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Michael V. Coyle
*Dalhousie University*

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Michael V. Coyle*

# *Sobeys Stores Limited* v. *Yeomans et al.*: A Case Comment

## I.

In *Sobeys Store Limited* v. *Yeomans et al.*[1] the Appeal Division of the Nova Scotia Supreme Court seems to strike down the provisions of the provincial Labour Standards Code[2] that make reinstatement a viable remedy for senior workers who have been dismissed without just cause. In reality, the judgement, now on appeal to the Supreme Court of Canada, may have missed its mark by a wide margin and, despite the obvious intention of the Court, left these very provisions untouched in the result.

In any event, the case brings the flaws of the current judicial approach to constitutional review under s.96 of the *Constitution Act, 1867* into bold relief. It reveals a disturbingly antiquated notion about the proper role and function of administrative tribunals within the provincial judicature. It betrays a remarkable insensitivity towards the social policy objectives of provincial legislation designed to improve conditions of work through minimum labour standards legislation. Indeed, this coldly mechanical and unteleological judgement stands as something of a monument to judicial formalism and calls into question the very propriety of this head of constitutional review.

Mr. Clifford Yeomans was the manager of a Sobeys supermarket in Dartmouth. Sobeys is a large, closely-held company bearing the name of a prominent Nova Scotian family. The company has a string of supermarkets throughout the Atlantic region. Mr. Yeomans had been employed by Sobeys, steadily working his way up through the ranks for over ten years when, in August of 1983, he was fired.

The reason for dismissal given by the employer at the hearing at first instance before the Nova Scotia Labour Standards Tribunal (and apparently taken as a fact by the appeal court)[3] was "unsatisfactory performance". The Tribunal, however, concluded that there was "no evidence that Sobeys attempted any other disciplinary measures short of dismissal", nor did the employer "fulfil their duty to provide sufficient

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1. Reported at (1986), 70 N.S.R. (2d) 391.
2. S.N.S. 1972, c.10 as am. by 1974, c.29, 1975, c.50, 1976, c.41, 1977, c.18, 1978, c.42.
3. *Sobeys, supra*, note 1 at 393.

notice to Mr. Yeomans that they viewed his performance as being incompetent such that it would warrant dismissal". Clearly, it was the employer's performance in this connection that the Tribunal saw to be "unsatisfactory". "An employee", the Tribunal opined, "should not have to come before the Labour Standards Tribunal or a court of law to find out why he was dismissed."[4]

Applying the doctrine of progressive discipline[5] found in the arbitral (but not the common law)[6] standard of "just cause" for dismissal,[7] the Tribunal held that Mr. Yeomans had been dismissed without just cause, contrary to s.67A(1) of the Labour Standards Code. Accordingly, the Tribunal ordered Mr. Yeomans reinstated to his position without loss of seniority or employment benefits and that he be paid for wages lost. On appeal,[8] the Appeal Division held s.67A(2) and (3) of the Code contrary to s.96 of the *Constitution Act, 1867* and, hence, *ultra vires* the Legislature. The order of the Tribunal was vacated on that basis.

On its face, *Sobeys* v. *Yeomans* turns on the constitutionality of the power given the Director of Labour Standards and the Tribunal in turn under the Code to receive and consider complaints of dismissal without just cause from workers with at least ten years seniority and to order, *inter alia*, their reinstatement. In essence, the appeal court stated that this is a matter within the exclusive competence of a federally appointed court of superior jurisdiction, by virtue of s.96.

When a senior employee is fired he or she loses a lot. Beyond the job itself and the income it brings, the employee loses the contribution of labour over a substantial part of a working career in addition to any other employment opportunities foregone. Typically, there are social attachments formed in the community by the employee (and family) which may well depend on a certain job with a certain employer in a certain place. Not unusually, a family home has been established. Fired senior employees lose self-esteem and the prestige that attaches (especially in this day and age) to long-term employment and, most of all, the employee loses accrued seniority and the security that, nominally at least, goes with it. The social and psychological impact of firing on a senior employee is, for these reasons, arguably greater than on a more

4. *Id.* 394.
5. Brown and Beatty, *Canadian Labour Arbitration* (1984), at 490.
6. *Robinson* v. *Canadian Acceptance Corporation Ltd.* (1971), 9 N.S.R. (2d) 226 (C.A.); *Morrell* v. *Grafton-Fraser Inc.* (1982), 51 N.S.R. (2d) 138 (C.A.); Christie, *Employment Law in Canada* (1980), at 239-40.
7. Brown and Beatty, *supra*, note 5 at 349. See also: *R.* v. *Arthurs, Ex. p. Port Arthur Shipbuilding Co.* (1967), 62 D.L.R. (2d) 342 (Ont. C.A.) *per* Laskin, J.A. at 362-63, rev'd 70 D.L.R. (2d) 693 (S.C.C.).
8. By virtue of s.18(2) of the Code, there is a right of appeal from the Tribunal to the Appeal Division of the Supreme Court on a question of law or jurisdiction.

junior worker and can be traumatic, even devastating, and adversely affect the worker's very employability.

And when a senior worker is fired without just cause the remedy most desired, understandably enough, is that of reinstatement. For both pecuniary and non-pecuniary reasons, reinstatement is the only remedy capable in many cases of real *restitutio in integrum*. Yet, it is the very remedy that the courts of common law and equity have refused to grant to this very day.[9]

Moreover, the common law entitles an employee who is dismissed without cause merely to notice of dismissal or to pay in lieu thereof.[10] If, however, the employer has cause at common law, even if the cause is not revealed to the worker or even known at the time to the employer, no notice of dismissal is required at all and dismissal is the only recognized response: there are no "shades of discipline" at common law.[11] Nor is an employer required to give warnings of any kind to an employee prior to dismissal or even to give reasons for the dismissal.[12]

The juridicial basis for the harsh refusal of the common law to grant reinstatement (specific performance of the employment contract) is threefold. First, since specific performance is an equitable remedy and it would be tantamount to slavery to require an employee to work for a certain employer against his will, the doctrine of mutuality dictates that such equitable relief should not be available such as to force an employer to continue to employ a worker he does not want.[13] It has been convincingly argued, however, that there is, in reality, nothing like "mutuality" present in the employer-employee relationship:[14] individual employees generally have very little real bargaining power and the notion of freedom of contract does not bear up under close inspection. Second, the courts have sought to justify the rule by saying that reinstatement would require the constant supervision of the court and, hence, is an impractical remedy.[15] It is difficult to see why it would either require constant supervision or be so impractical given the established procedures and sanctions available to enforce court orders (including but not limited to contempt proceedings) and the fact that reinstatement is not only

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9. Christie, *supra*, at 385-86; *Clarke* v. *Price* (1819), 2 Wils. Ch. 157; *Dupre Quarries Ltd.* v. *Dupre*, [1934] 4 D.L.R. 618 (S.C.C.); *General Motors of Canada* v. *Brunet* (1977), 13 N.R. 233 (S.C.C.); *Savage* v. *United Elastic Ltd* (1979), 105 D.L.R. (3d) 571 (N.S.S.C., T.D.).
10. *Robinson, supra*, note 6.
11. Freedland, *The Contract of Employment* (1977), at 226-27.
12. Christie, *supra*, note 6 at 234-40.
13. Christie, *Id.;* Freedland, *supra*, note 11 at 272-78; *Howarth* v. *City of Prince George* (1957), 14 D.L.R. (2d) 752 (B.C.S.C.).
14. Clarke, 32 Mod. L. Rev. 532 at 538; Freedland, *supra*, note 11 at 276-77.
15. Christie, *supra*, note 6 at 239.

available but routinely awarded in other settings without apparent difficulty. And third, the courts have labelled reinstatement as "contrary to public policy" where mutual confidence no longer subsists between employer and employee.[16] It can hardly be suggested that reinstatement is any longer against public policy in Nova Scotia in light of s.67A(1). Further, as Professor Christie points out, reinstatement was apparently never against public policy for the holders of public office[17] and, of course, reinstatement is almost invariably awarded pursuant to the job security provisions of collective agreements where the worker is dismissed without just cause.[18]

Quite clearly, the common law is out of step with the realities of the contemporary workplace. Its quaint notions about "mutuality" and subsisting personal confidences and the attendant social values remain as relics from days gone by when the employment relationship (or, more accurately, the relationship of master to servant) was both more personal and personalized. The common law approach conjures up images of England as a "nation of shopkeepers" each with a houseful of domestic servants to keep in line. Perhaps it is unrealistic to expect that rules made by lawyers would be more attuned to the modern conditions of work. Lawyers who become judges, after all, have for the most part spent their entire working lives not as employees but as partners, public office holders or tenured academics.

Meanwhile, pursuant to various statutory reforms that recognized the right of workers to join unions and bargain collectively for improved benefits and conditions of work[19] — and with precious little help from the common law courts — employers and employees were busily inserting job security provisions ("just cause" clauses) into their collective agreements and arbitrators were just as diligently defining and refining the rights of workers under those clauses to disciplinary warnings and progressive discipline.[20]

It was against this social and legal background[21] that, in 1972, the Nova Scotia Legislature passed the Labour Standards Code and, three

16. *Red Deer College* v. *Michaels* et al. (1975), 57 D.L.R. (3d) 386 (S.C.C.) *per* Laskin, C.J.C. at 400; but see: *Hill* v. *C.A. Parsons & Co. Ltd.*, [1972] ch. 305 (Eng. C.A.), *per* Denning M. R., where reinstatement was ordered. Laskin C.J.C. distinguished *Hill* in *Red Deer* on the grounds that, in *Hill*, there was a subsisting confidence.

17. Christie, *supra*, note 6 at 386.

18. *Re: Tenant Hotline and Peters and Gitlens* (1983), 1 LAC (3d) 130 at 138.

19. *Eg. Trade Union Act*, S.N.S. 1947, c.3.

20. *Port Arthur Shipbuilding*, *supra*, note 7; Brown and Beatty, *supra*, note 5 at 349, 362-63, 488-90.

21. See the speech of Hon. Leonard Pace, the Minister of Labour (now Pace, J.A.), *Assembly Debates*, February 23, 1972, at 467 where he said:

years later, brought in s.67A.[22] At least some non-union senior workers would now enjoy the same right not to be dismissed without just cause enjoyed by their organized counterparts.[23] The mischief to be remedied was clear: the arbitrary dismissal of senior workers. The threshold of "seniority" was set, by fiat, at ten years.[24]

Section 67A (1) contains the substantive right:

> Dismissal or Suspension without Just Cause
>
> 67A (1) Where an employee's period of employment with an employer is ten years or more, the employer shall not discharge or suspend that employee without just cause unless that employee is a person within the meaning of person as used in clause (d), (e), (f), (g), (h) or (i) of subsection (3) of Section 68.

The specific provisions of the Code by which an employee may complain to the Director of Labour Standards and, in turn to the Labour Standards Tribunal are pointed out in sub-sections 67A (2) and (3):

> Complaint to Director
>
> (2) An employee who is discharged or suspended without just cause may make a complaint to the Director in accordance with Section 19.
>
> Complaint to Tribunal
>
> (3) An employee who has made a complaint under subsection (2) and who is not satisfied with the result may make a complaint to the Tribunal in accordance with Section 21 and such complaint shall be and shall be deemed to be a complaint within the meaning of subsection (1) of Section 21. 1975, c. 50, s. 4; 1976, c. 21, s. 15.

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> Mr. Speaker, this [Labour Standards Code] sets really, the minimum standards for the labouring force of Nova Scotia. This is not, of course [,] very relevant to the organized which [sic] approximates roughly 30 per cent of our labour force. But it is minimum standards . . . [this legislation] is necessary for the unprotected and unorganized who have really no means, or not at least as extensive means as we have [?] to protect themselves from [sic] minimum working standards which we have set forth in this bill.

Also see the speech of Premier Gerald Regan, *Assembly Debates,* March 21, 1975 on s.67A. He goes as far as to characterize the employee's right to the job as a "property right". This general characterization, which of continuing academic interest, is not, in my view, particularly helpful in advancing the remedy of reinstatement. Sure, "property rights" are highly regarded by the courts, but merely to call the employee's interest in the job a "property right" is conclusionary reasoning that gets us nowhere. Indeed, it obscures the issue for what remedy ineluctably flows from a "property right"?

22. S.N.S. 1975, c.50.

23. Section 67A was amended the next year by S.N.S. 1976, c.41, s.15 to exclude numerous classifications of workers from the protection in s.67A(1), including senior employees who have been discharged or laid off for ". . . any reason beyond the control of the employer": s.68(3)(d); see Christie, *supra,* note 6 at 376.

24. This was the first legislation of its kind in Canada; but see: Canada Labour Code, R.S.C. 1970, c.L-1, s.61.5, as am. by S.C. 1977-78 c.27, s.21. The federal Code gives the possible remedy of reinstatement to any employee in the federal sector who has completed 12 consecutive months of continuous employment. The ten year threshold in the provincial Code is arguably set unreasonably high.

It must be noted that these sub-sections merely affirm the employee's right to complain about an alleged violation of s.67A (1). In themselves, neither of these sub-sections create new rights for employees. The Code already provided, in s. 19 (1) that the Director may receive a complaint "in any form" regarding an alleged violation of the Code and, in s. 19 (5) an employer or employee against whom the Director has made an order may "appeal" to the Tribunal. In this light, sub-sections 67A (2) and (3) add nothing to the Code. Moreover, these sub-sections do not purport to give adjudicatory or remedial powers to either the Director or the Tribunal. These powers are found elsewhere in the Code; yet, it was these provisions that the Appeal Division chose to declare *ultra vires* in *Sobeys*. The reference in s.67A (2) to a complaint "in accordance with section 19" merely serves to indicate how an employee is to go about enforcing s.67A (1) by bringing the matter to the attention of the Director, i.e. "in any form". Likewise, the reference in s.67A (3) to a complaint "in accordance with section 21" serves only to tell employees what procedure to follow should they object to an adverse finding by the Director. Section 21 requires, for example, that the complaint be put in writing at that stage in the form prescribed by regulation.

The possible remedy of reinstatement, however, is arrived at by reading s.67A (1) together with ss. 19 (3) and 24 (2) of the Code. Sections 19 (3) and 24 (2) empower the Director and the Tribunal, respectively, to order an employer or employee who is or was in contravention of the Code (a) "to do any act or thing that . . . constitutes compliance with this act", and both are further empowered to (b) "rectify any injury caused to the person injured or to make compensation therefor . . .".

Quite clearly, and in keeping with the remedial tone of the Code generally, s. 67A expresses a clear legislative preference for labour over capital — a preference found in each of the substantive, procedural and remedial aspects of the provision and one that breaks with the common law position in an attempt to make the rights and remedies created more real than illusory.

The preference is exhibited in the substantive provision because it gives the employee the right not to be dismissed without just cause and concomitantly limits the employer's common law right to hire and fire at will.

The procedural provisions of the Code, which taken together provide the crucial route from right to remedy, also prefer the interests of the worker over the employer. The procedure thereby established removes the legal and economic burdens that would otherwise fall on the complainant-employee taking a private action for wrongful dismissal and, instead, gives the worker access to the public investigatory/

adjudicatory apparatus set up by the state under the Code to enforce prescribed minimum labour standards. Civil litigation is prohibitively expensive and, hence, inaccessible to many, if not most, individual working people. Party and party costs recovered in a successful action amount to only a small fraction of the actual costs of litigating a claim. This plays into the hands of the employer who, by and large, has vastly superior economic power. This statutory procedure puts a thumb on the scale of justice to the extent that it at least gives an employee a chance to make a claim.

A complaint under the code automatically triggers an investigation by a Labour Standards Officer.[25] After the investigation, the officer will attempt to mediate and effect a settlement of the matter.[26] Failing a settlement (or in default of one) the Director may (as was done in Mr. Yeoman's case) make an order as described above. It is only when the party adversely affected by the Director's order (i.e. the employer under s.67A) wishes to take the matter further and have a full hearing on the facts that the case goes to the Tribunal. In this event, it is the Director, and not the worker who is specifically charged with carriage of the matter against the employer before the Tribunal.[27] It is tempting to say that the Director, in such a case, "steps into the employee's shoes" for the purposes of the hearing but this would be a less than accurate characterization. The complainant is not actually subrogated in any way and is given standing as a party before the Tribunal.[28] The procedure is better understood as one in which a public official, having conducted an independent investigation, has concluded that there has been a violation of the minimum labour standards laws and is under a statutory duty to enforce the right of workers under the Code. The point is that the complainant need to do nothing to further the matter after making the complaint. The *lis*, very clearly, at this stage is between the Director and the employer. Of course the matter is initiated by the employee's complaint, but how else is this public official to learn of alleged violations of the Code in the first place?

It should be clear that the Tribunal does not sit as an "appeal" tribunal on matters of law alone.[29] It hears the evidence like a court of first

25. Code, s.19(1).
26. Code, s.19(2).
27. Code, s.20(a). Should the Director decline to find a violation of the Code in favour of the employee, that employee has the right, under s.21, to take the matter to the Tribunal. In such a case it is the employee who has carriage of the matter and the Director is usually not a party. This is an extension of the preference in favour of the employee who, unlike the employer in the reverse situation, does not have to take on the Director himself before the Tribunal.
28. Code, s.20(c).
29. The proceeding is referred to in the Code, s.19(5), as an "appeal" but this is surely not strict legal usage. Cf. *A. G. of Quebec* v. *Farrah* (1978), 86 D.L.R. (3d) 161 (S.C.C.).

instance and, like virtually all such administrative tribunals, acting in the interests of efficiency and cost-effectiveness, combines its expertise in employment relations with relaxed rules of evidence and procedure.[30]

By the same token, the remedy of reinstatement itself expresses a preference for labour over capital. In opening the door to reinstatement, the legislature is quite clearly resolving the common-law hangups about mutuality, enforceability and "subsisting confidence" in favour of the worker.

It must be emphasized that it was neither the right nor the remedy *per se* that was under direct attack in *Sobeys:* both are valid aspects of provincial legislation.[31] The sole issue was the *vires* of the procedural scheme under the Code in light of s.96.

The upshot of the cases decided under s.96 of the *Constitution Act, 1867* is clear enough: as a rule, and with only limited possible exceptions,[32] the provinces cannot confer judicial power on inferior courts or tribunals that either directly or by analogy were exercised by a superior court in 1867.

Clearly, the first step in any analysis of the *vires* of legislation under s.96 is to identify with precision the source of the impugned judicial power. Yet, in the result, this crucial, if not plainly obvious, step seems to have eluded the Appeal Division in this case. Mr. Justice Hart, writing for the five-member Court, certainly discusses the adjudacatory and remedial functions of the Director and Tribunal with some distain, but only in *obiter,* for the Court ends up by expressly declaring that it is the specific provisions that point out the procedures by which a senior worker can complain about dismissal without cause as set out in 67A (2) and (3) that are offensive to s.96. Inadvertantly, I am sure, the Court failed to pass express judgement on the powers of the Director and the Tribunal, found elsewhere in the Code, to entertain and decide on complaints made under s.67A (1) and grant remedies, including reinstatement.

Accordingly, it seems to me that *Sobeys* leaves untouched:

(a) the substantive right of 10 year employees not to be dismissed without just cause [s.67A(1)];

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30. Code, s.15(8). The Tribunal is a three-person body. Although the Code does not specifically require it, by convention and practice it is made up of a neutral chairperson who is invariably a member of the bar and one member from each management and labour. Thus, it is as close as we are likely to come to a truly "expert" tribunal in these matters.

31. *Constitution Act, 1867,* s.92(13) and (16). Hart J. A., while formally recognizing this legal fact, obliquely expresses some doubt as to whether the courts would acknowledge the right or the remedy. See *Infra,* note 58.

32. *Infra,* note 37.

(b) the general right of workers to complain about violations of the Code, including s.67A(1) [s.19(1)];
(c) the power of the Director to receive such complaints, to investigate matters arising out of such complaints and to attempt to effect a settlement thereof [s.19(1) and (2)];
(d) the power of the Director to decide whether there has been a violation of the Code [s.19(2) and (3)];
(e) the power of the Director to order compliance with the Code and to grant remedies for non-compliance [s.19(3)];
(f) the right of the party adversely affected by an order of the Director to take the matter before the Tribunal [s.19(5)];
(g) the power of the Tribunal to hear such matters and decide whether the Code has been violated [ss.21, 24(2)];
(h) the power of the Tribunal to order compliance with the Code and to grant remedies for non-compliance [s.24(2)].

Obviously, this is not the view of the case taken by the Attorney General of Nova Scotia who has launched an appeal to the Supreme Court of Canada, nor of the Nova Scotia Department of Labour who have stopped taking complaints made under s.67A altogether pending the outcome of the appeal. Just as obviously, it was not what the Appeal Division intended to do in holding s.67A(2) and (3) *ultra vires.* But, inexplicably perhaps, it is what the Court seems to have done.

With this background, and accepting, for the sake of discussion, that the holding in this case does indeed somehow declare the powers I have identified above as (d), (e), (g) and (h) *ultra vires* the province, we can move now to some of the broader issues arising from the case as decided.

## II.

In the leading contemporary case on s.96, the reference *Re Residential Tenancies Act (Ontario),*[33] Mr. Justice Dickson (as he then was) observed that the judicature sections of the *British North America Act, 1867*[34] represented "one of the important historical compromises of the Fathers of Confederation".[35] The provinces would continue to design and control the make-up of the provincial judicature, while the Dominion authority would appoint, pay and remove the judges as selected from the bars of the respective provinces.[36]

33. (1981), 37 N. R. 158.
34. ss. 96-101.
35. *Supra,* note 33 at 170.
36. Curiously, the selection of the judges from the respective provincial bars of the original common law provinces is to continue "until the laws relative to Property and Civil Rights . . . are made uniform": s.97. Interesting though the idea may be, cross-provincial appointments to

It remains unclear just how much of a "compromise" this arrangement was or, indeed, how "important" (if at all) it really was to the framers of the *BNA Act*. All of the Fathers of Confederation were, after all, representing their respective provinces. There was no Dominion government yet to fight with and, unless we are prepared to endow them with remarkable prescience, we must assume that they could not have foreseen the development of administrative law as a major tool of modern government, much less the judicial interpretation of s.96, in particular, that was to follow.

From Nova Scotia's point of view, at least, this "compromise" must have seemed a pretty good deal. The colony gave up little and gained a lot. Nova Scotia would continue to control the design of the court structure but judicial appointments made historically by the Colonial Secretary in London (latterly from the provincial bar) would now be made by the new Dominion government in Ottawa. As a clear bonus, the Dominion authority would thenceforth pay the judges' salaries — a small matter from today's perspective but, for the colony of Nova Scotia it would eliminate what, by 1841, had become an unconscionable drain on the tiny provincial treasury and a major source of public scandal.

> England, it was shown had a population of 12,000,000 and twelve judges; Nova Scotia a population of 124,000 and nine judges. Even worse, the Chief Justice of Nova Scotia was receiving a larger salary than the Chief Justice of the United States and the judicial establishment of Nova Scotia was costing more than that of the State of New York.[37]

This situation led to the abolition of the (civil) Inferior Courts of Common Pleas and the (criminal) Courts of Quarter Session in 1841, leaving no body performing judicial functions in the colony between the Supreme Court and two justices of the peace acting in concert with a monetary jurisdiction limited, eventually, to $80.

Appointment of judges from the small, elite Nova Scotia bar nicely maintained the *status quo* and removal of the judges on joint address of Parliament by the Governor-General was a dream come true.

> For years the Assembly strove to make the puisne judges removeable by a joint address of the Council and the Assembly and, as a bargaining point [with the Colonial Secretary], it declined to place their salaries on a permanent basis . . . In the end, however it had to confess failure, for although it added a face-saving provision when it made salaries permanent [in 1848], the tenure of the justices continued, in effect to be at the pleasure of the Secretary of State [for the Colonies].[38]

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the bench remain as politically untenable today as they must have been in 1867. Every bit as untenable as the suggestion that the provinces should have uniform laws under s.91(13).

37. Beck, *The Government of Nova Scotia* (1957), at 128.

38. *Id.* at 71-2.

Nevertheless, and despite these mundane practicalities, judges and scholars alike have displayed piercing hindsight, if not outright historical revisionism, in ascribing all kinds of lofty purposes to ss. 96-101. The Privy Council rather extravagantly refers to them as "the principal pillars in the temple of justice"[39] and, in what has become the conventional view, described their purpose as reinforcing judicial independence.[40] The assumption being that federal appointment, pay and removal would insulate the judges from local pressure. Dr. Morris Schumiatcher seemed to suggest in a 1949 article that these sections are the Canadian equivalent of the "due process clause" of the American Bill of Rights — but surely he was thinking more of the effect of these sections and their apparently unlimited scope for judicial review than anything intended by the framers to be their purpose.[41] More recently, Dickson J. said the purpose was to ensure "a strong constitutional base for national unity, through a unitary judiciary".[42] One cannot help but comment that the sins committed in this country under the etherial rubric of "national unity" are legion. And Professor Hogg finds the rationale in the fact that the s.96 courts are courts of general jurisdiction, applying both federal and provincial laws — although he is the first to point out that this justification loses force the more the federal Parliament uses its powers under s.101 to create federal courts and tribunals to decide issues under federal law, as it has been increasingly doing since Confederation.[43]

There may be some value in some or all of these disparate rationales, but three things are abundantly clear from the cases: (a) the provinces cannot do by the back door what they cannot do from the front: statutes vesting judicial power on any body that the s.96 courts view as their own will be construed as an offence against s.96 and will not be permitted to stand, (b) the courts have been unable or unwilling to deliniate in any meaningful way the judicial powers peculiar to s.96 court as distinct from any other adjudicatory functions and, (c) the bottom line is that the s.96

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39. *Toronto* v. *York*, [1938] A. C. 415 at 426.

40. *Toronto* v. *York, Id.;* also see *Martineau & Sons* v. *Montreal*, [1932] A. C. 113 at 120; Lederman, (1956) 34 Can. Bar Rev. 769 and 1139, 1158-79. Professor Lederman points to the provisions of the 1848 act of the Assembly in Nova Scotia (11 Vict., c.21) as evidencing an early concern for judicial independence in Nova Scotia. But as Professor Beck notes, in passing this bill "the lower house appears to have been more concerned with making the judges dependent upon itself than with strengthing their independence [from the crown]". This was the "face-saving provision" regarding removal of puisne judges alluded to earlier. And Professor Hogg finds the whole rationale of reinforcing judicial independence "not very convincing": Hogg, *Constitutional Law of Canada*, (1985), at 136.

41. Schumiatcher, (1949), 27 Can. Bar Rev. 131. The matter of the scope provided for judicial *review and its comparison to the dreaded 'Lochner era' in the U.S. will be taken up infra,* note 68.

42. *Supra*, note 33 at 170.

43. Hogg, *supra*, note 40 at 136 n. 19.

courts have virtually unfettered discretion to define and protect the limits of their own jurisdiction by erecting constitutional barriers against intrusive, but otherwise quite valid, provincial legislation.

One might legitimately expect, therefore, that judges deciding cases under this head of constitutional review would be most anxious to foster — and be seen to foster — an appropriate balance between protecting the integrity of the constitutional provisions providing for their own appointment pay and removal, on the one hand, and the legitimate preferences of a democratically elected legislature, on the other. Accordingly, the reasons for judgement in such a case could be expected to be as purposive and sophisticated as the task is demanding.

Unfortunately, the judgement delivered in *Sobeys* falls far short of this expectation. The constitutional purpose of the exercise, if indeed there is one, did not seem to matter in the least to Hart J. A. for there is not a single word of teleological analysis in the judgement. One can only speculate on the constitutional ends the Court was seeking to secure by deciding this case solely on the s.96 question. Perhaps His Lordship was of the view that the purpose of the exercise is too well-settled or, alternatively, too obscure to admit further elaboration with reference to the facts of the instant case. Instead, however, the first part of the judgement consists of a mechanical, even *pro forma,* "historical overview", citing the same cases and repeating the same conclusions that Mr. Justice Dickson had done in arriving at the now-famous "test" in the Ontario Residential Tenancies reference. This "exhaustive test" (to use Mr. Justice Hart's term), as relied on by the Court in *Sobeys,* was summarized by Laskin C. J. C. in another case decided by the Supreme Court of Canada in the same year.[44]

1. Does the challenged power or jurisdiction broadly conform to the power or jurisdiction exercised by Superior, District or County Courts at the time of Confederation?
2. Is the function of the provincial tribunal within its institutional setting a judicial function, considered from the point of view of the nature of the question which the tribunal is called upon to decide or, to put it in other words, is the tribunal concerned with a private dispute which it is called upon to adjudicate through the application of a recognized body of rules and in a manner consistent with fairness and impartiality?
3. If the power or jurisdiction is exercised in a judicial manner, does its function as a whole and in its entire institutional context violate s.96?

In reality, this is not a "test" at all. As Professor Hogg points out, "the three step approach now favoured by the Supreme Court of Canada is no

44. *Massey-Ferguson Industries Limited et al.* v. *Government of Saskatchewan* (1981), 39 N. R. 308 at 324.

doubt a sound synthesis of the prior case law . . . [b]ut it is not a satisfactory constitutional-law doctrine.".[45] The three "steps" are vague and circular and, I suggest, can be relied on in any result.

The "test" can be more accurately characterized as embodying a simple rule, one example of a type of case falling outside the rule and one deceptively narrow exception to the rule. The rule, as stated above, is that provincial legislation granting judicial power to an inferior court or tribunal analogous to that exercised by a superior court in 1867 is *ultra vires.* The "second step" is clearly subsumed within the rule and is merely an elaboration on a type of case falling outside of it. For, if the power in question is other than a "judicial power", the rule simply does not apply.[46] The exception, which might seem on its face to be much broader than it is in practice, is to the effect that the courts may be prepared to allow the endowment of certain s.96 judicial functions to be exercised "as a part of a broader policy scheme"[47] under provincial legislation. For all practical purposes, however, this exception has been limited in application to statutory bodies regulating collective agreements[48] or where the tribunal has some other clearly specified and non-judicial administrative or rule-making function,[49] but this other function cannot be seen as merely incidental to the inpugned judicial function.[50] The judicial concession to social progress and democracy is, thus, more apparent in the exception than real.

Mr. Justice Hart begins his application of the rule by dismissing the inconvenient fact that the rule seems only to apply to judicial power that was *actually exercised* by a superior court over 118 years ago. By finding as a matter of law that the rule applies to all powers which, while never actually exercised, were at least *theoretically exercisable* by analogy, he is able to come to the conclusion that there is "no doubt" that the power to award reinstatement was "traditionally vested in the Supreme Court of Nova Scotia at the time of Confederation".[51] His Lordship put the matter this way:[52]

> It is argued that since the superior courts chose to exercise their discretion against ordering reinstatement in wrongful dismissal cases and confined

45. Hogg, *supra,* note 40 at 161.
46. See *Massey-Ferguson, supra,* note 44; *Capital Regional District* v. *Concerned Citizens of B.C.,* [1982] 2 S.C.R. 842.
47. *Supra,* note 33 at 173.
48. See *Tomko* v. *Labour Relations Board of Nova Scotia* (1975), 97 D.L.R. (3d) 250 (S.C.C.).
49. *Mississauga* v. *Peel,* [1979] 2 S.C.R. 244; *Massey-Ferguson, supra,* note 44; *Capital Reg. Dist., supra,* note 46.
50. *Re: Residential Tenancies Act (Ontario), supra,* note 33.
51. *Sobeys, supra,* note 1 at 398-9.
52. *Id.* at 399.

> the remedy to an award of damages based upon notice reasonably required for the termination of the contract of employment, that the s.96 Courts had not exercised this equitable jurisdiction. I cannot agree with this proposition, since the failure to grant a remedy available to the Court because of its deemed inappropriateness at a particular time is not an abdication of that jurisdiction but simply a suspension of it for the time being. The power to grant reinstatement under a contract of employment has always rested with the Supreme Court and did so at the time of Confederation.

No authority is cited for the proposition that the reach of the test for *vires* under s.96 extends to powers only theoretically and potentially exercisable by superior courts in 1867. Moreover, this particular extension of the rule ignores the fact that the remedy of reinstatement was (and is) unavailable, not "because of its deemed inappropriateness at a particular time", but rather because there is no judicially cognizable *right* to reinstatement, at common law or in equity, on which the remedy could be founded. Indeed, the courts have repeatedly said that the remedy is inequitable.[53] It was precisely because the judges refused to recognize such a right and give a suitable remedy that the Legislature of the Province was moved to create it.

In any event, this finding highlights the absurdity of the rule itself. History shows that the judicature of the colony of Nova Scotia was quite unsatisfactory and badly in need of reform at the time of Confederation.[54] Far from being the result of a carefully crafted design suitable to the needs and desires of the people of the colony, the structure of the courts, with plenary powers vested in a single court, was the result of a peculiar mix of economic and political factors, some of which have already been mentioned, that occurred well before Confederation and had nothing whatsoever to do with an intended separation of powers or consciously designed limitations on the powers of the provincial Legislature under the B.N.A. Act. The important fact is, and it is one that is blithely ignored by the courts in their haste to over-rule provincial laws under s.96, that by the reforms of 1841 which abolished the lower courts, every analogy to the British system of superior and inferior courts on which the judicial analysis of s.96 is based was destroyed in Nova Scotia.

Indeed, the very reason that the reforms of 1841 were so long in coming, despite wide-spread consensus that change was desperately needed, was precisely that the political parties, the Reformers and the Conservatives in turn, each opposed the changes on the basis that the British analogy would thereby be destroyed. Essentially there were two choices at the time: reduce the number of judges in each court or transfer

53. *Supra*, note 13.
54. See Beck, *supra*, note 37 at 128 ff.

all judicial functions (above the j.p.'s) to the Supreme Court. When the Legislature opted for the latter course in 1841 it can be safely said that there was not a politician in the colony who was unaware that the British analogy was dissolved.[55] To revive it now, 118 years later, for the purposes of striking down laws passed by the Legislature is an anti-historical *non-sequitur.* To extend the analogy, by further analogy, to vest exclusive constitutional power in the Supreme Court to grant remedies totally unknown in law in 1841 or 1867 just adds insult to the injury.

The inadequacy of the rule itself as a constitutional doctrine is all the more apparent in that it is applied *ad hoc* on a province-by-province basis. By sheer historical accident, some provinces seem to have been able or willing to adhere more closely to the British analogy and, accordingly, seem to have devolved more power on inferior courts and tribunals. This has led, of course, to the courts declaring the laws of some provinces *intra vires,* while almost identical laws in others have been found unconstitutional.[56]

Having satisfied himself that the inpugned power was *prima facie* within the rule, Mr. Justice Hart then moved on, as precedent dictates, to discover whether or not a closer look at the "judicial" aspect of the power would confirm that conclusion. It did. His Lordship discusses the question in a single paragraph:

> I can see no reason for reaching the conclusion that there is any change in the judicial nature of the powers vested in the tribunal when looking at it in its institutional setting. It may very well be that the tribunal when making orders to remedy breaches of minimum wages under the *Act* and others [sic] of its provisions is in reality simply carrying out an administrative function necessary to obtain the objects of the legislation, but when dealing with s.67A, which is in reality an amendment to the common law relating to contracts of employment and in considering whether "just cause" exists or not, the tribunal can only be performing a judicial function . . .

This neatly avoids the central issue as posed by Mr. Justice Dickson in the Tenancies Reference case, and duly quoted by Hart JA earlier in the

55. *Id.*

56. The recent cases dealing with rent review boards and residential tenancies tribunals are a good example of this. In the Ontario Residential Tenancies Act reference, *supra,* note 33, the Supreme Court of Canada found that the powers of Ontario's tribunal to make eviction orders and order parties to comply with rent control legislation were *ultra vires* in that these were powers analogous to those of Ontario superior Courts in 1867, but in *A. G. of Quebec* v. *Grodin,* [1983] 2 S.C.R. 364, the Court found that similar power had been exercised by inferior courts and, hence, Quebec's law is *intra vires.* See also: *Burke* v. *Arab* (1981), 49 N.S.R. (2d) 181, (C.A.), *Re Fort Massey Realties* (1982), 132 D.L.R. (3d) 51, *Re Proposed Legislation Concerning Leased Premises* (1978), 89 D.L.R. (3d) 460 (Alta. C.A.), *Re Pepita and Doukas* (1982) D.L.R. (3d) 577 (B.C.C.A.).

judgement, namely: Is the tribunal dealing with a matter that is essentially a "private dispute between parties"? As Mr. Justice Dickson put it, "the hallmark of a judicial power is a *lis* between parties" in which the tribunal "deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole".[57]

Surely, it is at least arguable that, with the way the Code is set up, with the Director having carriage of the matter before the Tribunal — having made an order after and independent inquiry that it is not a "private dispute" at all. The Director, in these cases, is no mere surrogate for the complainant-employee, he is the public official designated to uphold the "collective good of the community as a whole" as manifest in the Labour Standards Code. The ultimate goal, for both the Director and the Tribunal, is the enforcement of the Code. Certainly, this will involve an assessment on a case-by-case basis of whether the Code has, in fact, been violated, but how else can the Code be enforced? The finding that an employee was or was not dismissed "without just cause" is just a necessary but incidental step to that enforcement. Likewise, the remedy of reinstatement, which merely puts the employer and employee back in the place where they would have been had there been no violation is similarly a necessary incident to the enforcement of the Code. This argument is all the more potent, it seems to me, precisely because the Code breaks with the common law in setting a new standard for the conduct of employment relations.

Unfortunately, this consideration of the impugned "judicial power", while adverted to, seems to go by the wayside in the actual judgement. Instead, His Lordship concludes the paragraph just quoted with the following, rather revealing, remark:[58]

> It is the type of dispute between parties that traditionally falls for resolution to the superior courts, *and although these courts now may have to consider the remedy of reinstatement as an alternative to damages it is for them to do so and not a provincially appointed tribunal.*
>
> [emphasis added]

First, I would have thought that, in light of s.67A(1) which is admittedly valid provincial law, the courts would have to do more than merely "consider the remedy of reinstatement as an alternative to damages". This seems to contradict Mr. Justice Hart's earlier statement to the effect that the courts have always considered — but, it just so happens, invariably rejected — the remedy of reinstatement. Perhaps His

57. *Residential Tenancies, supra,* note 33 at 182.
58. *Sobeys, supra,* note 1.

Lordship means that, in light of s.67A(1), the courts might now be forced however reluctantly, to *apply* the remedy. But, more importantly, this statement seems to underscore the confusion in the Court's mind between its traditional abhorance of the remedy itself and the validity of the powers conferred on the Tribunal to grant the remedy. For, surely, the availability of any particular remedy does not go to the question of whether or not the issue to be decided is purely a private dispute between the parties. Remedies of one sort or another are frequently granted where the main issue in a case turns on a determination of "the collective good of the community as a whole".[59] By the same token, the mere fact that the remedy bears some analogy to one that might have been granted by a superior court does not ineluctably turn the adjudicatory function of the tribunal into a "judicial power".[60]

But having brought the function of the Tribunal in this case within the rule by this judicial alchemy, Mr. Justice Hart then purports to apply the "third step" in an effort to determine whether the impugned judicial function falls into the narrow exception for judicial powers exercised "as part of a broader social policy scheme".[61] Mr. Justice Hart duly quotes the words of Dickson J. setting out the task to be performed:[62]

> . . . It is no longer sufficient simply to examine the particular power or function of a tribunal and ask whether this power or function was once performed by s.96 courts. This would be examining the power or function, in a 'detached manner', contrary to the reasoning in *Tomko*. What must be considered is the 'context' in which the power is exercised. *Tomko* leads to the following result: it is possible for administrative tribunals to exercise powers and jurisdiction which were once exercised by the s.96 courts. It will all depend on the context of the exercise of the power. It may well be that the impugned 'judicial powers' are merely subsidiary or ancilliary to general administrative functions assigned to the tribunal *(John East; Tomko)* or the powers may be necessarily incidental to the achievement of a broader policy goal of the legislature *(Mississauga)*.

Very clearly, this would seem to require the court to engage in an analysis of the context of the exercise of the Tribunal's functions and the policy goals of the Labour Standards Code. The most frustrating thing about the judgement in *Sobeys* is that the Appeal Division would

59. See Massey-Ferguson, supra, note 44 where the Supreme Court of Canada upheld the power of provincially-appointed compensation board to grant the "remedy" of compensation on the grounds, *inter alia*, of absence of a private dispute between the parties.
60. This was the holding, relative to the power of the Saskatchewan Labour Relations Board to order reinstatement of workers dismissed on grounds that amounted to unfair labour practices, in *Labour Relations Board of Saskatchewan* v. *John East Iron Works*, [1948] 4 D.L.R. 673 (P.C.), from which Dickson J. derived the "second step" of the test.
61. *Supra*, note 47.
62. *Residential Tenancies, supra*, note 33 at 176, *Sobeys, supra*, note, 1 at 398.

mechanically recite the precedent requiring such an analysis and, while baldly claiming to follow it, would so transparently fail or refuse to engage in the required exegesis. Not a single word is said in the judgement about the context of the exercise of the "judicial powers" by the Tribunal. At no time is the procedure whereby a matter comes before the Tribunal mentioned. There is no attempt to examine the inpugned power, in relation to other functions performed by the Tribunal. No serious attempt is made to square the view of the Court of the function of the Tribunal with the labour relations cases *(John East* and *Tomko)* in which the courts held the inpugned "judicial powers" to be merely incidental to the more general function of securing "industrial peace" in light of new measures designed to provide for the greater protection of workers through collective bargaining. No attempt whatsoever is made to analyse or understand the social policy goals behind the Labour Standards Code and place the Tribunal's rule under s.67A in that context.

Instead, under the guise of applying Mr. Justice Dickson's "third step", Mr. Justice Hart distills another question altogether from thin air. The question His Lordship poses to himself is whether it is *"necessary"* that the matter be adjudicated upon by a s.96 court as opposed, presumably, to it being "necessary" that it be decided by a provincial tribunal. By posing this question, His Lordship is apparently content to dismiss as irrelevant the questions raised by Mr. Justice Dickson. Moreover, the "reasons" Hart J. A. gives for his conclusion that it is indeed "necessary" that a s.96 court deal with these matters exclusively are profoundly cryptic. His Lordship says:[63]

> As I mentioned earlier, the obvious intention of the Legislature in passing s.67A was to grant security of tenure to employees of more than ten years standing. This alteration of the common law can well be applied in the superior and county courts [sic] of the province.
>
> In my opinion it is *completely unnecessary* to pass the question of whether or not an employee has been unjustly dismissed to a provincial tribunal. The question is *simply a matter of a dispute between two parties to a contract of employment and is not a matter ancilliary to the broad social purpose of obtaining industrial peace as held in the Labour Relations Board cases.* Section 67A is *simply one piece of social legislation which was coupled together with a group of others relating to labour standards.* There is, in my opinion, *no valid need* to have the determination of such disputes resolved by the Labour Standards Tribunal.
>
> When one looks at the type of issues considered by the Board [sic] in attempting to make their determination, it is apparent that *the resolution of such a problem requires the ingenuity and inherent powers of a common law court.* The legislation raises the very issues attempted to be faced by the Board [sic], that is to say, the determination of the true meaning of

63. *Sobeys, Id.* at 400.

"just cause" in an employment contract and whether arbitral decisions relating to this subject based on collective agreements should be utilized in the determination of that meaning. Courts may decide that the traditional common law meaning of "just cause" can no longer remain now that all [sic] members of the work force have been given a certain amount of security of tenure commonly only available to those protected by collective agreements. Furthermore, the Tribunal had to consider the nature of the remedy to be granted for a breach of contract, including the possibility of an award of damages and/or reinstatement. The principles upon which such a remedy should be granted should be developed by the courts unless clearly specified by legislation. *This is not a task that should ordinarily be left to an administrative tribunal.*

[emphasis added]

Taking this view to its logical conclusion, it would, of course, *never* be strictly "necessary" to have administrative tribunals so long as the s.96 courts exist. The courts are capable, theoretically at least, of deciding any type of case. The point, however, is that, while it may not be strictly speaking, "necessary" to give certain functions to tribunals it may very well be *desireable* as a matter of public policy to do so. That is, there may well be valid policy reasons why the Legislature decided, as in the case of labour relations boards *(Tomko)* or the Ontario Municipal Board *(Missassauga)*, to vest these functions in bodies composed of persons possessed of qualifications other than those germane to an appointment under s.96. Professor Hogg has summarized some of these considerations as follows:[64]

The novel tasks of adjudication which entailed new schemes of regulation have commonly been entrusted to administrative tribunals rather than to courts. Some of the reasons for this preference can be identified. First is the desire for a specialist body; specially qualified personnel can be appointed to a tribunal, and those who do not start off specially qualified can acquire experience and expertise in the field of regulation (whether it be labour relations, marketing of agricultural products, transportation, broadcasting, liquor licensing, or whatever). Second is the desire for innovation: a tribunal can be given broad discretion to develop the policies and remedies required to implement a new scheme of regulation (such as foreign investment review, control of pay television). Third is the desire for initiative: a tribunal (such as a human rights commission or a securities commission) can be given power to initiate proceedings, undertake investigations, to do research and to play an educative and policy-formulating role as well as an adjudicative one. Fourth is the problem of volume: if adjudication is required with great frequency (as in worker's compensation, unemployment insurance, immigration, income tax objections, for example), the tribunal can develop procedures to handle a case load that would choke the ordinary court system. Fifth is economy:

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64. Hogg, *supra*, note 40 at 155-6.

> a tribunal can be structured and mandated to be less formal, speedier and less expensive than the ordinary courts . . .

In my view, each of these five factors apply in the case of the Labour Standards Tribunal and the Director of Labour Standards. By failing to even consider the issue, the Appeal Division seems to be making the novel and (rather startling) statement that it is *never desireable* that matters be decided upon by (mere) tribunal in preference to (real) courts, unless a court decides, for some reason, that it is "necessary" in the sense that the subject-matter is trivial enough not to require the alleged "ingenuity and inherent power of a common law court". Mysteriously, this new rule would seem to apply *a fortiori* where the courts have been content to demonstrate their "ingenuity and inherent powers" by refusing to grant a remedy desired by the Legislature.

This proposition flies in the face of stance taken, *in obiter,* by the Privy Council in *John East.*[65]

> This matter [of *vires*] may be tested in another way. If the appellant [labour relations] Board is a Court analogous to the Superior and other Courts mentioned in s.96 of the *B.N.A. Act,* its members must not only be appointed by the Governor-General but must be chosen from the Bar of Saskatchewan. It is legitimate therefore to ask whether, if trade unions had in 1867 been recognized by the law if collective bargaining had been the accepted postulate of inductrial peace, if, in a word, the economic and social outlook had been the same in 1867 as it became in 1944, it would not have been expedient to establish just such a specialized tribunal as is provided by s.4 of the Act. It is as good a test as another of "analogy" to ask whether the subject-matter of the assumed justiciable issue makes it desireable that Judges should have the same qualifications as those which distinguish the Judges of Superior or other Courts. And it appears to their Lordships that to this question only one answer can be given. For wide experience has shown that . . . it is essential that its . . . members should bring an experience and knowledge acquired extra-judicially to the solution of their problems.

In the same way it could be argued — if the question were entertained by the Court — that, if the "economic and social outlook" in matters of employment law generally and in regard to remedies for dismissal without just cause in particular, were in 1867 what they were in 1972 or 1975, it would have been seen as *desireable* to have these very matters decided by persons other than judges of the Nova Scotia Supreme Court. Very likely, I suggest, it would. Not "necessary", perhaps, but *desireable* nonetheless.

But no where in the cases do we find authority for the proposition, apparently relied on in *Sobeys,* that certain matters are just too serious

65. *John East, supra,* note 59 at 681-2.

and too complex (like determining a standard for "just cause") to be "left to an administrative tribunal". As mentioned, the arbitrators, deciding questions under collective agreements, have done quite well in this regard. What, it may be fairly asked, is the real and essential difference between deciding the issue of "just cause" under a statutory minimum standards scheme on the one hand, and making the same decision pursuant to a similar clause in a collective agreement? What is it about the former that seems to necessitate the special insights and expertise of a s.96 court that are absent in the latter case? And, even if there is a difference, given that the Court is prepared to acknowledge that it is the intention of the Legislature to give a protection to workers not covered by collective agreements that is enjoyed by their unionized counterparts, why would it be suggested that the courts might appropriately employ a different standard for "just cause"? We look in vain for answers to these questions in this judgement.

In any event, the Court's rather extravagant concern that a mere tribunal might not be quite capable of making these important decisions overlooks the fact that an appeal lies from the Tribunal to the Appeal Division, directly, on any question of law.[66] Presumably, that Court would be duty bound to exercise supervisory jurisdiction to correct errors of the Tribunal should it show itself incapable or unworthy of this awesome responsibility.

In the result, the judgement in *Sobeys* would seem to stand for the following constitutional law proposition: all that is required to defeat provincial legislation under s.96 is to show that the impugned function was, by some analogy, one that might have provided a remedy that might have been given by the Supreme Court of Nova Scotia in 1867, even where the remedy and the right to it were totally unknown in law, unless the court finds that the matter is so trivial as to make it unnecessary that it be decided by a "real" judge.

Accordingly, the Appeal Division unanimously found that "the provisions of the Labour Standards Code, which vest in the Labour Standards tribunal the right [sic] to determine whether a particular employee has or has not been dismissed for 'just cause' and to further determine a sanction which should be imposed upon any employer as a result of breach of s.67A of the *Act*, are . . ." *ultra vires* the Legislature.

III.

Despite the apparently broad reach of that finding, the Court went on to make an order[67] that only specifically declares "that s.67A(2) and (3) of

66. See *supra*, note 8.
67. Order dated October 29, 1985, *per* Clarke, C.J.N.S.; Prothonotary's file S.C.A. No. 01430.

the Labour Standards Code . . . are *ultra vires* the Province of Nova Scotia". For the reasons already explained, this declaration falls far short of ruling the specific judicial and remedial powers of the Director and the Tribunal unconstitutional, nor, as strictly read, does it alter or limit in any way the access that fired senior employees would have to redress under the Code *via* the Director and Tribunal. And, interestingly, the question that the Attorney General of Nova Scotia apparently intends to put before the Supreme Court of Canada is simply: "Are s.67A(2) and (3) of the Labour Standards Code, SNS 1972, c.10 *ultra vires* the Province of Nova Scotia?"[68] If my view that these sub-sections do not themselves bestow adjudicative power on the Tribunal is accepted, posing the question in this narrow way might result in a very brief and narrow finding to the effect that these sub-sections cannot offend s.96. And, while this may accomplish the immediate result of over-turning the Order of the Appeal Division and its specific declaration, it would not, of course, result in the much broader re-examination of the s.96 problem that the judgement of the Appeal Division in this case begs.

I question the historical basis for the application of s.96 as a constitutional doctrine — especially as it relates to Nova Scotia. I suggest that any judicial overruling of laws passed by a democratically elected legislature must be purposive and that purpose must be subject to constant review especially by the courts, who must be prepared, each time it is invoked, to justify the purpose of the exercise in rational and contemporary terms. It is simply not good constitutional law-making, or appropriate judicial behavior, to engage in an avowedly mechanical exercise of judicial formalism the upshot of which is to strike down provincial statutes by saying 'Hands off our jurisdiction, you chaps'.

The judgement in *Sobeys* v. *Yeomans* is a case in point, made all the more disturbing because it represents the use by the Court of the s.96 exercise to thwart an important social reform and to turn the clock back by asserting a judge-made right to pass judgement on provincial laws. It is not difficult to see that part and parcel of this social reform designed to improve and protect the rights of workers is a clear and unequivocal legislative preference for the interests of labour over capital. And it does not take much reading between the lines in a case like *Sobeys* to see that the "offense" that concerned the Court was precisely this substantive, procedural and remedial preference. For it is a preference antithetical to the interests with which that Court, historically at least, is most associated.

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68. The Notice of Appeal filed in the Supreme Court of Canada by the Attorney General of Nova Scotia (dated March 19, 1986) reveals no grounds for appeal. Leave to appeal was

*Sobeys* represents a species of 'judicial activism' reminiscent of the infamous 'Lochner era' in the U.S.,[69] when the American courts struck down state laws designed to reform employment law by providing for minimum hours of work and wages and limiting anti-union activities by employers on the grounds that these reforms violated the employers' rights to 'substantive due process'. But as Mr. Justice Holmes was quick to point out in his famous dissent in *Lochner,* the Court was merely substituting its preference, under the guise of constitutional review, for *laissez-faire* economics that had been deliberately rejected by the Legislature. His statement then, in 1905, is strikingly relevant today.[70]

> Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez-faire.* It is made for people of fundamentally different views, and the accident of our finding certain opinions natural and familiar, or novel and even shocking ought not to conclude our judgement upon the question whether statutes embodying them conflict with the Constitution of the United States.

To the extent, then, that our law in relation to s.96 is so vague and unpredictable and susceptible of grave abuse, we must question the very propriety of this head of constitutional review. It is curious indeed that our courts would be uncharacteristically activist and seemingly prepared to throw all judicial restraint to the breeze when the matter at issue is their own jurisdiction versus that of the Legislature.

Far from clarifying the law or furthering in any practical way the cause of judicial restraint in these matters, the Supreme Court of Canada, from the *Residential Tenancies* case on, has sufficiently muddied the waters as to unleash a torrent of expensive and unpredictable litigation. That Court will now have an excellent opportunity in *Sobeys* to rethink the matter entirely with a view to eliminating once and for all some of the sacred cows that surround s.96. It must be acknowledged that the existing "test" — if that, indeed, is what it is — has been a failure. A much more practical alternative, but one not without its problems, is found in Lord Simonds dictum in *John East*[71] to the effect it is as valid as any other test of analogy to ask whether and for what reasons if may be *desirable,* in light of *existing* social conditions, that the issues presented be decided upon by some group other than those lawyers who happen to have been

granted to the A.G. for N.S. on February 28, 1986. The information as to the stated issue was given the writer by the solicitor for Mr. Yeomans.

69. From 1905-1937. See *Lochner* v. *New York* (1905), 198 U.S. 45; 25 (U.S.) Supreme Court Reporter 539.

70. *Lochner, supra,* 25 (U.S.) Sup. Ct. R. 546-7.

71. *Supra,* note 64.

appointed (for whatever reasons) to a s.96 court. There is, in my view, a very compelling argument — backed up by the history of the common law of employment — to the effect that, of all people you might care to name, lawyers by their typical training, professional background and personal work experiences are among the worst people you could assemble to effect a set of social reforms designed and intended to prefer (even if only in a limited context) the interests of labour over capital.

The alternative, of course, is to take the matter away from the judges altogether by a constitutional amendment[72] that would empower the provinces to appoint provincial tribunals to carry out any function within provincial legislative competence. It may well come to that. How soon may well depend on how the Supreme Court of Canada deals with this case when it comes before it.

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72. See, for example, *The Constitution of Canada: A Suggested Amendment Relating to Provincial Administrative Tribunals*, (Department of Justice, Ottawa, 1983).