

JURISDICTIONAL FACT, CONSTITUTIONAL FACT AND THE PRESUMPTION OF CONSTITUTIONALITY

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I

Statutory tribunals are limited creatures. Statutes rigorously circumscribe their power. Tribunals may only do such things as statute specifies; their power is exercisable in circumstances only for which statute provides. If the tribunal's constituent statute says certain facts must exist prior to the exercise of tribunal power, these facts must exist. The facts — known as jurisdictional facts — are a condition precedent to the valid engagement of tribunal jurisdiction.

Jurisdictional facts pose a logical problem. The facts must exist as a matter of law, not in reality. Some authoritative body must make findings as to the facts. Statutory tribunals have the obligation to make such findings, but it has always been held that their findings are reviewable by superior courts.¹ The tribunal cannot assume jurisdiction by a wrong finding on the facts.² As Mr. Justice Farwell explained in *R. v. Shoreditch Assessment Committee*, "it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure"³

The logical problem inheres in the reason why statutory tribunals are established in the first place. The *raison d'être* for creating administrative tribunals is to provide machinery for cheap, quick, and expert administration. That purpose is defeated to the extent that courts interfere with tribunal proceedings. When the courts review a tribunal's findings of fact, the administrative machinery becomes suspiciously inefficient; it ceases to be quick, cheap or expert. If, on the other hand, a tribunal's findings of jurisdictional fact are unreviewable, the tribunal metamorphoses. From a limited, stinted jurisdiction, it accretes court-like power to determine the extent of its own jurisdiction, a phenomenon contradicting its legal nature.

How is this dilemma to be resolved? Dr. D.M. Gordon suggested as long ago as 1929 that courts have no business interfering with a tribunal's findings of fact. The only relevant question is: whose opinion — court or tribunal — shall be authoritative.⁴ The legislature, said Mr. Gordon, gives a precise answer to that question: "And always the Legislature, when it says, If such and such facts exist, etc., means, If these facts exist in the opinion of the tribunal indicated".⁵ If the tribunal autocratically usurps a jurisdiction it was not meant to have, the legislature itself will correct the tribunal.⁶

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1. *Bunbury v. Fuller* (1853), 9 Ex. 111, at 140.

2. *R. v. Fulham (etc.) Rent Tribunal ex p. Zerek*, [1951] 2 K.B. 1, at 6.

3. [1910] 2 K.B. 859, at 880. See also *Anisminic Ltd. v. Foreign Compensation Commsn.*, [1969] 2 A.C. 147, at 197 (per Lord Pearce), at 209 (per Lord Wilberforce), at 233 (per Browne J.).

4. D.M. Gordon, "The Relation of Facts to Jurisdiction" (1929), 45 L.Q.R. 459, at 463.

5. *Id.*, at 470. See also D.M. Gordon, "The Observance of the Law as a Condition of Jurisdiction" (1931), 47 L.Q.R. 386; D.M. Gordon, "Excess of Jurisdiction in Sentencing or Awarding Relief" (1939), 55 L.Q.R. 521; D.M. Gordon, "Tithe Redemption Commsn. v. Gwynne" (1944), 60 L.Q.R. 250; D.M. Gordon, "Conditional and Contingent Jurisdiction of Tribunals" (1960), 1 U.B.C.L. Rev. 185.

6. This point was first made by Professor Laskin (as he then was) in the context of privative clauses. See B. Laskin, "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses" (1952), 30 Can. B. Rev. 986, at 1000: "The privative clause may be regarded, as far as it reaches, as an expression of legislative policy that the legislature will supervise or correct board misbehaviour"

While Mr. Gordon's view has attracted considerable academic favour,⁷ no court has ever applied it. The Supreme Court of Canada,⁸ as well as the provincial appellate courts,⁹ have rejected Gordon's view completely by their practice. Canadian courts have been aggressive in applying the jurisdictional fact doctrine to review preliminary issues of fact upon which the tribunal's jurisdiction depends. In *Bell v. Ont. Human Rights Commission*, Mr. Justice Martland said this: "The Act does not purport to place that issue [of jurisdictional fact] within the exclusive jurisdiction of the board, and a wrong decision on it would not enable the board to proceed further".¹⁰

Bell was criticized immediately in the law journals.¹¹ Professor Hogg wrote that the jurisdictional fact doctrine defied "all logic and policy . . .", although he conceded that it was "too late in the day to make the jurisdictional fact doctrine go away". He suggested that "the courts should exercise restraint in the application of the doctrine". Professor Hogg continued:

They can do this in two ways. The best way is to classify the facts as within jurisdiction rather than as jurisdictional, thereby eliminating the doctrine in practice and perhaps eventually in theory. This course is open in every case because . . . the classification of a fact as within jurisdiction can always be supported by strict statutory interpretation The second way in which restraint may be exercised is to continue to classify some findings as jurisdictional, but to attach considerable weight to the view taken by the agency If the point is reasonably arguable, then the court could decide to respect the agency's expert view, even if the court would have reached a different view had the matter been at large.¹²

Since *Bell*, the jurisdictional fact doctrine has twice come before the Supreme Court. The Court unanimously has accepted both of Professor Hogg's suggestions for exercising restraint in reviewing jurisdictional fin-

7. Professor Rubenstein calls it "brilliant": *Jurisdiction and Illegality* (1965) 212. Professor S.A. de Smith referred to it as "The 'pure' theory of jurisdiction": *Judicial Review of Administrative Action* (3rd ed. 1973) 98. Professor P.W. Hogg thinks it is "one of the outstanding contributions to periodical literature in any field of law": "The Jurisdictional Fact Doctrine in the Supreme Court of Canada: *Bell v. Ontario Human Rights Commission*" (1971), 9 *Osgoode Hall L.J.* 203, at 210. *But see* H.W.R. Wade, *Administrative Law* (4th ed. 1977) who contends that the theory is "simple" (p. 253), "mistaken" (p. 255), and "irreconcilable with fundamental rules of subordination without which the legal system itself cannot be coherent" (p. 253).
8. *Toronto Newspaper Guild v. Globe Printing*, [1953] 2 S.C.R. 18; *Jarvis v. Associated Medical Services*, [1964] S.C.R. 497; *Galloway Lumber Co. Ltd. v. B.C. Lab. Rel. Bd.*, [1965] S.C.R. 222; *Metropolitan Life Ins. Co. v. Int'l Union of Operating Engineers, Local 796*, [1970] S.C.R. 425.
9. *Parkhill Bedding v. International Molders* (1961), 26 D.L.R. (2d) 589 (Man. C.A.); *Re Lodum Holdings Ltd.* (1969), 67 W.W.R. 38 (B.C.C.A.).
10. [1971] S.C.R. 756, at 775.
11. Hogg, *supra* n. 7; I.A. Hunter, "Judicial Review of Human Rights Legislation: *McKay v. Bell*" (1972), 7 U.B.C.L. Rev. 17; D. Mullan, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada — A Mitigating Plea" (1972), 10 *Osgoode Hall L.J.* 440. The criticisms differ considerably and, in fact, are equally critical of each other.
12. Hogg, *supra* n. 7, at 216-17. Gordon had anticipated the second suggestion. He thought it was "hopelessly illogical": "The Relation of Facts to Jurisdiction" (1929), 45 L.Q.R. 459, at 475. He continued (at pp. 475-6): "If the facts in the absolute are to govern, the sufficiency of evidence must be irrelevant; if the sufficiency of evidence is to govern, the facts in the absolute must be irrelevant. And how can a supervising Court go into the sufficiency of evidence on any point without exercising appellate jurisdiction, which can only be given by express enactment." Gordon did concede, however, that the suggestion was "practical" (at p. 475).

Is the suggestion really illogical? It is incorrect to draw opposition between "the facts in the absolute" and "the sufficiency of evidence". If a court interferes to reverse tribunal findings, it is not the facts in the absolute which govern; it is the court's view of these facts. It means that a second tier review body re-examines the findings. The relevant question must be: When (if ever) should the review mechanism be engaged? If the review mechanism be used as an emergency switch, activated when the error appears plain and unmistakable in circumstances where grave injustice would result, the suggestion is not only "practical"; it is logical and necessary."

dings. In *C.U.P.E. Local 963 v. New Brunswick Liquor Corp.*¹³ the Court was asked whether a labour board wrongly assumed jurisdiction over a labour dispute by misinterpreting a section of the *Public Service Labour Relations Act*.¹⁴ Mr. Justice Dickson, for a unanimous Court, refused to find that the board's jurisdiction depended on correct interpretation of the section. He used "judicial restraint",¹⁵ applying Professor Hogg's first suggestion squarely.

The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.¹⁶

Professor Hogg's second suggestion — that the court interfere only if the tribunal's jurisdictional findings are unreasonable — was applied by the Court in *Jacmain v. A.G. Canada and Public Service Staff Relations Board*.¹⁷ Mr. Justice Dickson, dissenting on other grounds, stated the governing principle in this way:

The Court should allow some latitude in its surveillance of jurisdictional findings. It should ask whether there is substantial evidence for decisions of fact and a rational basis for decisions of law, or mixed decisions of fact and law. The role of the court is one of review, not trial *de novo*.¹⁸

Mr. Justice Pigeon, for the majority, made the same point.

I doubt that if I held the Adjudicator could review the sufficiency of the cause of rejection, I would hold the Federal Court of Appeal entitled to revise his decision. It is true that it is a finding on which his jurisdiction depends, however it was noted in *Segal v. The City of Montreal* [1931] S.C.R. 460 at p. 473, that where the jurisdiction depends upon contested facts, a superior court will hesitate before reversing the inferior court's findings of fact, and will only do so on 'extremely strong' grounds.¹⁹

C.U.P.E. and *Jacmain* are the first cases in the Supreme Court of Canada that probe the theoretical foundation of the jurisdictional fact doctrine. Mr. Gordon's view is explored in detail. The apparent contradiction referred to by Farwell J. is scrutinized. All policies developed by the academic writers and case law are considered. Alternatives are canvassed. That two judgments of the Supreme Court, following close on the heels of each other, should have formulated unanimous views on the point must be taken to have laid the jurisdictional fact controversy to rest in Canada.

The present law as to jurisdictional fact may be summarized as follows: Tribunal findings of jurisdictional fact are reviewable at the outset of the case, but will only be reversed on extremely strong grounds. The courts use restraint. Reversal of jurisdictional findings is reserved for clear cases of error. It must be shown that the tribunal proceeded on insufficient evidence or that no rational basis existed for the result reached. Tribunal findings will not be characterized as jurisdictional in doubtful cases.

13. *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* (1979), 97 D.L.R. (3d) 417 (S.C.C.)

14. R.S.N.B. 1973, c. P-25, s.102(3)(a).

15. *Supra* n.13, at 424.

16. *Supra* n.13, at 422.

17. [1978] 2 S.C.R. 15.

18. *Id.*, at 29.

19. *Id.*, at 42. Mr. Justice de Grandpre wrote separate reasons. He did not address the jurisdictional fact doctrine because, as he said: "I accept the adjudicator's finding of fact and wish to consider only his conclusion of law": *Id.*, at 36.

II

The jurisdictional fact doctrine is not the only situation in which capacity to exercise power depends upon findings of fact. A similar phenomenon exists in constitutional law. The constitutional authority of Parliament or the legislatures to exercise legislative power in relation to particular matters often depends on factual findings. For example, Parliament's extraordinary power to invade provincial heads of jurisdiction during times of national crisis requires the existence, in fact, of an emergency. Provincial legislative regulation of local works and undertakings requires that the work and undertaking be local. Provincial regulation of commodity market congestion requires that the market be provincial; it could not be interprovincial or international. Federal legislation in relation to labour relations requires, as a matter of fact, that federal authority over the labour relations of the undertaking subject to federal jurisdiction be an integral element of such federal jurisdiction.²⁰ Findings of fact upon which the legislature's constitutional power depends may be called "constitutional facts".

Suppose now that the first authority responsible to find the constitutional facts is an administrative tribunal. For example, when employees seek certification under the *Canada Labour Code*²¹ the Canada Labour Relations Board must determine whether a federal undertaking is present. The Board must decide, additionally, whether the operation in which the employees are engaged is essentially, vitally and integrally related to that federal undertaking.²²

Clearly, the facts are jurisdictional facts. The Board's authority to certify depends upon the Board's findings of fact; the Board can proceed only if it finds there is a legally relevant relation between the employees and a federal undertaking. If this were the end of the matter, the jurisdictional fact doctrine articulated in *C.U.P.E.* and *Jacmain* would apply. If there were a rational basis for the Board's findings, the court would hesitate to interfere; it would be slow to characterize the Board's findings as jurisdictional facts.

But this is not the end of the matter. More than the Board's statutory jurisdiction depends upon the Board's findings of fact. The constitutional authority of Parliament to extend its Labour Act to the employees also turns on the Board's findings. The stakes are higher; constitutional integrity is called into question. If a reviewing court disagrees with the Board's findings, can constitutional authority nevertheless accrue to Parliament because its Labour Board's findings are based on sufficient evidence?

20. See e.g., *Emergency: Fort Frances Pulp and Power Co. v. Man. Free Press Co.*, [1923] A.C. 695; *Wartime Leasehold Regulations Reference*, [1950] S.C.R. 124; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Marketing: A.G. Man. v. Man. Egg and Poultry Assn.*, [1971] S.C.R. 689; *Reference re Farm Products Marketing Act*, [1957] S.C.R. 198; *Reference re Agricultural Products Marketing Act*, (1978), 19 N.R. 361 (S.C.C.); *Local and Interprovincial Undertakings: C.P.R. v. A.G. B.C.*, [1950] A.C. 122; *A.G. Ont. v. Winner*, [1954] A.C. 541; *Dionne et al. v. Public Service Board (Que.)* (1978), 18 N.R. 271 (S.C.C.); *Labour Relations: Montcalm Construction Inc. v. Minimum Wage Commission* (1979), 25 N.R. 1. (S.C.C.); *Northern Telecom Ltd. v. Communications Workers of Canada et al.* (1979), 98 D.L.R. (3d) 1 (S.C.C.).

21. R.S.C. 1970, c. L-1.

22. *Arrow Transfer Co. Ltd. et al.*, [1974] 1 Can. Lab. Rel. Bd. R. 29.

This situation recently arose before the Supreme Court of Canada in *Northern Telecom Ltd. v. Communications Workers of Canada and C.L.R.B.*²³ In this case the Communications Workers (the Union) successfully applied to the Canada Labour Relations Board for certification. A question of constitutional jurisdiction was raised but was not seriously argued before the Board or the reviewing Federal Court of Appeal. Counsel for Telecom stated before the Board that he did not contest the issue of constitutional jurisdiction. A lengthy record was produced before the Supreme Court, but as Mr. Justice Dickson noted:

What became apparent in the course of oral argument was that serious problems existed in the scope and cogency of the evidence relating to the constitutional question, as a consequence of the position taken by Telecom before the Board.²⁴

After reviewing the relevant proven facts, His Lordship concluded:

Equally clear from the record is the near-total absence of the relevant and material 'constitutional facts' upon which such a delicate judgment must be made. On the evidence in the record, this Court is simply not in a position to resolve the important question of constitutional jurisdiction over the labour relations of the employees involved in the installation department of Telecom.

The absence of any such evidence can be almost wholly attributed to the ambiguous stance taken by Telecom before the Board.²⁵

Counsel for the Union drew the Court's attention to the jurisdictional nature of the facts at issue. Because jurisdictional facts were involved, he argued, the court should allow a degree of latitude; the Board's findings should stand if based on substantial evidence. The Supreme Court rejected this submission completely as no question of the Board's administrative jurisdiction was raised; the appeal involved the constitutional division of authority over labour relations.²⁶ Constitutional facts, not jurisdictional facts, were required. Accordingly, there was no room to apply the jurisdictional fact doctrine as laid down in *C.U.P.E.* and *Jacmain* to protect the Board's findings.

The near total absence of constitutional facts, said Mr. Justice Dickson, placed the Court in a "dilemma". More than the litigant's private interests are affected by constitutional issues. Important interests of two governments are brought into the balance. But here the Union would suffer significantly if the case were sent back to trial for factual determinations. The employees already had been denied certification during five years of proceedings on the jurisdictional issue. Should the Court make the Union wait years longer because of Telecom's questionable tactics in failing to contest the constitutional issue before the Board? Mr. Justice Dickson concluded that without the necessary facts,

23. *Supra* n. 20.

24. *Northern Telecom Ltd.*, *Supra* n. 20, at 12. Mr. Justice Dickson went on to say (at p. 15-16) that there must be evidence of constitutional facts, that is, facts that focus on the constitutional issues, such as evidence relating to:

- (1) the general nature of Telecom's operation as a going concern and, in particular, the role of the installation department within that operation;
- (2) the nature of the corporate relationship between Telecom and the companies that it serves, notably Bell Canada;
- (3) the importance of the work done by the installation department of Telecom for Bell Canada as compared with other customers;
- (4) the physical and operational connection between the installation department of Telecom and the core federal undertaking within the telephone system and, in particular, the extent of the involvement of the installation department in the operation and institution of the federal undertaking as an operating system.

25. *Id.*, at 19.

26. *Id.*, at 12.

this Court is in no position to give a definitive answer to the constitutional question raised. I think we must leave that question to another day and dismiss the appeal simply on the basis that the posture of the case is such that the appellant has failed to show reversible error on the part of the Canada Labour Relations Board.²⁷

Accordingly, the Board's certification order survived.

III

The *Northern Telecom* decision leaves the impression that it is an unusual case. Counsel used "questionable tactics"; the Supreme Court was placed in a "dilemma"; it extricated itself by refusing to answer the constitutional question posed. The decision also appears to leave open the question whether administrative determinations of constitutional fact will be allowed a degree of latitude if based on sufficient evidence as are administrative determinations of jurisdictional fact.

Any impression that the decision is exceptional is quite false. There is solid legal doctrine for deciding similar cases in like manner. Nor is the Court really caught in a dilemma because of the constitutional issue. There is clear legal doctrine for resolving such constitutional questions. Nor again is the question whether the courts must use restraint in upsetting tribunal findings of constitutional fact really left open. The case law supplies an answer.

The legal doctrine relevant to issues of constitutional fact is the presumption of constitutionality. That the presumption of constitutionality may be used in an evidentiary sense to resolve disputed issues of constitutional fact is well established in the United States. In *Lindsley v. Natural Carbonic Gas Co.*, Mr. Justice Van Devanter explained: "[I]f any state of facts reasonably [can] be conceived that would sustain it, [the challenged Act], the existence of that state of facts at the time the law was enacted must be assumed."²⁸ Mr. Justice Brandeis pointed out in *Pacific State Box Co. v. White*²⁹ that the presumption applied equally to specific applications of legislation to concrete facts and circumstances (such as the application of labor legislation to certification proceedings).

Three recent cases from the Supreme Court of Canada make clear that a like evidentiary presumption of constitutionality forms part of Canadian constitutional law. In *Canadian Industrial Gas and Oil Ltd. v. Gov't. of Saskatchewan*³⁰ Mr. Justice Dickson, dissenting on other grounds, applied a presumption of constitutionality to rebut the submission that certain Saskatchewan legislation interfered with federal control over interprovincial trade in oil. The submission raised essentially an issue of fact. In *Kruger and Manuel v. The Queen*, the Supreme Court unanimously applied a presumption of constitutionality to answer the crucial factual question whether the status and capacities of certain British Columbia Indians depended on hunting as a way of life. The Court held:

27. *Id.*, at 20.

28. (1910-11), 31 S. Ct. 337, at 340. See also *Borden's Farm Products Co. v. Baldwin* (1934), 55 S. Ct. 187, at 192.

29. (1935), 56 S. Ct. 159, at 163; 296 U.S. 176, at 186.

30. *C.I.G.O.L. v. Gov't of Sask.* (1978), 80 D.L.R. (3d) 449 (S.C.C.), at 468.

The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former. If, of course, it can be shown in future litigation that the Province has acted in such a way as to oppose conservation and Indian claims to the detriment of the latter . . . it might be very well concluded that the effect of the legislation is to cross the line demarking laws of general application from other enactments. It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians.³¹

Accordingly, British Columbia's *Wildlife Act*³² constitutionally could apply to the Indians. In *Construction Montcalm v. Commission du Salaire Minimum*,³³ Mr. Justice Beetz applied a presumption of constitutionality to decide an issue of constitutional fact. In order to allocate labour relations jurisdiction over Montcalm's employees working at Mirabel Airport, the Court had to determine whether Montcalm was an ordinary building contractor or whether it was a contractor integrally related to a federal undertaking. In the absence of conclusive evidence, Mr. Justice Beetz presumed that Montcalm was an ordinary building contractor. He thereby upheld the application of Quebec's *Minimum Wage Act*³⁴ which had been challenged by Montcalm on constitutional grounds: "If the facts were otherwise, it was incumbent upon Montcalm to allege and prove them."³⁵

Any attacker of legislation must prove such constitutional facts as will demonstrate the constitutional defect alleged. If the attacker does not establish necessary constitutional facts, the presumption of constitutionality governs. All facts will be presumed in favour of constitutional validity. This, it is submitted, is the true explanation for the result in *Northern Telecom*. Counsel for Telecom attacked the constitutionality of the Canada Labour Code as extended to the Union. That raised an issue of constitutional fact — was a federal undertaking present and was there a legally relevant relationship between that federal undertaking and the Union? The presumption of constitutionality required counsel for Telecom to supply an evidentiary record in support of his allegation of constitutional defect. He failed to do so. All disputed issues of fact, therefore, had to be presumed against him and in favour of the legislation's constitutional validity.

IV

Two objections lie against this analysis. First, it can be said that no presumption should operate to regularize a plainly unconstitutional state of affairs. Nor ought any presumption transfer to the federal or a provincial government responsibilities which the constitution prohibits such government from exercising.

The objection has force, but it is answerable. American cases suggest a "reasonableness" limit to the presumption's operation. The court presumes

31. (1977), 75 D.L.R. (3d) 434 (S.C.C.), at 439-40, 443.

32. S.B.C. 1966, c.55; R.S.B.C. 1979, c.433.

33. (1979), 25 N.R. 1 (S.C.C.).

34. R.S.Q. 1964, c. 144.

35. *Supra* n.34, at 11.

only such facts as *reasonably* can be assumed.³⁶ If it is unreasonable to presume the relevant constitutional facts, the court will refrain from so doing; the legislation, accordingly, would be *ultra vires* or inoperative. It follows that no question of regularizing a *plainly* unconstitutional state of affairs could arise.

Further, the presumption of constitutionality is part of a new constitutional jurisprudence which anticipates that narrow constitutional rulings may vary as factual circumstances change.³⁷ If subsequent litigation demonstrates that factual conditions are otherwise than as presumed, the law will fall.³⁸ Large, abstract domains of exclusive constitutional competence never are created by the presumption. So if the constitutional defect alleged is factually unclear and the constitutional issue is narrow, there is every reason to require the attacker affirmatively to prove his case in fact before invalidity of legislation is declared. Otherwise the court would have to invalidate the law on speculative grounds alone; our constitutional law is clear that courts never do that.³⁹

A second possible objection is that the analysis is illogical. If legislation unconstitutionally is extended to cover particular facts, the legislation must be unconstitutional *ab initio*, from the moment the legislature transgresses its constitutional mandate. No presumption that the facts are otherwise can *ex post facto* legitimize the illegal.

This view misunderstands the legal concept of unconstitutional action. Government action cannot be said to be unconstitutional in the sense that it has no existence at law. Those who are affected by such action certainly conceive of and experience it differently. For them, and in reality, such governmental behaviour persists until a suit at law successfully results in a ruling of *ultra vires* or inoperability. But there is many a slip twixt cup and lip. The plaintiff seeking a ruling of unconstitutionality might fail for lack of standing.⁴⁰ He might fail for lack of adequate proof, for procedural defect or otherwise. If he does so fail, the unconstitutional action remains unconstitutional, theoretically, but it continues to have legal effect. So too, with the presumption of constitutionality, which is but part of the evidentiary machinery of an action taken on constitutional grounds. In other words, although in theory certain governmental action may be unconstitu-

36. *Lindsay v. Natural Carbonic Gas Co.* (1911), 31 S. Ct. 337; *Borden's Farm Products Co. v. Baldwin* (1934), 55 S. Ct. 187.

37. P.H. Lane, "Facts in Constitutional Law" (1963), 37 Australian L.J. 108, at 118 explains the position in this way: A statute is passed on the basis of certain facts; when these facts change, the Act becomes inoperative or unconstitutional; and the court could be made aware of this change by the presentation of evidence. Examples of constitutional validity varying as the facts change are *Armstrong v. State of Victoria (No. 2)* (1957), 99 C.L.R. 28 (H.C. of A); *Commonwealth Freighters Pty Ltd. v. Sneddon* (1958-59), 102 C.L.R. 280 (H.C. of A); *Andrews v. Howell* (1941), 65 C.L.R. 255 (H.C. of A), at 275. In Ireland, see *Ryan v. The Attorney General*, [1965] I.R. 294 (S.C.).

Chief Justice Laskin made clear that the Canadian position is similar. In *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at 427; 68 D.L.R. (3d) 452, at 499, the Chief Justice said this:

[A] statutory provision valid in its application under circumstances envisaged at the time of its enactment can no longer have a constitutional application to different circumstances under which it would, equally, not have been sustained had they existed at the time of its enactment.

See also *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.*, [1923] A.C. 695, at 706. The position is the same in the United States: *Hamilton v. Kentucky Distilleries & Warehousing Co.* (1919), 251 U.S. 146, at 162; 64 L. Ed. 194, at 202.

38. *Kruger & Manuel v. The Queen* (1977), 75 D.L.R. (3d) 434, at 439-40 (S.C.C.).

39. *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, 586; *C.I.G.O.L. v. Gov't of Saskatchewan* (1977), 80 D.L.R. (3d) 449, 465.

40. This almost happened to Mr. Forest, despite *Thorson v. Attorney-General for Canada*, [1975] 1 S.C.R. 138; and *Nova Scotia Board of Cinema Censors v. McNeil*, [1976] 2 S.C.R. 265. See *Forest v. Attorney-General for Manitoba* [1978] 5 W.W.R. 721 (Man.Q.B.).

tional, the action will nevertheless persist unless the right person successfully brings the right action at the right time.⁴¹ Unconstitutionality cannot be understood as an unqualified condition. It has to be understood in light of the plaintiff's ability to bring to fruition judgment in his favour.

This relative sense in which unconstitutional action must be conceived is very much in line with what the courts have worked out in administrative law. A similar problem arises with respect to *ultra vires* administrative action which is void *ab initio*. "[I]t leads to confusion", said Lord Diplock, "to use such terms as 'voidable', 'voidable ab initio', 'void' or 'a nullity' as descriptive of the legal status of subordinate legislation alleged to be *ultra vires* before its validity has been pronounced on by a court of competent jurisdiction."⁴² In *Calvin v. Carr*, the Privy Council held that administrative action which is void, still has legal existence.

Their Lordships' opinion would be, if it became necessary to fix upon one or other of these expressions [voidable or void] that a decision made contrary to natural justice is void, but that, until it is so declared by a competent body or court, it may have some effect, or existence in law . . . the impugned decision cannot be considered as totally void, in the sense of being legally non-existent. So to hold would be wholly unreal. The decision of the stewards resulted in . . . immediate and serious consequences for the Plaintiff . . . These consequences remained in effect unless and until the stewards' decision was challenged . . .⁴³

It is perfectly logical that the presumption of constitutionality should extend this doctrine to constitutional law. The proper party must bring the proper action at the proper time in order to obtain a ruling of constitutional defect. It is true in constitutional and administrative law that waiver cannot confer jurisdiction,⁴⁴ but that principle does not transform the concept of unconstitutional behaviour or *ultra vires* administrative action into a concept without conditions or qualifications. It is perfectly rational that the presumption of constitutionality require, as a condition of a successful action, that an attacker of legislation sufficiently make out his case in fact, as well as in law. If the party complaining waives contestation of the constitutional issue at trial or before a board, and thus refrains from adducing relevant constitutional facts, the presumption must defeat him. It would be unfair and unwise to reopen the factual issue on appeal where inferior fact gathering capacity exists. For example, in the *Northern Telecom* case, it would have worked a serious hardship on the Union if the case could have

41. See Wade, *supra* n.7, at 300 who, in speaking of *ultra vires* administrative action, says:

The reality of the matter, therefore, is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceeding and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it . . .

Lord Denning "after some vacillation" agrees with Professor Wade's explanation of void and voidable administrative action: *The Discipline of Law* (1979) 78; *And see Firman v. Ellis*, [1978] 3 W.L.R. 1(C.A.), at 15.

An example of the point may be observed in a constitutional setting in *Re Abel and Peneianguishene, Mental Health Center* (1979), 24 O.R. (2d) 279, at 296 (Div. Ct.) where Mr. Justice Grange said:

The board is an emanation of the Province having been set up under the *Mental Health Act*. It may be that the enactment of s. 547 of the Criminal Code has rendered unconstitutional or inoperative s. 31 of the *Mental Health Act* but that question was neither raised nor argued before us.

My point is that notwithstanding the existence of a substantial issue of unconstitutionality, the administrative action survives. In theory, the administrative action may be unconstitutional, but that is irrelevant unless the proper proceeding, properly brought, results in a ruling of constitutional defect. See also *Les Immeubles Fournier v. St. Hilaire* (1975), 52 D.L.R. (3d) 89, at 97-98.

42. *Hoffman-LaRoche v. Secretary of State for Trade and Industry*, [1975] A.C. 295, at 366.

43. [1980] A.C. 573 (P.C.), at 589-90; 2 All E.R. 440, at 445-6. See also Wade, *supra* n. 7, at 300, 450; *Firman v. Ellis*, *supra* n.41; *The Discipline of Law*, *supra* n.41, at 77-78.

44. The point in administrative law embraces statutes designed to protect the public, not cases in which private rights only are affected: see *Bd. of Naturopathic Physicians of B.C. v. Heuper*, [1976] 3 W.W.R. 481; 66 D.L.R. (3d) 727 (B.C.C.A.).

been sent back for trial. Years more would have passed before certification. The logical solution is to require the party complaining of constitutional defect to prove his case.

V

Is there room in the doctrine of constitutional fact for the courts to use restraint in upsetting the findings of constitutional fact made by an administrative tribunal?

Fifty years ago this question raised difficulties in American constitutionalism. In *Crowell v. Benson*,⁴⁵ a submission was made that certain administrative procedures conferred judicial power on an executive agency contrary to art. III of the Federal Constitution. In rejecting that submission, the U.S. Supreme Court conceded that access to the courts must be maintained in the case of facts which are "fundamental or 'judicial' in the sense their existence is a condition precedent to the operation of the statutory scheme". The Court continued:

In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depends.⁴⁶

Crowell v. Benson prohibits an administrative tribunal for becoming the final adjudicator of constitutional facts. It does not, in terms, prohibit the court from treating agency determinations of constitutional fact with respect. Nor does it say courts may not uphold tribunal findings if reasonable, even though the court might have decided differently if sitting in first instance. This latter point was discussed in *St. Joseph Stock Yards Co. v. United States*.⁴⁷ In that case constitutional complaint was made against an executive prescription of maximum rates pertaining to the Stock Yard Company. The Federal District Court held itself bound to accept the Secretary's findings upon which the rates were based if supported by substantial evidence. In considering whether the District Court exercised a proper standard of review, the Supreme Court said:

The court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings.

45. (1932), 285 U.S. 22, at 54-62.

46. *Id.*, at 56-7. The case is explained by A. Larson, "The Doctrine of Constitutional Fact" (1941), 15 Temple L.Q. 185, at 208 as follows:

The real reasoning behind *Crowell v. Benson* is this . . . it is the sole prerogative and duty of the Judiciary to keep Congress from exceeding its constitutional powers. If, therefore, Congress' action may in effect be carried over to situations beyond its powers just as effectively by a finding of fact . . . the judicial prerogative of keeping Congress' action within bounds extends to examining these findings of fact . . . ;

See also J. Dickinson, "Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of Constitutional Fact" (1932), 80 U. of Pa. L. Rev. 1055.

47. (1936), 298 U.S. 38; 56 S. Ct. 720.

But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency.⁴⁸

In the United States, thus, it seems clear that the doctrine of jurisdictional fact, as articulated in *C.U.P.E.* and *Jacmain*, applies equally to administrative determinations of constitutional fact. It applies in the sense that the courts will respect administrative determinations of constitutional fact if based on sufficient evidence.

There is every reason to think that the presumption of constitutionality creates a similar constitutional fact doctrine in Canada. Canadian case law demonstrates that the presumption of constitutionality is not lightly overcome. "Before the Court concludes that the Province has transcended its constitutional powers . . .", said Mr. Justice Dickson, "the evidence must be clear and unmistakable . . ."⁴⁹. Lord Wright used virtually identical language: ". . . very clear evidence that an emergency has not arisen, or that the emergency no longer exists, is required . . ."⁵⁰. It is not necessary to reformulate these holdings into the known categories of proof on the probabilities or beyond a reasonable doubt. The point is sufficiently intelligible in the language of the decided cases. It comes to this. A presumption of constitutionality reinforces administrative determinations of constitutional fact which tilt in favour of constitutional validity. Those determinations, as so reinforced, are not easily overcome. The Court will hesitate; a degree of latitude will be allowed. Very clear evidence is required before the court concludes constitutional facts necessary to support challenged legislation do not exist. Canadian courts will support an administrative determination of constitutional fact if based on sufficient evidence.

How does the presumption of constitutionality operate if insufficient or no administrative determinations of constitutional fact have been made? That is the situation which arose in *Northern Telecom*. On the recent cases,⁵¹ the courts presume such constitutional facts as are necessary to support challenged legislation. They will do so even if no facts are adduced in evidence. Very clear evidence is required to overcome the presumption. The court will hesitate before upsetting legislation on factual grounds.

A final possibility is that administrative determinations of constitutional facts may be made adversely to constitutional validity. The Canada Labour Relations Board in certification proceedings, for example, might decide that no federal undertaking was present. Constitutional extension of the *Canada Labour Code* could not be taken this far; jurisdiction would be declined.

48. *Id.*, at 51-53, 56 S. Ct., at 725-6. In discussing *St. Joseph Stock Yards Co. v. United States*, Louis L. Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact" (1957), 70 Harv. L. Rev. 953, at 977 remarked: "There is a so called presumption of constitutionality . . . and legislation is tested not for the existence of any precise fact but for the 'reasonableness' of its factual basis."

49. *Canadian Industrial Gas and Oil Ltd. v. Gov't of Saskatchewan*, [1978] 2 S.C.R. 545, at 573.

50. *Co-operative Committee on Japanese Canadians v. A.G. Canada*, [1947] A.C. 87 (P.C.), at 101-2. See also *Fort Frances Pulp and Paper Co. v. Manitoba Free Press*, *supra* n.37, at 706 ("very clear evidence"); *Kruger and Manuel v. The Queen* *supra* n. 38, at 440, ("in the absence of clear evidence . . .").

51. *Supra*, n. 30-33.

The case law unanimously requires very clear evidence to support factual determinations adverse to constitutional validity.⁵² This would eliminate in this situation all room for courts to uphold administrative determination of constitutional facts if based on sufficient evidence. More is required; the evidence must be clear and unmistakable.⁵³

A Gordonesque question might be posed: In whose opinion — tribunal's or court's — must the evidence be very clear? The Gordian Knot presented is really a non-sequitur. *Ex hypothesi*, if the evidence is very clear and unmistakable, there would be no room for court and tribunal to disagree. If the court disagrees with the tribunal, it could only be because the evidence is not unmistakable. It would follow that the standard of proof required to overcome the presumption of constitutionality had not been met. Accordingly, the court freely could substitute its opinion for the tribunal's findings.

Conclusion

Canadian public law has moved forward rapidly on three fronts: the doctrines of jurisdictional fact, constitutional fact, and the presumption of constitutionality. The jurisdictional and constitutional fact doctrines employ similar concepts. Courts hesitate before interfering with administrative determinations of jurisdictional or constitutional fact; they will not do so if the findings are reasonable and based on sufficient evidence. The presumption of constitutionality doctrine extends this position in constitutional law to cases where insufficient or no determination of constitutional facts is made. The courts hesitate before puncturing constitutional jurisdiction; attacking counsel has the onus to supply very clear evidence of constitutional defect.

The Supreme Court's new articulation of the jurisdictional fact doctrine attempts to reconcile the need to foster cheap, expert and expeditious machinery in tribunal proceedings with a proper supervisory role for the superior courts. The new constitutional fact doctrine is similarly motivated, but there is more. The doctrine indicates a movement away from large abstract jurisdictional battles between central and local governments. The Court has shown its preference that counsel narrow the constitutional issue by concentrating its attention on factual questions. The presumption of constitutionality, by turning a searchlight on attacking counsel's obligation to supply an evidentiary record, advances this latter purpose.

52. *Supra*, n. 49-50.

53. *Supra*, n. 49-50.