Res Judicata in Administrative Law

"Justice begins where arbitrariness leaves off"; consistency has long been a hallmark of procedural justice in our system of law; there is no such similar stricture on administrative decision making. Since a great variety of administrative boards and tribunals are routinely expected to render both administrative and judicial decisions, the extent to which the rules of procedural justice apply is often called into question. For example, while the rule of *res judicata* is fundamental to procedural justice in judicial decision-making, it can operate in a fashion contrary to 'administrative' decision-making.

A *res judicata* is a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over both the cause or matter being litigated upon as well as over the parties to the litigation.[1] The doctrine of *res judicata* constitutes one type of estoppel. In its early form, the doctrine seemed to be composed of two distinct branches.[2] The first of these stated that a *res judicata* estopped or precluded any party to the litigation from afterwards disputing, as against any other party to it, the correctness of the decision in law or fact.[3] The second branch prohibited the re-assertion of a cause of action in respect of which relief has already been granted by a judicial tribunal of competent jurisdiction.[4] Modern authorities, however, do not appear to make the same distinction.[5] Thus, *res judicata* is now defined as a doctrine establishing merely that "the final judgment of a competent court may not be disputed, on the issue which it has settled, by the parties or their successors, in any subsequent legal proceeding".[6]

Practitioners involved in administrative decision-making frequently face the problem of whether doctrines or rules of English Common Law ought to be incorporated into Administrative Law. The magnitude of the problem in respect to *res judicata* prompted the following observation from no less an authority than S. A. deSmith:

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[1]Bower, *The Doctrine of Res Judicata* (London: Butterworth & Co., 1924), at 17.

[2]*Ibid.*, at 3. Mr. Bower divides his treatise into two parts entitled "Estoppel by Res Judicata" and "Res Judicata as a Bar to Subsequent Recovery". Each part deals with a separate branch of the doctrine.

[3]*Humphries* v. *Humphries*, [1910] 2 K.B. 531 (C.A.).

[4]*Outram* v. *Morewood* (1803), 3 East. 346; 102 E.R. 630 (K.B.).

[5]Indeed, some judicial statements seem to suggest that to divide the doctrine into two branches confounds two distinct ideas and leads to a confusion with the doctrine of 'merger'; *e.g.*, *McIntosh* v. *Parent*, [1924] 4 D.L.R. 420, at 422 (Ont. S.C., App. Div.). See Wade. *Administrative Law* (4th ed.) (Oxford: Clarendon Press, 1977),at 226-7.

[6]Dias, *Jurisprudence* (4th ed.) (London: Butterworth & Co., 1976), at 45. See also *Rex* v. *Manchuk or Munchuk*, [1938] O.R. 385 (C.A.).

> It is difficult not to conclude that the concept of res judicata in administrative law is so nebulous as to occlude rather than clarify practical issues, and that it should be used as little as possible.[7]

There are two ways of approaching the problem of determining whether *res judicata* applies to a decision of an administrative body. One would be to dissect the neat legal requirements for the application of the rule. I would call this the mechanical approach. The other approach would be to look to the interest promoted by the rule and determine whether those interests ought to be similarly promoted in the field of administrative decision making. This latter I would call the reasoned approach. We have examples of both approaches in our Canadian case law.

One of the more frequently cited authorities, that is an example of the mechanical approach, is also a good example of the shortcomings of that approach in providing a guide in the application of *res judicata* in administrative law. The case is *Re Fernie Memorial Hospital Society and Duthie*.[8] The decision in question was that of a Hospital Board reversing its own earlier decision not to dismiss a certain employee. The Supreme Court of British Columbia (affirmed on appeal) held that the principle of *res judicata* applied "only to a judicial decision pronounced by a judicial tribunal".[9] The reasoned approach would undoubtedly lead to the same result but it may have resulted in a less categoric statement about the application of res judicata to the decisions of an administrative tribunal.

An equally 'mechanical' approach is evident in the numerous instances where administrative Boards have paid lip service to the principles of *res judicata* but then have relied upon the exceptions to the rule so as to avoid its application. As these Boards are frequently asked to determine a variety of questions, the exception to the *res judicata* rule most commonly invoked is that 'the issues are not the same'.

Labour Relations Boards provide a good example of the same or related matters being decided differently because of a difference in the purposes for which they convene. Most Labour Relations Boards, in their administration of the collective bargaining system, have both the responsibility for ascertaining the legality of a strike as well as the responsibility for deciding whether to grant consent to prosecute for (among other things) the conduct of an illegal strike. In the *Alger Press Ltd. Case*,[10] the Ontario Labour Relations Board said that the 'declaration' of a strike's illegality would not constitute *res judicata* in respect to a subsequent Board determination on whether or not to grant consent to prosecute. The Board's

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[7]deSmith, *Judicial Review of Administrative Action* (3d ed.) (London: Stevens, 1973), at 94.

[8](1963), 42 W.W.R. 511 (B.C.S.C.); aff'd 47 W.W.R. 120 (B.C. C.A.).

[9]42 W.W.R., at 512.

[10]Ont. L.R.B. file No. 9204-64-U. December, 1964.

reasoning, set out in an article written by J.F.W. Weatherill (the Board's Deputy Vice-Chairman at the relevant time), was based on their having viewed the two processes as being different in nature.[11] This is the very same approach that is taken to preclude the application of *res judicata* in a criminal proceeding in regard to facts established in a previous civil action.[12]

Similar reasoning has been applied where an authority operating under two or more different statutes makes apparently conflicting decisions. in *Re Gloucester Properties Ltd. et al. And The Queen in Right of British Columbia*,[13] the British Columbia Supreme Court held that the province's Environment and Land Use Committee, acting under two separate statutes, was not bound by a decision made pursuant to one when contemplating the other since the two Acts imposed contrasting responsibilities.

The Privy Council has dealt with the application of the *res judicata* doctrine to the purely 'administrative' act of tax assessment on at least two occasions. In one case, it was said that *res judicata* did not apply when the assessment was challenged in Court because the statute did not preclude the taxpayer's right to do so. [14] In a more recent decision, the Privy Council held that *res judicata* "cannot constitute an estoppel when a new issue of liability to a succeeding year's rate or tax comes up for adjudication".[15] The question as to whether a tax assessment decision ought to be protected by the principle of *res judicata* does not appear to have been considered in either of these cases.

The Supreme Court of Canada, in refusing to apply the *res judicata* rule to a decision of the Tariff Board classifying products under the *Customs Act*, did not venture to say that the rule was inappropriate but merely looked to the rule's exceptions to find the means of avoiding its' application.[16]

Earlier decisions dealing with the application of *res judicata* to a judge's 'discretionary' power to issue prerogative writs appear to support the proposition that it is not the nature of the tribunal but the nature of the decision being made that is important. In *Grand Junction and Midland Railways of Canada* v. *Corporation of Peterborough*, the Privy Council said that "the refusal of the prerogative writ of mandamus cannot be pleaded as *res judicata* in

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[11]J.F.W. Weatherill, "Res Judicata in an Administrative Tribunal", (1965) 4 Western Ont. L. Rev. 113 at 119-20.

[12]See *Re Dineen Roads & Bridges Ltd. and United Brotherhood of Carpenters and Joinders of America et. al.* (1975), 60 D.L.R. (3d) 86 (Ont. H.C., Div. Ct.).

[13](1980), 116 D.L.R. (3d) 596 (S.C.C.).

[14]*Bennett and White (Calgary) Ltd.* v. *Municipal District of Sugar City No. 5*, [1951] A.C. 786 (P.C.) (Alta.).

[15]*Society of Medical Officers of Health* v. *Hope (Valuation Officer)*, [1960] A.C. 551 (H.L.(E.)); see also *Caffoor* v. *Income Tax Commissioner*, [1961] A.C. 584 (P.C.) (Ceylon).

[16]*Javex Co. Ltd. et. al.* v. *Oppenheimer et al*, [1961] S.C.R. 170; 26 D.L.R. (2d) 523 (S.C.C.).

bar of (the present) suit; because first the jurisdiction exercised in such a refusal is a discretionary jurisdiction."[17]

On this point the dissenting opinion of Martland J. (Laskin C.J.C., concurring) in *Grillas* v. *Minister of Manpower and Immigration*[18] is of particular interest. Mr. Justice Martland found that the Immigration Appeal Board's power to review a decision was an "equitable" jurisdiction of a continuing nature exercisable at the Board's discretion and hence. *res judicata* was not applicable.[19] Mr. Justice Pigeon, in a separate judgment concurring with the majority result, cited *The City of Jonquiere* v. *Munger*[20] as authority for the principle that "decisions made by a board established under a statute pertaining to the exercise of an administrative jurisdiction (are final).[21] However, Mr. Justice Pigeon did not characterize the matter as one involving the application of *res judicata*. Moreover, the 'Jonquiere' case dealt with the jurisdiction of an arbitral board to vary its award and not with the principle of *res judicata*.

There are a number of cases in which, like 'Jonquiere', the issue is characterized as a 'jurisdictional question' rather than one of the applicability of *res judicata*.[22] The distinction apparently depends upon whether a Board undertakes to actually re-open a matter, which raises a jurisdictional question,[23] or whether it simply entertains a second application in regard to the same matter, which raises the issue of *res judicata*.[24] Wade explains the issue in this fashion:

> *Res judicata* is sometimes confused with the principle of finality of statutory decisions and acts, and thus with the general theory of judicial control. If a public authority has statutory power to determine some question, for example, the compensation payable to an employee for loss of office, its decision once made is normaly final and irrevocable. This is not because the authority and the employee are estopped from disputing it, but because, as explained elsewhere, the authority has power to decide only once and thereafter is without jurisdiction in the case. Conversely, where a statutory authority determines some matter within its jurisdiction, its determination is binding not because of any estoppel but because it is a valid exercise of statutory power.[25]

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[17](1887), 13 A.C. 136 at 142 (P.C.) (per Lord Hobhouse) (Ont.); see also *Canaday's Apparel Ltd.* v. *Ross et al* (1959), 30 W.W.R. 697 (Sask. Q.B.).

[18][1972] S.C.R. 577, 23 D.L.R. (3d) 1 (S.C.C.).

[19][1972] S.C.R. at 590.

[20][1964] S.C.R. 45.

[21]*Supra*, footnote 19, at 592.

[22]*e.g., Canadian Industries Ltd.* v. *Development Appeal Board of Edmonton and Madison Development Corporation Ltd.* (1969), 71 W.W.R. 635 (Alta. S.C.); *Lambert* v. *Alberta Teachers Assoc.*, [1978] 6 W.W.R. 184 (Alta. S.C., T.D.).

[23]*e.g., The City of Jonquiere* v. *Munger*, supra footnote 20; *Canadian Industries Ltd., supra*, footnote 22.

[24]*e.g., Zorba's Food Service Ltd.* v. *City of Edmonton* (1970), 74 W.W.R. 218 (Alta. S.C., Appl. Div.).

[25]Wade, *supra*, footnote 5, at 227.

In a case where the issue was whether a Development Appeal Board could issue a permit concerning the use of a building which conflicted with a condition or an earlier permit, Mr. Justice Johnson of the Supreme Court of Alberta said:

> This leads to the second argument, which is that the Board's original order and the conditions which were attached to its operation were akin to a judgment of a court of law and the matter was now *res judicata*. The *res judicata* (sic) cannot, of course, apply to these orders because they are not orders of a court. The rule that orders of administrative boards which arrive at their decisions by applying judicial or quasi-judicial procedures are given such finality that they cannot be altered or appealed is akin to *res judicata*. To determine if the original order of the Development Appeal Board was that kind of order it is necessary to determine whether the procedure for the application, including the hearing of the appeal, is quasi-judicial or is merely an administrative procedure, for if it is merely the latter, the rule has no application: de Smith, Judicial review of Administrative Action, 2nd ed., p. 91.[26]

The reliance of the Alberta Court on the administrative/judicial dichotomy to solve the problem of whether *res judicata* applied and its reference to the second edition of de S[illegible]h as authority is worth noting because, in a later edition, Professor de Smith wrote in regard to this very matter:

> Never the less some of these propositions are deficient in recent authoritative support. In particular the dichotomy of judicial and non-judicial acts has not been regularly reaffirmed in the case law. No attempt yet made to reconstruct this area of administrative law has carried conviction, though the difficulties inherent in the conceptual reasoning have been skillfully exposed.[27]

Similarly, Professor Wade refers to the attempt to distinguish administrative from judicial decisions in the application of *res judicata* as another example of "that favourite fallacy".[28]

Perhaps what is needed is an approach to the problem that more closely examines the common law rationale for the *res judicata* principle and whether the same rationale should apply in bestowing finality on the determination of any particular issue by a statutory decision-maker. There have been some efforts made in this direction by Labour Relations Boards and arbitrators, in particular, determining whether *res judicata* applies to their own previous decisions.

The reasons for the *res judicata* rule have been simply put:

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[26]*Supra*, footnote 24, at 220 (per Johnson J.A.).

[27]*Supra*, footnote 7, at 93.

[28]*Supra*, footnote 25, at 230.

> They depend on, 1, Public Policy, it being in the interest of the state that there should be an end of litigation: *Interest rei publicae ut sit finis litium* and 2, the hardship to the individual that he should be twice vexed for the same cause: *Nemo vexari pro eodem causa.*[29]

One need not look long or hard to come up with all sorts of administrative board decisions that, on the aforementioned grounds of utility and equity, simply ought not to be final. Indeed, there were allusions to this fact in *Re Zorba's Food Services Ltd.* v. *City of Edmonton*[30] where the Court suggested that to have imposed *res judicata* on the Development Appeal Board's decisions would have resulted in individual hardship and would, as well, have been counter to community interest. It seems to be equally clear that to *not* impose *res judicata* on the arbitration of a group of employees' wages would be counter to both public interest and individual equity.

The Ontario Labour Relations Board has had considerable opportunity to grapple with the issue of *res judicata*. They have adopted the approach of disavowing its applicability (while at the same time citing its virtues) and applying a doctrine "akin to *res judicata* in a variety of circumstances".[31] The Board's comments when applying the doctrine in *Ontario Nurses Association* v. *Oakwood Park Lodge* are typical:

> Although the Act does not expressly authorize the application of the doctrine of *res judicata*, there are strong practical and policy grounds for doing so. Rights and duties have meaning only if they are certain and relatively stable. Parties expect that a decision of the Board will clarify their legal relationship and put an end to the controversy between them. Board decisions would lose much of their value if they did not provide a reliable guide for the conduct or planning of the parties affairs. Continuous litigation would undermine the harmonious relationship between the parties which the Act is designed to foster, and could give rise to abuse and harassment of a weaker party. It could also give rise to costly duplication, inefficient utilization of the Board's scarce resources, and a serious impediment to the effective administration of the Act. This potential consequence is especially serious in labour relations matters where "time is the essence" and finality is an important statutory objective.[32]

At issue in the case was the status of persons as "employees" under the Act, an issue in which finality is probably a desirable objective. Some Labour Relations Board decisions, however, involve far broader questions of public interest and affect persons to a far less permanent degree. The New Brunswick Public Service Labour Relations Board, for example, has refused to apply the principle in its decisions designating essential employees prohibited from striking, a function which by statute the Board must perform in each successive round of negotiations.[33]

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[29]*Pickford* v. *Daley* (1957), 7 D.L.R. (2d) 600, at 604 (per Doull J.) (NSSC); see also Bower, *supra* footnote 1, at 4 and 176-7.

[30](1970), 12 D.L.R. (3d) 618.

[31]*Ontario Nurses Association* v. *Oakwood Park Lodge*, [1980] O L R B Rep. 1501, at 1504.

[32]*Ibid.*, at 1503.

[33]In the matter of an Application Under s. 50 for Designation in a Dispute Involving Treasury Board and New Brunswick Council of School Board Unions, Jan. 12, 1982 (N.B.P.S. L.R.B.).

Dr. Wade advocates the reconciliation of the fundamental idea of statutory decision-making with the concept of *res judicata,* as opposed to simply discarding it. He points out that statutory decision-makers have a "statutory public duty to make correct (decisions) on each occasion, and that no estoppel can avail to prevent them from doing so".[34] He further points out that it is contrary to public interest to bind public authorities to wrong decisions by the mechanical applicaton of *res judicata.* According to Professor Wade, it is this very different dimension of public interest in the area of statutory decision-making authority that distinguishes it from the adjudication of private rights, and which makes *res judicata,* another principle of public interest, inapplicable. Dr. Wade, while admitting some scope for the application of *res judicata* to administrative decision, states:

> A large class of administrative cases must also be rules out because they involve public policy. . . . As will be seen the discretionary power of a public authority cannot normally be fettered, even by its own decisions. *Res judicata* rests on the theory of an unchanging law, whereas policy must be free to change at any moment, as the public interest may require.[35]

Such a formulation of the principal underlying the application of *res judicata* to administrative decisions offers both some coherence and a rational explanation. Certainly, it is also consistent with the often unstated philosophy in most of the recent decisions. In addition, it would appear to be in conformity with those decisions which have held that *res judicata* does not apply to the 'discretionary' authority of judicial bodies.

On several occasions recently, Courts have refused to apply the doctrine of *res judicata* to those decisions of statutory tribunals which have a broad public impact. As examples, one could list a rate amendment decision for Bell Canada by the Canadian Transport Commission,[36] a decision by an Agricultural Land Commission[37] and the decision of a professional governing body regarding charges of negligence against one of its' members.[38] Although the latter case substantially involved an individual's right, it was overshadowed by the public responsibility of a self-governing professional body and was thus, conceptually different from those cases involving private arbitration of an employee's rights where *res judicata* is often applied.

On the other hand, in a case where the Ontario Labour Relations Board was dealing with the same parties in an application to certify a union under section 8 of the Ontario Act, adjudicated on by the Board in a previous application involving unfair labour practices, the Ontario Division Court said:

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[34]*Supra,* footnote 25, at 231.

[35]*Ibid.,* at 236.

[36]*Centre for Public Interest Law* v. *Canadian Transport Commission and Bell Canada,* [1974] 1, S.C.R. at 276.

[37]*Supra,* footnote 13.

[38]*Regina* v. *Association of Professional Engineers of Saskatchewan, Ex Parte Johnston* (1968), 2 D.L.R. (3d) 588 (Sask. C.A.).

> The Act is a code designed to resolve volatile labour disputes quickly and relatively inexpensively. To apply, as the Board did here, the doctrine of *res judicata* in a limited way, appears to be proper and commendable. To give effect to the applicant's contention (that the question of a contravention of the Act had to be relitigated) would fly in the face of the intent of the legislation.[39]

In trying to decide whether or not to impose the principles of *res judicata* on an arbitration tribunal established pursuant to labour legislation and a collective agreement, Mr. Justice Monnin of the Manitoba Court of Appeal held, in a dissenting opinion, that it was a principle "reserved for the court rooms".[40] Noting both of the legislators preferences for methods to solve labour disputes that avoid the rigidity and time-consuming features of the court room as well as the complexity of the issue of *res judicata*, Mr. Justice Monnin came to the conclusion that it was not a principle which would further the interest of the parties in the system.

The Arbitrators, themselves, have displayed considerable ingenuity in coming to grips with this issue. For example, in the case of *Wicket and Craig*[41] Professor Arthurs was able to save the baby even while throwing out the bathwater by distinguishing betwen the "persuasive" as opposed to the "preclusive" effect of a previous decision. Although he did not consider himself legally bound to follow an earlier decision, Professor Arthurs said:

> Thus, in considering the effect to be accorded an earlier award between the same parties . . . a second arbitrator considers both its reasoning and its expected precedential role, and may be so overwhelmed by the combined weight of both factors that he is persuaded to defer to it even though he would not have done so were he to consider its reasoning along.[42]

The dilemma that *res judicata* poses to the arbitrator with a jurisdiction to exercise is put very well by Professor Kuttner in *Re Desire Robichaud*:[43]

> Although it has long been established that the doctrine of *res judicata* is not integral to the system of grievance arbitration, to deny the overriding persuasive force of previous decisions made in similar facts circumstances calling for the interpretation of the same collective agreement would wholly undermine those values universally accepted as essential to any rational system of third party dispute resolution: certainty, uniformity, stability and predictability. Of course, neither justice nor equity is to be sacrificed to these values and an arbitrator is statutorily bound to adjudicate the dispute before him on its merits. Indeed, to do otherwise, and blindly adopt the reasons for decisions given in a previous dispute could arguably be viewed as a declining of jurisdiction.[44]

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[39]Tandy Electronics Ltd. and Commercial Workers Union, Local 832, 80 CLLC 14, at 216 (*per* Corey J.).

[40]*Re Manitoba Food Union & Commercial Workers Union, Local 832 and Canada Safeway Ltd.* (1981), 120 D.L.R. (3d) 42 (Man. C.A.).

[41]*Re Amalgamated Meat Cutters, Local 125L, and Wicket and Craig Ltd.* (1963), 13 LAB ARB. CAS. 363 (O L R B).

[42]*Ibid.*, at 365.

[43]Re Desire Robichaud, unreported decision under Public Service Labour Relations Act RSNB 1973 — filed July, 1981.

[44]*Ibid.*, at 14.

Considerable guidance for arbitrators dealing with this issue has been provided in an early authoritative comment by J. F. W. Weatherill[45] which is, in fact, frequently cited with approval by arbitrators.[46]

The theme that remains constant in all the authorities is that one must look to the jurisdiction set out in the statutory authority to answer the question of whether the Board can consider the matter before it and no estoppel can be raised to prevent a statutory authority from exercising its jurisdiction.[47] The use of the distinction of whether the board or tribunal is a court or a statutory tribunal, as a basis for determining whether *res judicata* applies, does not appear to have received overwhelming acceptance. Similarly, the question of whether or not the decision-maker is rendering a judicial or administrative decision does not appear to have been generally accepted as the basis for determining whether or not the *res judicata* rule should apply.

A review of the authorities leaves the impression that what one must do is examine very carefully the statutory power under which a decision-maker is operating in order to determine whether or not it was ever intended that the jurisdiction exercised by that Board was one in which an estoppel ought to have applied. This requires a clear understanding of the interest of the parties and the public interest in the decision-making process coupled with a consideration of whether those interests are furthered by the application of the principle of *res judicata* to the decisions made by that board or tribunal. The justice that is promoted by the application of the *res judicata* principle to judicial decisions (of the courts) is not absolute. It would, therefore, be a mistake to assume that justice would be done in all cases by the application of the rule of *res judicata* to the judicial or administrative decisions made by boards or tribunals acting under a statutory authority. Clearly, there are situations where justice is served by imposing on a decision-maker some degree of consistency. Just as clearly, however, there are many types and instances of decision-making where justice would not be served by imposing on the system the rigidity inherent in the principle of *res judicata*. Having recognized this, I think it is safe to say that it is always preferable to address the fundamental question of whether or not *res judicata* applies, rather than attempt to make use of the exclusionary rules accompanying *res judicata* to avoid its application in those instances where it would be inconvenient.

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[45]J.F.W. Weatherill, "The Binding Force of Arbitration Awards" (1958), 8 LAB. ARB. CAS. 323. This article also deals with *stare decisis* and its application to arbitral jurisprudence.

[46]*e.g. Re Phillips Cables and Limited Electrical, Radio and Machine Workers, Local 510* (1978), 16 L.A.C. (2d) 225 (O.L.R. B.). This decision is, in itself, an excellent survey of the jurisprudence.

[47]*Gill* v. *R.* (1978), 88 D.L.R. (3d) 341 (F.).

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