untenable position. The mere fact that a post-Confederation legislature sees fit to confer an authority on a s. 96 court cannot be determinative of the constitutional question as to what are the essential attributes of a s. 96 court.

[29] *Supra* note 10, at 337.

[30] *Supra* note 3. The Court consisted of Laskin C.J.C., Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

aspects of this particular body which led to its invalidity. This will be discussed after the comments on the validity of the privative clause.

III. SECTION 96 AND PROVINCIAL PRIVATIVE CLAUSES

The Professional Code contained a clause to the effect that decisions of the Tribunal were final. However, such provisions have been interpreted conventionally as indicating that there is simply no statutory right of appeal from decisions of the relevant statutory authority.[31] More significantly, there were three other provisions speaking specifically to the availability of judicial review:

> 194. No extraordinary recourse contemplated in articles 834 to 850 of the Code of Civil Procedure shall be exercised and no injunction granted against the persons mentioned in section 193 acting in their official capacities.
> 195. Article 33 of the Code of Civil Procedure does not apply to the persons mentioned in section 193 acting in their official capacities.
> 196. Two judges of the Court of Appeal may, upon motion, summarily annul any writ, order or injunction issued or granted contrary to sections 193 and 194.

The provisions of the Code of Civil Procedure mentioned are those dealing with judicial review[32] and in section 193, "persons" is defined to include both the Professions Tribunal and the discipline committees of the various professional corporations. In other words, these sections purported to immunize both the committees and the Tribunal from all judicial review. Nevertheless, in addition to the Court of Appeal's decision in this case, there was other authority to the effect that, as a matter of interpretation, such clauses did not apply in the case of jurisdictional error.[33] Indeed, in two cases decided by the Supreme Court of Canada as recently as the 1980-81 term, the Court had accepted without question that clauses such as sections 194 and 195 did not apply to a situation of jurisdictional error.[34] According to Beetz J. in *Blanco v. Rental Commission*:

> Section 17 of the *Conciliation Act* contains a privative clause which places the administrator and the Rental Commission outside the supervisory

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[31] S. 175. *See, e.g.*, Lord Nelson Hotel Ltd. v. City of Halifax (No. 2), 39 D.L.R. (3d) 539, at 549-50 (N.S.S.C. 1973).

[32] Art. 33 subjects all inferior statutory authorities to the superintending and reforming power of the Quebec Superior Court save to the extent of legislative modification, while arts. 834-50 deal with the particular remedies of judicial review of administrative action.

[33] An earlier decision interpreting the privative clauses of the Code in this way is Brière v. Tribunal des Professions, [1975] C.S. 745. *See* Issalys, *supra* note 6, at 614-15.

[34] A.G. Que. v. Labrecque, [1980] 2 S.C.R. 1057, at 1062, 38 N.R. 1, at 7; Blanco v. Rental Comm'n, [1980] 2 S.C.R. 827, at 830-31, 35 N.R. 585, at 588.

> power of the Superior Court. They may therefore err in the exercise of their jurisdiction but they may not, by a mistaken interpretation of the law, appropriate jurisdiction which they do not have or decline that which they do have.[35]

In *Crevier*, Laskin C.J.C. did not mention either of these decisions. He simply did not think the interpretation approach appropriate with respect to such privative clauses. "It is necessary to bring [the constitutional issue] forward, however, when it is raised as squarely as it has been under the *Professional Code*."[36] Then, after referring[37] to *dicta* in earlier cases[38] to the effect that section 96 constituted an impediment to privative clauses which on their fair interpretation prevented review for jurisdictional error, he justified his adoption of that *dicta* in the following terms:

> It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touching jurisdiction. However, given that s. 96 is in the *British North America Act*, and that it would make a mockery of it to treat it in non-functional terms as a mere appointing power, I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review.[39]

Stated in this form, the argument in fact combines two possible ways of attacking the validity of privative clauses excluding review for jurisdictional error. Looking at the matter from the perspective of the superior court, such a clause *excludes* one of its traditional functions, that of judicial review of administrative action for jurisdictional error. In terms of the tribunal, such a clause gives it the power to determine the extent of its own jurisdiction, one of the hallmarks of a superior court. Under this second argument there has been a *conferring* of a superior court attribute upon a non-section 96 body. However, if the two propositions are collapsed the proposition that emerges is that such a privative clause is

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[35] *Supra* note 34, at 830-31, 35 N.R. at 588.

[36] *Supra* note 3, at 577, 127 D.L.R. (3d) at 13.

[37] *Id.* at 556-57, 127 D.L.R. (3d) at 12-13

[38] Farrell v. Workmen's Compensation Bd., [1962] S.C.R. 48, at 52, 31 D.L.R. (3d) 177, at 181 (1961) (*per* Judson J.); Toronto Newspaper Guild v. Globe Printing Co., [1953] 2 S.C.R. 18, at 40, [1953] 3 D.L.R. 561, at 582 (*per* Fauteux J.), Alliance des Professeurs Catholiques de Montréal v. Quebec Lab. Rel. Bd., [1953] 2 S.C.R. 140, at 155, [1953] 4 D.L.R. 161, at 175 (*per* Rinfret C.J.C.).

[39] *Supra* note 3, at 558, 127 D.L.R. (3d) at 13-14.

invalid because it *transfers* to a provincial tribunal one of the key functions exercised in 1867 by the superior courts.[40]

Thus, a matter of lengthy academic debate has at long last been resolved by the Supreme Court. At this stage, the various arguments and positions which characterized that debate[41] will not be reiterated. Later, in the context of considering the position of judicial review in the federal legislative sphere, some of the justifications for its guaranteed constitutional position will be identified. Suffice it to say here that it is somewhat ironic that since 1952 the focus for much of the argument supporting the constitutionality of such privative clauses was derived from the comments of the now Chief Justice in a *Canadian Bar Review* article, entitled *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses*:

> At the threshold of this inquiry it may be well to make the assertion that there is no constitutional principle on which courts can rest any claim to review administrative board decisions. . . .
> . . . We must not then delude ourselves that judicial review rests on any higher ground than that of being implicit in statutory interpretation. In this connection the term "jurisdiction" has become the convenient umbrella

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[40] There are, however, possibly a couple of warts on the symmetry of this exercise. (1). Such a privative clause does not in fact totally exclude the possibility of superior court scrutiny or review of the Professions Tribunal; it is still possible in some contexts (*e.g.*, questioning the validity of a decision in the context of enforcement proceedings). This perhaps suggests that the stronger thrust of the argument is on that aspect of it which speaks to the constitutional importance of direct judicial review by the superior courts. On the other hand, it is also difficult to imagine situations where collateral attack would be available to the corporation in the event of a wrongful declining of jurisdiction. (2). In terms of direct review, the judgment also clearly differentiates between review of provincial tribunals for jurisdictional error (which is constitutionally protected) and review for intrajurisdictional error (which is not so protected). In fact, there is some considerable merit for this distinction in the history of pre-1867 judicial review. (*See e.g.*, J. EVANS, DE SMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 367 (4th ed. 1980) for pre-1867 examples of the English courts using the concept of jurisdiction to circumvent privative clauses. Against this background there are difficulties in arguing that Canada inherited a judicial review system based on judicial review for all errors of law as opposed to jurisdictional error). Nevertheless, Professor Rod Macdonald of McGill has problems accepting *Crevier* because of these elements and develops the arguments in far more detail in a forthcoming comment on *Crevier* in the U.B.C. Law Review while, from a somewhat different perspective, my colleague, Professor Noel Lyon, continues to maintain that judicial review for all errors of law should be protected by s. 96: *see* Comment, 49 CAN. B. REV. 365 (1971) and Comment, 58 CAN. B. REV. 646 (1980).

[41] Aside from the Laskin article, *infra* note 42, *see* Hogg, *Is Judicial Review of Administrative Action Guaranteed by the British North America Act?*, 54 CAN. B. REV. 716 (1976) and the articles listed at 717, n. 4, and Lederman, *The Supreme Court of Canada and the Canadian Judicial System*, 13 TRANSACTIONS OF THE ROYAL SOCIETY OF CANADA — FOURTH SERIES 209, at 221-24 (1975); Duplé, *Nouvelles récentes de l'article 96*, 18 C. DE D. 315 (1977); Deslauriers, *La Cour provinciale et l'art. 96 de l'A.A.N.B.*, 18 C. DE D. 881 (1977); Weiler, *Arbitration Under the British Columbia Labour Code*, 25 MCGILL L.J. 193, at 204-07 (1979); Pépin, *supra* note 2; Schwartz, *Woodward's Estate: A Case of Nonconstitutional Law*, 4 QUEEN'S L.J. 124 (1978).

> under which the provincial courts have chosen to justify their continual assertions of a reviewing power. . . .
> . . . 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.[42]

A footnote in that article did suggest at least lingering doubts[43] and by June 1975, at the Canadian Association of Law Teachers' annual meeting, these doubts had increased somewhat, though not nearly to the extent necessary to reach the holding in *Crevier*:

> [W]hat Professor Scott has done is to say that you can't be a Superior Court unless you are an agency or board or some tribunal that can determine without review elsewhere, except by appeal, your own jurisdiction. And he then also tells us that whenever any agency's authority is declared to be unreviewable, it must therefore be a Superior Court. Well, put me in the doubter's ranks, at least for the sake of argument. . . . But it is an important aspect of constitutional authority. Some of the more recent cases of the Supreme Court of Canada on the subject, which are well known to you, have tended, I think, to take a pretty generous view of the scope of provincial legislative power in that respect.[44]

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[42] 30 CAN. B. REV. 986, at 989-91 (1952).

[43] *Id.* at 990, n. 14, reads as follows:

> It may be observed that in none of the labour board statutes has the legislature specifically foreclosed judicial review on matters of "jurisdiction". *Quaere* whether the use of this word . . . would oust judicial review?

It is, however, unclear whether the author was here expressing his own doubts as to the constitutionality of such a provision, his doubts as to the effect of such language or his doubts as to what a court would do when confronted by such a clause.

[44] *The Supreme Court and the Protection of Civil Liberties Commentary*, 14 ALTA. L. REV. 135, at 137 (1976). The Chief Justice was commenting on a paper delivered by Professor Stephen A. Scott of McGill, *The Supreme Court and Civil Liberties*, 14 ALTA. L. REV. 97 (1976). Shortly afterwards in a paper delivered in July 1977 at the 19th Australian Legal Conference, the Chief Justice appeared to have moved to Professor Scott's position. After stating in a discussion of s. 96 that statutory tribunals cannot avoid making decisions on issues of law, he continued: "The reasonable compromise here is to deny them unreviewable authority to make such determination, and equally to deny them power to determine finally the limits of their jurisdiction." *See* Laskin, *Comparative Constitutional Law — Common Problems. Australia, Canada, United States of America*, 51 AUST. L.J. 450, at 457 (1977). It is interesting to note that both here and more specifically in *Crevier*, Laskin C.J.C. links the arguments of guaranteed judicial review and the inappropriateness of a non-section 96 court ruling on the limits of its own jurisdiction. Provided one defines the extent of guaranteed judicial review as being the ability to rule on issues for jurisdiction, they are indeed two sides of the same coin. Note, however, that both Hogg, *supra* note 41, and Arthurs, *"The Dullest Bill": Reflections on the Labour Code of British Columbia*, 9 U.B.C.L. REV. 280, at 329-35 (1974), deal with these arguments separately. In fact, this was necessary in that they were dealing with the Lyon argument that the constitutional guarantee of judicial review extended to all issues of law: *supra* note 40. This has now been clearly rejected by *Crevier*, *supra* note 3, at 558-59, 127 D.L.R. (3d) at 14.

Now, just over six years later, the wheel has come full circle and the Court led by the Chief Justice has been persuaded to hold not only that privative clauses (at least in provincial statutes) cannot validly prevent review for jurisdictional error but that also, in the context of *Crevier*, the attempt to do so invalidated those clauses completely.

What has led to the change in views? Notwithstanding the supporters of Laskin C.J.C.'s 1952 position, there was always considerable strength in the contention that if section 96 requires any functional guarantees at all, judicial review was one of the subject matters that was the hallmark and preserve of superior courts at the time of Confederation.[45] To permit statutory bodies to be the ultimate authority on the scope of their own jurisdiction would therefore derogate from one of the most basic functions of federally appointed superior courts.

Perhaps the Chief Justice may also be more sympathetic to a judicial review system based on jurisdiction than he was in 1952. At the very least, he seems to have become convinced that it is possible to sort out jurisdictional error from error within jurisdiction. To quote from his judgment in *Crevier*: "There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction, evidentiary matters or other matters."[46] This comparative sanguinity may find some justification in such recent Supreme Court decisions as *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*[47] in which Dickson J. greatly contributed to a better understanding of and limited scope for the term jurisdictional error. Nevertheless, a reading of the Supreme Court's latest ventures into the murky world of jurisdictional error gives considerable cause for disquiet. Particularly relevant are the two recent Quebec privative clause decisions already mentioned: *Blanco v. Rental*

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[45] In this regard, *see* particularly Lederman, *The Independence of the Judiciary*, 34 CAN. B. REV. 769 and 1139, at 1174-75 (1956); the judgment of Pratte J. in *Farrah*, *supra* note 2, at 649-52, 86 D.L.R. (3d) at 173-76; Vallières & Lemieux, *Le Fondement Constitutionnel du Pouvoir de Contrôle Judiciaire Exercé par la Cour Fédérale du Canada*, 2 DALHOUSIE L.J. 268, at 285-91 (1975). It is also worth noting that H. Wade is of the view that the judges have in effect imposed judicial review as a constitutional guarantee in the United Kingdom notwithstanding the doctrine of supremacy of Parliament. *See* H. WADE, CONSTITUTIONAL FUNDAMENTALS 64-65 (1980), particularly by reference to Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 A.C. 147 (H.L.). *Crevier* also lays to rest the arguments of some writers (including myself at an earlier point) that Executors of Woodward's Estate v. Minister of Finance, [1973] S.C.R. 120, 27 D.L.R. (3d) 608, and Robertson v. British Columbia Sec. Comm'n, [1975] 1 S.C.R. vi, had resolved the issue against a guarantee of judicial review from provincial interference. Those interpretations of these two decisions are taken to task by Lederman, *supra* note 41, at 223, particularly n. 18, and Schwartz, *supra* note 41, at 138-42.

[46] *Supra* note 3, at 558, 127 D.L.R. (3d) at 13.

[47] [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417.

Commission[48] and *A.G. Que. v. Labrecque*.[49] In both of these decisions, the Court ruled without reference to the *New Brunswick Liquor Corp.* case or to any principle of a limited category of jurisdictional error. Rather, it was assumed after very little discussion that the relevant issues were jurisdictional and the Court then made a *de novo* determination.

It is also noteworthy that the decision on the privative clause issue does not settle all problems. The question of whether it applies to federally enacted privative clauses is one to which I will return later.[50] Nevertheless, even with respect to provincial privative clauses, there may be problems in identifying the type of provision that amounts to removal of review for jurisdictional error. Is breach of the rules of natural justice or procedural fairness a jurisdictional error?[51] Is specific exclusion of review for breach of the rules of natural justice or procedural fairness unconstitutional? Is there a difference between excluding review for these reasons and simply providing that the rules of natural justice do not apply?[52] Do the obligations of procedural fairness or natural justice perhaps have an independent substantive constitutional justification?[53]

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[48] *Supra* note 34.

[49] *Supra* note 34. I comment on this aspect of these two decisions in *Developments in Administrative Law: The 1980-81 Term*, 3 SUP. CT. L. REV. 1, at 41-49 (1982).

[50] *See infra* at Part V. CREVIER AND CONSTITUTIONAL LIMITATIONS ON THE FEDERAL PARLIAMENT.

[51] The Supreme Court of Canada has been somewhat ambivalent on this issue. For the purposes of circumventing the effects of a "standard", "no *certiorari*" privative clause, breach of the rules of natural justice has been viewed as a nullifying or jurisdictional error: *Toronto Newspaper Guild*, *supra* note 38. *See also* Wiswell v. Metropolitan Corp. of Greater Winnipeg, [1965] S.C.R. 512, at 523-24, 51 D.L.R. (2d) 754, at 766-67. However, in cases such as *Re* Canada Lab. Rel. Bd. and Transair Ltd., [1977] 1 S.C.R. 722, 67 D.L.R. (3d) 421, the Court has recently held that breach of the rules of natural justice is not jurisdictional error for the purposes of allowing the statutory authority under challenge the right to defend its jurisdiction in judicial review proceedings. *See also* Harelkin v. University of Regina, [1979] 2 S.C.R. 561, at 581-83, 96 D.L.R. (3d) 14, at 45-47, in which the majority held that breach of the rules of natural justice made a decision voidable rather than void.

[52] *See* the discussion by Schwartz, *supra* note 41, at 132-36. In at least two decisions, the Supreme Court of Canada has clearly accepted that the *audi alteram partem* rule does not survive express legislative negation: The Queen v. Randolph, [1966] S.C.R. 260, at 265, 56 D.L.R. (2d) 283, at 287 (*per* Cartwright J.); *Alliance des Professeurs Catholiques de Montréal*, *supra* note 38, at 154, [1953] 4 D.L.R. (3d) at 174 (*per* Rinfret C.J.C.); *id.* at 157, [1953] 4 D.L.R. (3d) at 177 (*per* Kerwin and Estey JJ.); and *id.* at 166, [1953] 4 D.L.R. (3d) at 185 (*per* Fauteux J.).

[53] Schwartz argues, *supra* note 41, at 131, that *audi alteram partem* is a constitutional principle but accepts that it is subject to legislative negation. Its role as a constitutional principle does mean, however, that the courts are justified in expecting explicitness in legislative provisions before it should be seen as having been negated. Explictness is, of course, the key to the negating of the procedural protections found in the Canadian Bill of Rights, R.S.C. 1970 (App. III) (*viz* paras. 1(*a*) and 2(*e*) particularly). However, procedural due process has presumably found greater security in s. 7 of the Canadian Charter of Rights and Freedoms (Constitution Act, 1982, Part I *enacted by* Canada Act, 1982, U.K. 1982, c. 11), and its provision that removal of "life, liberty and security of the person" be subject to the safeguards of the "fundamental principles of justice".

As well, there is the question of whether such clauses should always be struck down entirely or whether there is sometimes room for simply holding that they do not apply to review for jurisdictional error. The latter approach would still preserve their effect on review for mere or intrajurisdictional errors of law, a permissible area of operation of privative clauses as conceded by Laskin C.J.C.[54] Perhaps in *Crevier* it did not matter as the rest of the Tribunal's authority was also about to disappear. Nevertheless, in such an important judgment, the Court should have at least discussed this issue.

IV. SECTION 96 AND THE TRIBUNAL'S APPELLATE JURISDICTION

It seems from Laskin C.J.C.'s judgment that it was not simply the presence of the privative clauses which led to the finding of invalidity of the total jurisdiction of the Professions Tribunal. After setting out the facts and statutory basis, he discussed the Court of Appeal judgments. In doing so he stated:

> Even if it were otherwise and the supervisory authority of the Superior Court on questions of jurisdiction was expressly preserved, it would still not be a complete answer to the contention that the Professions Tribunal is exercising powers more conformable to those belonging to a s. 96 Court than those properly exercisable by a provincial administrative or *quasi*-judicial tribunal or even a provincial judicial tribunal.[55]

In addition, in the heart of his judgment, he separated the privative clause issue from his discussion of other aspects of the Tribunal's jurisdiction in such a way as to suggest that these were independent grounds for invalidity.[56]

Previous Supreme Court of Canada authority had held that the mere fact that a provincial administrative tribunal was subject to the judicial review or appellate authority of a superior court did not immunize it from section 96 challenges. Thus, in the important Quebec decision of *Séminaire de Chicoutimi v. A.G. Que.*,[57] the Supreme Court struck down a legislative provision conferring on the Quebec Provincial Court authority to review the validity of municipal by-laws. Though subject to superior court review, this jurisdiction was held to be the equivalent of the power exercised by pre-Confederation superior courts in scrutinizing the validity of municipal enactments. By the same token presumably, a

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[54] Crevier, *supra* note 3, at 558-59, 127 D.L.R. (3d) at 14.

[55] *Id.* at 552, 127 D.L.R. (3d) at 8.

[56] In the course of his judgment, Laskin C.J.C. splits the case into three issues: first, whether this is a *Tomko* (*supra* note 3) situation (*id.* at 555-56, 127 D.L.R. (3d) at 11-12); second, the effect of s. 96 on the privative clauses (*id.* at 556-59, 127 D.L.R. (3d) at 12-14); and third, the impact of *Farrah* (*supra* note 2) (*id.* at 559-60, 127 D.L.R. (3d) at 14-15).

[57] *Supra* note 3.

specialist administrative court exercising general judicial review powers would be invalid if created and staffed by a province even if there was a right of appeal to, or further review by, a superior court.[58] The initial jurisdiction simply replicates something being done by superior courts at Confederation and invalidity results even though the superior court's own judicial review authority is preserved.

In *Crevier*, however, the arguments by way of historical precedent or analogy seemed to weigh heavily in favour of the validity of the Professions Tribunal. At the time of Confederation, there was no real evidence that appeals from professional disciplinary decisions were the preserve of the section 96 courts. In Quebec, as noted already, the Bar had its own internal appeal procedure. Justices of the Peace exercised jurisdiction over unlicensed medical practitioners. It is also worth noting, as did Paré J.A. that

> [O]n retrouve à cette époque l'existence de Tribunaux intérieurs créés à l'intérieur de quelques corps professionnels et chargés d'en administrer la discipline. Il semble même dans le cas de *l'Acte concernant les arpenteurs et les arpentages* que les membres du bureau de discipline nommés par le Gouverneur pouvaient fort bien n'être pas arpenteurs. Il n'importe donc peu, à mon avis, que les membres du Tribunal des professions ne soient pas des membres de la profession même au sujet de laquelle ils sont appelés à exercer leur juridiction.[59]

Moreover, the fact that then and thereafter appeals from certain professional disciplinary bodies were handled by section 96 courts does not affect that question in the sense that there would seem to be no room for the operation of section 96 where the issues in question are not analogous to those handled *exclusively* by the superior courts at Confederation.[60]

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[58] Thus, if a province wished to create a body such as the Australian Administrative Appeals Tribunal, which exercises a broad appellate jurisdiction with respect to a large range of statutory authorities, the judges would have to be appointed federally under ss. 96-100. After *Crevier*, there would appear to be little room for the argument that rights of appeal on the merits are different from or far broader than traditional judicial review. In this respect, it is interesting to note Katz, *Australian Federal Administrative Law Reform*, 57 CAN. B. REV. 340, at 348-49 (1980), in which he questions the constitutionality of the A.A.T. dealing with issues of jurisdiction as part of hearing appeals on the merits. This, he suggests, may be contrary to the separation of powers explicitly provided for in the Australian Constitution.

[59] *Supra* note 10, at 335-36.

[60] Note, however, Laskin C.J.C.'s judgment in *British Columbia Family Relations Act*, *supra* note 3, at 264-65, in which he makes the point that anomalies in non-section 96 court jurisdiction in 1867 should not necessarily prevent the operation of s. 96 as an invalidating tool. *Quaere* whether this was the situation with professional disciplinary appeals in 1867. The history would seem to indicate a lack of uniformity rather than a situation of anomaly in those cases where non-section 96 tribunals had jurisdiction.

The Supreme court judgment merely mentions[61] in passing the Court of Appeal's discussion of the history of professional discipline in Quebec, this in rather stark contrast to the Court's May 1981 judgment in the Ontario *Residential Tenancies Reference* where the history was somewhat more helpful to the argument that landlord-tenant dispute resolution was a section 96 court matter at the time of Confederation.[62]

Given such ambiguous history, there is simply no case for section 96 and the federal appointing power to act as a brake on provincial attempts to achieve what is considered to be an appropriate scheme of regulation and discipline in relation to the professions. Nor is that argument affected in any way even by accepting Montgomery J.A.'s unsubstantiated assertion that the issues dealt with by the Tribunal "would normally be mixed questions of law and fact".[63] Before Confederation, non-section 96 courts and tribunals decided issues of law. Disqualification or invalidity cannot follow from this fact alone. The nature and context of the questions of law are all-important and, here too, the answer seems to be provided by the fact that pre-Confederation issues of professional disciplinary law were not the exclusive preserve of section 96 courts.

If this historical analysis had been accepted, there would arguably[64] have been no need for the Court to go any further in *Crevier*. However, given the scant reference to this aspect of the case by Laskin C.J.C., it must be taken that he failed to see the historical precedents as a direct or unequivocal indication one way or the other as to the validity of the Tribunal. On what evidence or factors then did he reach the conclusion that the Professions Tribunal corresponded to the invalid *Chicoutimi*[65] model, rather than coming within the category of general administrative appeal tribunals incidentally deciding questions of law and jurisdiction of

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[61] Laskin C.J.C. simply refers to Paré J.A.'s historical account when summarizing the Quebec Court of Appeal judgments and does not return to it in the heart of his reasons: *supra* note 3, at 552-53, 127 D.L.R. (3d) at 9.

[62] *Supra* note 3, at 177-82, 123 D.L.R. (3d) at 578. *See also* the extensive use of historical material in the judgments in *British Columbia Family Relations Act*, *supra* note 3.

[63] *Supra* note 10, at 341.

[64] I say "arguably" because the accepted view of s. 96 is that it certainly does not "freeze" the jurisdiction of the superior courts as at 1867. Thus, in cases like *Tomko*, *supra* note 3, the Court was clearly influenced by the evolution of society and legal institutions in reaching the conclusion that what was from some perspectives an 1867, s. 96 court function should not be treated as such. Presumably, there is no reason why this type of argument should only work one way with the s. 96 courts always losing, never gaining jurisdiction. With respect to appeals in professional discipline cases, it might therefore be feasible to argue that, while in 1867 such matters were not of sufficient importance to justify s. 96 attention, times have changed and this should not be seen as a superior court role. However, it could also be argued that, while perhaps a more significant issue nowadays, there are other relevant factors that dictate that this jurisdiction not be seen as necessarily a s. 96 court preserve. These countervailing factors are developed later in the text (*infra* at 257).

[65] *Supra* note 3.

which he had seemingly approved in *Farrah*?[66] Of course, it is possible that he simply changed his mind and now sees all general administrative appeal tribunals as invalid for *Chicoutimi* reasons. It is, nevertheless, difficult to attribute such an unacknowledged change of position to the Chief Justice, elliptic though his judgments sometimes are.[67]

Whatever the situation, it was surely not too much to have hoped that the Court would have explicitly considered the tensions between *Chicoutimi* and the role of administrative appeal tribunals and indicated clearly why this particular scheme was offensive. Provincial legislators would certainly have appreciated the guidance and much future litigation could have been avoided. Unfortunately, clarity of reasoning is all too frequently absent in this area and *Crevier* is no exception. One is therefore left to speculate, relying on snatches here and there in the Supreme Court judgment and, because it was included by specific incorporation,[68] the dissenting judgment of Montgomery J.A. in the Quebec Court of Appeal.

What are these speculative reasons for the outcome?

1. The Professions Tribunal was constituted by non-section 96, Provincial Court judges — not members of the regulated professions.

2. The Professions Tribunal simply acted as an appeal body in proceedings which were essentially penal or *quasi*-criminal in nature; it had no other regulatory role.

3. On appeal, the Tribunal had the authority to quash a disciplinary committee finding as well as reverse, confirm or modify.

4. The exercise of its jurisdiction would frequently involve it in the determination of questions of law, including jurisdiction.

It can be argued that no single one of these factors is sufficient to deprive the Professions Tribunal of constitutional validity and that, even when considered cumulatively, they do not overcome the strong countervailing arguments in support of the Tribunal's claims to exist.

Laskin C.J.C. in effect deals with aspects of the first two possibilities in contending that the Professions Tribunal should not be viewed "as part of an institutional arrangement by way of a regulatory

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[66] *Supra* note 2.

[67] In this respect, it is worth noting that in *British Columbia Family Relations Act*, *supra* note 3, at 262, Laskin C.J.C. reiterated his statement in *Farrah* that it was possible for a province to create an administrative appeal tribunal to hear appeals from decisions of provincial statutory authorities. What was impermissible was to create such a body in such a way as to exclude the review authority of a superior court or to substitute such an authority for an appellate court. This general statement, however, goes no way towards resolving the *Crevier* dilemma.

[68] *See* the account of Montgomery J.A.'s judgment: *supra* note 3, at 554-55, 127 D.L.R. (3d) at 10-11.

scheme for the governance of the various professions''[69] and therefore saved under the recent *Tomko*[70] ''institutional trappings'' test:

> The Professions Tribunal is not so much integrated into any scheme as it is sitting on top of the various schemes and with an authority detached from them. . . . There is no valid comparison with the cease and desist orders which the Labour Relations Board in the *Tomko* case was authorized to issue in its administration of a collective bargaining statute.[71]

There are, however, problematic aspects of the *Tomko* elaboration of the *John East Ironworks* case.[72] Regulatory schemes are seemingly only valid when they involve a radical transformation of the substance and institutions of the previously existing law. The less radical the transformation, the more likely it is that the scheme will be held contrary to section 96 as witness the Supreme Court of Canada's previous incursion into this area — the *Residential Tenancies Reference*.[73] So too in *Crevier*, it is implicit that the scheme does not go far enough. Regular judges with no particular expertise in professional disciplinary matters are employed to deal with appeals from disciplinary matters. They are also given no other role in relation to the regulation of the professions in Quebec. In his dissenting judgment in the Quebec Court of Appeal, Montgomery J.A. in fact contrasted the Professions Tribunal with the Quebec Transport Commission at issue in *Farrah* and its much broader regulatory tasks.[74] He then stated that the Professions Tribunal was not

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[69] *Supra* note 3, at 555, 127 D.L.R. (3d) at 11. Though it was not raised in any of the judgments in *Crevier*, note the arguments of Deslauriers, *supra* note 41, to the effect that the Quebec Provincial Court itself offends s. 96.

[70] *Supra* note 3. A later elaboration of this test is to be found in the judgment of Dickson J. in the *Residential Tenancies Reference*, *supra* note 3. There he suggests that the institutional setting or context of the exercise of a particular power may mean that it is not in any sense judicial or, alternatively, even if judicial and analogous to a s. 96 court power, it may be so much part of a comprehensive regulatory scheme as to make it in effect lose its s. 96 character: *supra* note 3, at 174-76, 123 D.L.R. (3d) at 571-73. *See* the discussion of this case, Lyon, Comment, 16 U.B.C.L. REV. 131, at 136-44 (1982), and Lysyk, *Developments in Constitutional Law: The 1980-81 Term*, 3 SUP. CT. L. REV. 65, at 88-93 (1982).

[71] *Supra* note 3, at 555, 127 D.L.R. (3d) at 11.

[72] *Supra* note 13.

[73] *Supra* note 3. Here the Court ruled that the Ontario Residential Tenancy Commission's authority to adjudicate in landlord and tenant disputes, under the unproclaimed provisions of the Residential Tenancies Act, R.S.O. 1980, c. 452, was *ultra vires* because it infringed on the powers of s. 96 courts exercised at the time of Confederation. In the course of delivering the judgment of the Court, Dickson J. emphasized the conventional way in which the Commission was to deal with disputes, namely to act on complaints, to adjudicate according to law on matters of contract, and to award court-like relief: ''There is no broad legislative scheme as there was in *Mississauga* [*supra* note 3] to subsume the judicial functions of the Commission'' (37 N.R. at 186, 123 D.L.R. (3d) at 581). The Commission lacked any power to initiate investigations; it had no significant policy development role or discretionary authority; no special expertise was required of its appointees by the empowering statute.

[74] *Supra* note 10, at 340.

"an administrative tribunal of appeal"[75] in terms of Laskin C.J.C.'s judgment in *Farrah* but rather a "tribunal constituted to hear appeals from domestic courts of penal jurisdiction".[76]

Aside from the minimizing of legislative options effected by an interpretation of section 96 favouring only radical transformations of existing laws and institutions, this approach is difficult to accept in the particular case of professional disciplinary matters. At a policy level there are very obvious reasons why a legislature might decide that professional disciplinary appeals should be handled by a body distinct from the professions regulated and limited in its professional jurisdiction to such matters. To both public and professional alike, it may indicate a potential for independence of viewpoint not possible if there were no appeal, or a completely internalized process. It also deserves recording that in terms of the caseload so far, there is further justification for a separate disciplinary appeal body not responsible for other aspects of professional regulation as well as an indication that expertise, if not present initially, might not be long in coming. In the first three years of the Tribunal's operations there were over a hundred appeals from some five hundred disciplinary committee decisions, with over half of those in the third of those years.[77] Finally, the type of qualifications best suited for the handling of disciplinary appeals may not necessarily be identical to those appropriate to other aspects of professional regulation. In particular, the ability to deal with facts and the weighing of evidence in a judicial-type setting does not necessarily indicate a skill at prescribing standards of behaviour or *vice versa*.[78] At the same time, however, there is no particular reason to think that a superior or section 96 court judge is a necessity for the satisfactory handling of such an appellate role.

This, of course, assumes that the Professions Tribunal will operate similarly to the relevant disciplinary committees but in an appellate

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[75] *Id.*

[76] *Id.*

[77] *See* Issalys, *supra* note 6, at 609-10.

[78] In making these "policy" arguments, I am conscious of Dickson J.'s admonition in the *Residential Tenancies Reference*, *supra* note 3, at 163, 123 D.L.R. (3d) at 560 that the courts' concern in s. 96 cases is with the constitutional validity of the legislation, "not with the soundness of the overall legislative scheme or the wisdom of the Legislative Assembly in enacting it". Similarly, Laskin C.J.C. in the *British Columbia Family Relations Act*, *supra* note 3, at 264, states that it is not the role of the courts, much as they might disagree with s. 96, "to reduce it to an absurdity through an interpretation which takes it literally as an appointing power without functional limitations". Nevertheless, insofar as the state of the world for these purposes is not to be taken as frozen as at 1867, there would seem to be room for asking the question whether that world has so changed as to lead to the conclusion that, in terms of 1867 constitutional purposes, different institutional arrangements are now legitimate. In upholding radical transformation of existing substantive law accompanied by the creation of new institutional arrangements, the Court seems to have recognized this. However, the same argument also suggests that in some situations less radical transformations should also be permitted. In either case, of course, the courts should look at the conditions and motives that prompted the change.

capacity; that is, it will be concerned with the same issues of disciplinary fact and law which confronted the first instance tribunal. If the first instance tribunal is constitutionally valid, there is nothing particular about appellate powers which should necessarily lead to a changed characterization for section 96 purposes. Section 96 courts have never had a monopoly on appellate powers and Laskin C.J.C. stated as much in *Farrah*.

What then is necessary to characterize an appellate power as illegitimate by virtue of section 96? According to *Farrah*, one way is by confining an appellate function to issues of law, particularly when those determinations of law are protected from judicial review by a privative clause.[79] Presumably this principle can be extended to the situations where a general right of appeal is created but in circumstances where it is clear that the appellate body will be concerned almost exclusively with questions of law. But this is not *Crevier*! There is no evidence of this kind of colourable purpose. Also, for what it is worth, the Court struck down the privative clauses in their entirety leaving all errors of law subject to judicial review. Indeed, it is arguable that even if the clauses had only been struck down to the extent that they prevented review for jurisdictional error, this would not have affected the argument; to the extent that the determinations of first instance tribunals may be protected from review for intrajurisdictional errors of law, so too should this be possible for the decisions of bodies exercising a genuine general appellate authority.

However, this does lead to another possible perspective on the legislative scheme in *Crevier*, namely that when viewed as a whole the structure created by the legislation amounts to an attempt to substitute the Professions Tribunal for the regular courts as a judicial review agency for the disciplinary committees. In particular, the privative and finality clauses and the authority to "quash" decisions may be seen as speaking to such a purpose. Nevertheless, it is doubtful whether much reliance can be placed on the use of the judicial review term "quash" rather than the

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[79] It is a little difficult to know how significant the privative clause was in *Farrah*. Laskin C.J.C. (with whom Spence, Dickson and Estey JJ. concurred) appeared to treat both the privative clause and the conferring of a power to decide questions of law alone on appeal as relevant to the s. 96 issue though at times he was also so clearly opposed to appeals restricted to issues of law that the reader is encouraged to believe that this alone would have led to invalidity (*supra* note 2, at 643-47, 86 D.L.R. (3d) at 165-68). Pratte J. (with whom Martland, Ritchie, Pigeon and Beetz JJ. concurred) focussed much more directly on the privative clause and seemed to hold that it was the combination of the appeal jurisdiction and the privative clause that resulted in constitutional invalidity (*id.* at 654-56, 86 D.L.R. (3d) at 177-78). Pigeon J. in his concurring judgment also emphasized the combination of the two elements but he also appeared to place some weight on the fact that appeals on the particular issues of law were previously handled by the Quebec Court of Appeal (*id.* at 656-57, 86 D.L.R. (3d) at 169-70). In *Crevier*, Laskin C.J.C. deals with *Farrah* in terms of both the appeal provision and the privative clause (*supra* note 3, at 558-59, 127 D.L.R. (3d) at 14-15).

appellate term "reverse" in the English version of the statute.[80] The generality of the right of appeal also speaks against this being a body much like a court exercising the restricted powers involved in judicial review.

Certainly, the Tribunal may have been confronted with issues similar to those arising in judicial review such as allegations of jurisdictional error and breach of the rules of natural justice. However, these are also matters which could be raised before the first instance tribunal in the form of requests that the tribunal not proceed without a full hearing or because of a lack of jurisdiction. It seems unlikely either that it was intended or that it would work out in practice that this would constitute the bulk of the Tribunal's jurisdiction. Moreover, it is suggested that once section 96 court review of the Tribunal's decisions is restored by the removal of the privative clauses, the Tribunal looks even less like a body whose purpose is to replace the judicial review authority of the regular courts. Indeed, even if that intention existed initially, removal of the privative clauses is arguably sufficient to negate the effects of that intention (at least in this case). The answer to the question whether the province of Quebec would rather have no Professions Tribunal or one subject to the superintending jurisdiction of the Quebec Superior Court seems obvious. Given this and the fact that section 96 cases always involve a clash between the limitations implied from the federal appointing power and a claim arising from a substantive area of provincial jurisdiction, the only appropriate operating theory for the courts is one by which legislation is declared *ultra vires* to the minimum extent possible to vindicate the federal interest.

Absent such a philosophy, I would reiterate that the very least that the Supreme Court could have done, not only for the benefit of the Quebec legislature but also of the other provinces, was to have indicated with far greater precision what is offensive about the legislative provisions and the minimum steps necessary to rectify the situation. To be as cryptic as the Court was in *Crevier* is irresponsible and conducive to more litigation as various refinements are tested against a will o' the wisp judicial standard of invalidity. In the meantime, this lack of clear direction means administrative appeal tribunals across the country are placed in a position of considerable uncertainty[81] while the core has been removed from a progressive and innovative Quebec attempt at professional regulation. Of course, administrative convenience cannot be the ultimate criterion for evaluating whether a statutory authority is invalid by virtue of section 96. Nevertheless, earlier decisions such as *Tomko*

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[80] The French version is "*infirmer*". This contrasts with the normal use of "*évoquer*" and "*annuler*" in relation to the quashing remedies of *certiorari* and evocation. "*Infirmer*" is more commonly used in the sense of "reversing" as on appeal. *See, e.g.*, the judgment of Rinfret C.J.C. in *Alliance des Professeurs Catholiques de Montréal*, *supra* note 38, at 149, [1953] 4 D.L.R. (3d) at 169.

[81] *See, e.g.*, Nadeau, *L'arrêt Crevier et le Tribunal du Travail*, 22 C. DE D. 863 (1981), for a discussion of the impact of the decision on the Quebec Labour Tribunal.

exhibited considerable sympathy on the part of the Court for the exigencies of modern administrative problems and demanded that apparently judicial powers should not be isolated from their institutional context. There is precious little evidence of such a philosophy in *Crevier*.

V. CREVIER AND CONSTITUTIONAL LIMITATIONS ON THE FEDERAL PARLIAMENT

In *Crevier*, Laskin C.J.C. is careful at all times to use the qualifying adjective "provincial"[82] when discussing the validity of the legislation and the Tribunal it established. Nevertheless at one point he hints, albeit ambiguously, that the judicial review authority of the superior courts may be more generally based and not simply derived from section 96 and the federal appointing power:

> It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction. In my opinion, *this limitation*, arising by virtue of s. 96, *stands on the same footing as the well-accepted limitation of the power of provincial statutory tribunals to make unreviewable determinations of constitutionality*.[83]

While here too the Chief Justice seems pointedly to have used the qualifying adjective "provincial" and to have placed the statement squarely in the context of section 96, it is worth examining why provincial statutory tribunals cannot make unreviewable determinations on constitutional questions. The answer is one that depends on the proposition that the final determination of constitutional questions is a superior court role,[84] but it is also true that it is not derived from the federal appointing power in section 96 but from a constitutionally guaranteed role for the superior courts of Canada to rule finally on constitutional questions. It implies that federally as well as provincially appointed statutory tribunals cannot make unreviewable determinations on constitutional questions. If, therefore, review for jurisdictional error of a non-constitutional variety "stands on the same footing", Laskin C.J.C. may be seen as accepting a guaranteed core of judicial review jurisdiction for the superior courts not subject to removal by either the federal Parliament or the provinces. Whether by way of the traditional judicial review remedies, a new comprehensive remedy, or statutory appeal, access to the superior courts at least for jurisdictional error has to exist.

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[82] *Supra* note 3, at 556-59, 127 D.L.R. (3d) at 12-14.

[83] *Id.* at 558, 127 D.L.R. (3d) at 13 (emphasis added).

[84] Established in Canada by Valin v. Langlois, 3 S.C.R. 1 (1880). *See also* P. HOGG, CONSTITUTIONAL LAW OF CANADA 43 (1977).

One of the most persuasive advocates for a guaranteed core of jurisdiction for the Canadian superior courts has been Professor W.R. Lederman.[85] His arguments from English and Canadian constitutional and judicial history concerning an implied guaranteed core of jurisdiction derived from the judicature provisions of the Constitution Act are too well-known to require detailed recitation here.[86] Suffice it to say that he derives from history and the Constitution Act's judicature provisions an intent on the part of the Fathers of Confederation to enshrine or entrench the British concept of an independent judiciary.[87] Once this is accepted, it is not really a large step to argue that independence means little or nothing unless there is a core of jurisdiction that the judiciary is entitled to exercise.

Since Lederman first propounded these views in 1956, strong judicial support for the argument has come from the Judicial Committee of the Privy Council in *Liyanage v. The Queen*.[88] Here, the Judicial Committee held that, under the then Ceylonese Constitution, the independence of the judiciary was guaranteed and that, without a constitutional amendment, this prevented the legislature from enacting a statute the intent and effect of which was to ensure the conviction of certain people in a criminal trial. While it might be argued that this constitutes a prohibition on interference with the processes of the courts or the way they operate rather than the assertion of a guaranteed core of substantive jurisdiction, it at least goes a long way towards the recognition of Lederman's views in the Ceylonese context. Moreover, as Professor J. Noel Lyon has pointed out, the actual judicature provisions of the Ceylonese Constitution did not vary in any relevant way (save perhaps one) from the Canadian constitution.[89] In fact, subsequently there seems to have been at least grudging acceptance of the *Liyanage*

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[85] *See* particularly *The Independence of the Judiciary*, *supra* note 45 and *The Supreme Court and the Canadian Judicial System*, *supra* note 41, at 220-24. For recent commentary on, and a somewhat different formulation of the Lederman views, *see* Elliot, Comment, 16 U.B.C.L. REV. 313, (1982). However, *compare* Hogg, *supra* note 41, at 728.

[86] *Id. See* particularly *The Independence of the Judiciary*, *supra* note 45 at 1166-77.

[87] This is the subject of a very detailed examination in both parts of *The Independence of the Judiciary*, *supra* note 45.

[88] [1967] 1 A.C. 259 (P.C.) (Cey.).

[89] *Constitutional Validity of Sections 3 and 4 of the Public Order Regulations, 1970*, 18 McGILL L.J. 136, at 142-43 (1972).

decision by the Quebec Court of Appeal, albeit that it was distinguished on the facts.[90]

Of course, the Ceylonese Constitution differed from the Constitution Act in that it was the constitution of a unitary, not a federal state. Nevertheless, it is difficult to discern a reason why this should lead to a different interpretation of virtually the identical judicature provisions in our Constitution. Indeed, the fact that one is dealing with a federal state gives an added dimension to the guaranteed core of jurisdiction argument: the notion that in a federal system it is important to have an umpire of interjurisdictional disputes and, given the structure of the Constitution, the most logical candidates for this role because of their supposedly neutral standpoint are the judges.[91] There is, however, a judicature provision in the Constitution Act for which there was no equivalent in the Ceylonese Constitution. This is section 101:

> The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.[92]

As a result of judicial interpretation, it is established that the "additional" courts that the section authorizes are only with respect to subject matters assigned to the Parliament of Canada by the Constitution Act.[93] In other words, "laws of Canada" means "laws properly enacted by the federal Parliament or which are part of federal common law". On the other hand, it seems as though the word "additional" means "additional to the Supreme Court of Canada" rather than "additional to already-existing courts".[94] Thus, in matters involving laws properly within federal jurisdiction, the additional courts may properly be authorized to adjudicate to the exclusion of existing section 96 provincial

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[90] *See* Gagnon v. La Reine, [1971] C.A. 454, 14 C.R.N.S. 321. In *Gagnon*, Montgomery J.A. (*id.* at 472-74, 14 C.R.N.S. at 327-29) distinguished *Liyanage* holding that there were sufficient differences between the Public Order Regulations and the legislation in issue in *Liyanage* as would justify sustaining the Public Order Regulations. This seemed to assume the applicability of *Liyanage* to Canada and the Constitution Act. Brossard J.A. also dealt with the *Liyanage* argument (*id.* at 461-65, 14 C.R.N.S. at 349-53) though not by name and the judgment is admittedly quite ambiguous as to whether it was rejected on the basis of the content of the Regulation or because it simply had no application to Canada and the Constitution Act. Of the other judges, Taschereau J.A. (*id.* at 471, 14 C.R.N.S. at 326) and Turgeon J.A. (*id.* at 475, 14 C.R.N.S. at 357) expressed agreement with both Montgomery and Brossard JJ.A., while Casey J.A. did not feel obliged to rule on this issue though he indicated sympathy for Brossard J.A.'s conclusions (*id.* at 471, 14 C.R.N.S. at 325).

[91] Valin v. Langlois, *supra* note 84.

[92] For a general discussion of s. 101, see P. HOGG, CONSTITUTIONAL LAW OF CANADA, *supra* note 84, at 121-27.

[93] Quebec North Shore Paper Co. v. Canada Pacific Ltd., [1977] 2 S.C.R. 1054, 71 D.L.R. (3d) 111.

[94] *See* Mullan, *The Federal Court Act: A Misguided Attempt at Administrative Law Reform?*, 23 U. TORONTO L.J. 14, at 18-21 (1973).

courts. This means that the Federal Court of Canada has almost certainly successfully taken over the provincial superior courts' previously existing judicial review jurisdiction with respect to federal statutory authorities.[95]

Given these interpretations, what effect does section 101 have on any argument for a guaranteed core of jurisdiction for section 96 courts?

Unless one is prepared to accept that section 101 destroys the entire basis for a guaranteed core judicial role,[96] it has no effect on any arguments for such a core with respect to matters within provincial legislative competence. On the other hand, as the federal power to create additional courts applies notwithstanding anything else in the Constitution Act, it is possible that in federal areas this authorizes the federal Parliament to transfer jurisdiction from the regular courts to new "federal courts", the members of which do not have the qualifications and tenure of office required of other section 96 courts and the decisions of which can be protected from superior court review authority even for jurisdictional error.

Lederman argues that the "notwithstanding" clause in section 101 of the Constitution Act should not be given such a broad interpretation and that it merely protects this particular category of federal power against any apparent provincial jurisdiction to create courts contained in the Constitution Act.[97] It does not affect in any way the requirements of the balance of sections 96 to 100, the judicature provisions of the Constitution Act. Thus, to the extent that a federally created adjudicative body is given authority over typically section 96 court matters, that body must be appointed in accordance with sections 96 to 100 of the Constitution Act. In particular, this interpretation would have the effect of ensuring that judicial review of federal administrative action remained the preserve of a section 96-type court[98] and that federal "super"-

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[95] *See* the judgment of Beetz J. in A.G. Can. v. Canard, [1976] 1 S.C.R. 170, at 202, 52 D.L.R. (3d) 548, at 572; *Re* James Richardson & Sons Ltd. and Minister of National Revenue, 117 D.L.R. (3d) 557 (Man. Q.B. 1980), as well as the discussion of Pringle v. Fraser, [1972] S.C.R. 812, 26 D.L.R. (3d) 28. *See* text accompanying notes 102-10 *infra*. *Compare* Gibson, Comment, 54 CAN. B. REV. 372, at 378-79 (1976).

[96] Interestingly, Hogg does not make this argument. Rather he asserts (*supra* note 41, at 728):

> But while it is widely accepted that the judicature sections (other than section 101) apply only to courts created by the provincial legislatures, surely the theory of a constitutionally-guaranteed core of provincial superior-court jurisdiction requires that the guaranteed core of jurisdiction be invulnerable to federal as well as provincial legislative attack. [footnote omitted]

[97] *The Independence of the Judiciary*, *supra* note 45, at 1175-76. *See also* the different approach of Elliot, *supra* note 85, at 338-47.

[98] At present, the Federal Court of Canada does not provide for the availability of *habeas corpus*-type relief (*see* ss. 18 and 28 of the Federal Court Act, S.C. 1970-71-72, c. 1); that remedy remains available with respect to federal statutory authorities in the provincial superior courts. Note also possible doubts about the retirement age of Federal Court judges, *infra* note 110.

privative clauses[99] would be ineffective to exclude such review unless the ultimate decision-maker under the relevant statute was a section 96-type court.

For the most part, however, Canadian judicial reaction to any suggestion of such a limitation has not been encouraging. Thus, in the *Residential Tenancies Reference*, Dickson J., delivering the judgment of the Court, asserted:

> [T]here is no "general separation of powers" in the *British North America Act, 1867*. Our Constitution does not separate the legislative, executive, and judicial function and insist that each branch of government exercise only its own function. Thus it is clear that the Legislature of Ontario may confer non-judicial functions on the courts of Ontario and, subject to s. 96 of the *B.N.A. Act*, which lies at the heart of the present appeal, confer judicial functions on the body which is not a court.[100]

Of course, this statement does not necessarily speak to the issue of whether section 96 courts have any guaranteed functions. It may merely amount to an assertion that *all* judicial power in Canada does not reside exclusively in section 96 courts. Some, of course, might.

Similarly, statements by Laskin C.J.C. in two earlier decisions[101] that section 96 does not inhibit the federal Parliament in what it may do may simply be interpreted as a statement of the obvious: the specific federal appointment power argument is a limitation on the provinces, not the federal Parliament. That does not necessarily say anything about the validity of a more general argument for a guaranteed core of jurisdiction derived from the totality of the judicial or court provisions (sections 96 to 101) of the Constitution Act. Indeed, at the 1975 Law Teachers' meeting, Laskin C.J.C. specifically considered this possibility and reserved judgment on it as well:

> [Professor Scott] isn't very clear whether [his argument] applies to federal agencies; perhaps section 96 is also a limitation on function as well as form, and to be applied to federal agencies. I think my old friend Professor Lederman, in some writing of his that I remember suggested that; I think it was probably, was it only a footnote, Bill, or was it the text?
>
> [In the text, sir (Lederman)].
>
> And he may still be of that opinion. But as for me, I think that all I can do is really reserve judgment. It would be very foolish for me to say anything else. But it is an important aspect of constitutional authority.[102]

Significantly, these remarks were made after his statements in the course of the two judgments just mentioned.

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[99] By "super", I refer to privative clauses which attempt to immunize even jurisdictional error and "nullities" from judicial review.

[100] *Supra* note 3, at 169, 123 D.L.R. (3d) at 566.

[101] In Papp v. Papp, 8 D.L.R. (3d) 389, at 397 (Ont. C.A. 1970); and *Canard*, *supra* note 95, at 176, 52 D.L.R. (3d) at 551, referred to by Pépin, *supra* note 2, at 820, n. 3.

[102] *Supra* note 44, at 137.

The context of these comments was a discussion of the one Supreme Court of Canada decision that might be interpreted as directly relevant to this issue, namely *Pringle v. Fraser*.[103] Here the Court was confronted by a privative clause giving the Immigration Appeal Board "sole and exclusive jurisdiction to hear and determine all questions of fact and law, including questions of jurisdiction"[104] that arose in relation to deportation orders. Notwithstanding this privative clause, it was argued in *certiorari* proceedings that the clause was ineffective to preclude judicial review of deportation orders.

Evidently, the ability of Parliament to remove relief by way of *certiorari* was not challenged[105] but in the course of holding that as a matter of interpretation the clause excluded judicial review, Laskin C.J.C. stated:

> The fact that the result of such an interpretation is to abolish *certiorari* as a remedy for challengeable deportation orders is not a ground for refusing to give language its plain meaning. This Court has held that *habeas corpus*, certainly as honoured a remedy as *certiorari*, takes its colour from the substantive matters in respect of which it is sought to be invoked, and its availability may depend on whether it is prescribed as a remedy by the competent legislature. . . . So too, *certiorari*, as a remedial proceeding, has no necessary ongoing life in relation to all matters for which it could be used, if competent excluding legislation is enacted.[106]

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[103] *Supra* note 95, 26 D.L.R. (3d) 28. *Quaere* whether Human Rights Comm'n v. A.G. Can., 41 N.R. 318 (S.C.C. 1982) is of any authority on this point. Here, the Supreme Court of Canada upheld the constitutional validity of subs. 41(2) of the Federal Court Act, S.C. 1970-71-72, c. 1. This was the provision conferring on the Executive the authority to make an apparently unreviewable claim of privilege with respect to certain categories of documents. Chouinard J., delivering the judgment of the Court, held that the risk of "abuse of power" did not derogate from Parliament's right to make the privilege absolute. If this goes as far as asserting that the courts cannot review the good faith or jurisdiction of the purported claim under subs. 41(2), then it can be read as excluding judicial review in the conventional sense. The clearest hint that this might be so is where Chouinard J. contrasts a general risk of abuse of power with the possibility of alleging that the executive has "exceed[ed] the federal field of jurisdiction and trench[ed] on a provincial field of jurisdiction". The latter, he indicated, would be subject to review (*id.* at 332-34). However, even if the claim is not reviewable for bad faith or jurisdictional error, it is possible that this does not amount to a general authorization for the exclusion of judicial review in areas of federal competence. Of particular importance is the fact that Chouinard J. characterized Crown or Executive privilege in terms of a prerogative power, the exercises of which are not judicially reviewable even if statutorily codified: Smythe v. The Queen, [1971] S.C.R. 680, 19 D.L.R. (3d) 480.

[104] Immigration Appeal Board Act, S.C. 1966-67, c. 90, s. 22.

[105] "Parliament's authority to establish such a code is not challenged; nor is Parliament's authority to deny or remove *certiorari* jurisdiction from provincial superior courts over deportation orders": *per* Laskin J. (as he then was), *supra* note 95, at 825, 26 D.L.R. (3d) at 31.

[106] *Id.* at 826-27, 26 D.L.R. (3d) at 32.

Nevertheless, this does not necessarily speak to the more general issue of the availability of access to the superior courts.[107] Rather, it can be interpreted as simply being concerned with the continued availability of particular remedies. In other words, it supports measures such as the Ontario[108] and British Columbia[109] Judical Review Procedure Acts and section 28 of the Federal Court Act[110] by which new judicial review remedies were created in place of the historic prerogative writs and other common law methods of judicial review. Change is alright, provided access to superior courts is preserved in some direct form.[111] Thus, on this interpretation, in *Pringle v. Fraser* it was important that the statute allowed appeals albeit by leave on questions of law and jurisdiction to the Supreme Court of Canada.[112] Appeal had taken the place of review but the major grounds of judicial review (law and jurisdiction) were still there.

Laskin C.J.C. in fact gives some credence to this interpretation by his statements at Edmonton in 1975:

> I'm bound to say from the way I read our cases — and that may not be the way you read our cases — that it was not so much that the Immigration Appeal Board was given exclusive jurisdiction respecting orders of deportation, as that a complete code of procedure has been established under immigration legislation, giving reviewing power to the board, to the Federal Court and ultimately to the Supreme Court of Canada (we said), to the exclusion of provincial courts.[113]

In sum, the argument is that the authorities do not in fact preclude the possibility of contending that the judicature provisions of the Constitution Act create a guaranteed core of jurisdiction for sections 96 to 100 courts immune from federal as well as provincial abrogation. If this argument is accepted it also seems to me that judicial review of administrative action for jurisdictional error is one of those categories of

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[107] Note, however, Hogg's use of *Pringle*, *supra* note 41, at 727-28. *See also* Arthurs, *supra* note 44, at 332.

[108] R.S.O. 1980, c. 224.

[109] R.S.B.C. 1979, c. 209.

[110] S.C. 1970-71-72, c. 1. For a discussion of whether the fact that Federal Court judges retire at 70 rather than 75 as provided in s. 99 of the Constitution Act for s. 96 court judges raises a constitutional problem, *see* Hogg, *supra* note 41, at 728, n. 42 and Schwartz, *supra* note 41, at 139, n. 75.

[111] I use "direct" in contradistinction to "collateral". *See supra* note 40.

[112] Immigration Appeal Board Act, S.C. 1966-67, c. 90, s. 23. The fact that leave was required does not seem to me to be of importance. First, historically, the obtaining of relief by way of *certiorari* was itself a two stage process, with the first stage being the rough equivalent of a leave-granting stage. Secondly, the availability of an opportunity to argue that leave should be granted is arguably in itself a sufficient guarantee of access to the courts for review purposes. *See*, however, Schwartz, *supra* note 41, at 139, n. 73.

[113] *Supra* note 44, at 136. Note, however, that in his subsequent Australian Legal Conference paper, he appeared somewhat less sympathetic to the Lederman view of judicial review being guaranteed even against federal interference, describing it as having been rejected in R. v. Canada Lab. Rel. Bd., 44 D.L.R. (2d) 446 (Man. Q.B. 1964): *supra* note 44, at 456.

judicial function coming within the guaranteed core of substantive jurisdiction.

The judgments of the Supreme Court of Canada in *Farrah* in fact leave no doubt as to the place and importance of judicial review of administrative action by the superior courts in pre-Confederation Canada.[114] Moreover, as Laskin C.J.C. suggests in *Crevier*, the task of judicial review for jurisdictional error is not far removed in importance from judicial scrutiny of statutes for constitutionality.[115] That task is one of deciding whether a statutory authority has strayed beyond the mandate delegated to it by Parliament. To quote Lederman in a more recent article:

> [I]t would be strange indeed if the elected members of the federal parliament could be reviewed by the superior courts to keep them within the limits of the B.N.A. Act, but the appointed members of the federal Labour Relations Board could not be reviewed by the same superior courts to keep them within the limits of a valid federal statute.[116]

It is also important that review for jurisdictional error, whether viewed as guaranteed provincially or both federally and provincially, does not itself act as a brake on legislative experimentation with new structures for resolving old, new, or changing substantive problems. Rather, it serves in a reserve capacity ensuring that, whatever experimentation the various legislatures conduct, the actors in a particular statutory scheme keep within the legislative limits set for them. As such, judicial review for jurisdictional error as part of a guaranteed core of superior court authority has a higher claim for recognition than, for example, any argument that would suggest that tort liability for personal injuries resulting from negligence could not be abolished and replaced by a New Zealand-style Accident Compensation Scheme.[117] Certainly, it speaks to the preservation of existing institutions, namely the courts, but only in a special or reserve capacity and one which does not threaten the ability of legislatures to change institutions and methods of dealing with intransigent, social engineering problems of our society. It does not even totally preclude experimentation with methods of judicial review; it simply specifies the qualifications, tenure and mode of appointment of those who should perform the task. A federally appointed specialist court is

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[114] *See* in particular the judgment of Pratte J., *supra* note 2, at 649-52, 86 D.L.R. (3d) at 173-76.

[115] After referring to the effectiveness of privative clauses restricting judicial review for "mere" or intrajurisdictional errors of law, he goes on to say: "The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality." *Supra* note 3, at 559, 127 D.L.R. (3d) at 14.

[116] *The Supreme Court and the Canadian Judicial System*, *supra* note 41, at 223-24.

[117] In 1972, by the Accident Compensation Act, the New Zealand Parliament abolished the action in tort for personal injuries and replaced it with a categorized system of compensation for all personal injuries with associated administrative and adjudicative structures.

still possible as are different procedures for judicial review, provided the requirements sections 96 to 100 are met.

In fact, if the core function idea operates as a limitation on the federal Parliament in the manner indicated up to this point, the authority of *Crevier* should be sufficient to include judicial review of administrative action for jurisdictional error within that core. The restraints on the provincial legislatures and the federal Parliament would be equated. In other words, the argument brings with it not only a guarantee of judicial review jurisdiction for a sections 96 to 100 court but also all the other limitations on interference with the jurisdiction of such courts including regrettably the uncertain limitations on the creation of administrative tribunals suggested by *Crevier*. There are, however, other possibilities which do not transfer all the section 96 precedents into the federal sphere.

Provided one accepts the notion that the Canadian Constitution enshrines a separation of powers doctrine with guaranteed roles for the legislative, executive and judicial branches of government, there is an independent argument that can be made against privative clauses which attempt to restrict review for jurisdictional error. This is suggested by Lyon in his 1976 article, *The Central Fallacy of Canadian Constitutional Law*.[118] His point is that such privative clauses constitute an impermissible delegation of legislative power in that conferring the ability to define the scope of one's authority or jurisdiction amounts to the creation of a mini-legislature.[119] Lyon admits[120] that the prospects for such an argument are weakened by the 1970 judgment of the Supreme Court in the *Breathalyzer Reference*[121] sustaining the selective proclamation of federal breathalyzer legislation. Nevertheless, in the context of a thorough-going analysis of the basis of the Canadian Constitution and a consideration of the applicability of the *Liyanage* decision,[122] it is possible that the Supreme Court could change its position on this issue and recognize limitations on the delegation of legislative power.

Another possibility is that judicial review of administrative action simply stands on a special footing because of its near equivalence to constitutional review and that its availability in the face of both federal and provincial privative legislation can thereby be defended, not-

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[118] 22 McGILL L.J. 40 (1976).

[119] *Id.* at 42-50 particularly. Lyon does not advance his argument in these precise terms. Rather, he makes the more general assertion that there is a separation of legislative and executive functions in the Constitution Act which prevents the delegation of legislative power to the executive branch. Interestingly, H. WADE in CONSTITUTIONAL FUNDAMENTALS, *supra* note 45, at 66, also makes a similar argument in relation to the United Kingdom when he talks of "super" privative clauses as an abuse of parliamentary power involving the delegation of potentially dictatorial authority.

[120] In fact, this fundamental issue was not addressed in the case: *supra* note 118, at 42.

[121] Reference *re* Criminal Law Amendment Act, 1968-69, [1970] S.C.R. 777, 10 D.L.R. (3d) 699.

[122] *Supra* note 88. *See* Lyon, *supra* note 118, at 44-50.

withstanding that the judicature provisions generally do not apply to restrict the federal Parliament. Putting it slightly differently, section 101 allows the federal Parliament to create adjudicative bodies in any manner it pleases but that this does not authorize the precluding of judicial review of these or other federal jurisdictions by a superior court. Judicial review is thereby read as transcending section 101, but this does not apply to other jurisdictions guaranteed to section 96 courts from provincial interference; over these section 101 would still prevail. However, apart from Laskin C.J.C.'s aside in *Crevier* about the relationship between constitutional review and regular jurisdictional review, it is difficult to find support for such an argument.

VI. SUMMARY

In short, the problem with *Crevier* is not that it decides that superior court judicial review is immune from provincial abolition. Indeed, one could argue that the logic of Laskin C.J.C.'s argument points to a guarantee against federal interference as well. Rather, the concern is focussed on the great uncertainty that the case has left with respect to intermediate administrative appeal tribunals. It appears to be quite contrary to the exigencies of our present society to potentially deny to the provinces in the name of section 96 the authority to establish administrative agencies of the type that are characterized at the federal level by the Tax Review Board and the Immigration Appeal Board. No principle of federalism would seem to demand that the authority to create and staff such bodies should be the federal Parliament's alone. The federal interest in such matters arising by virtue of section 96 and any overriding or guaranteed judicial role enshrined by the Constitution Act is amply preserved by the continued existence of judicial review for jurisdictional error.