

SMITH & RHULAND LIMITED..... APPELLANT;

1953

AND

*Mar. 10, 11
*June 8THE QUEEN, ON THE RELATION }
OF BRICE ANDREWS et al } RESPONDENT.ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA
IN BANCO

Trade Unions—Certification—Labour Relations Board's discretion to refuse certification—Apprehension of Communistic influence—The Trade Union Act, 1947 (N.S.), c. 3, ss. 2, 7, 8, 9—The Interpretation Act, 1923, R.S.N.S., c. 1, ss. 22 (1), 23 (11).

The local of a trade union applied under the *Trade Union Act, 1947 (N.S.)* c. 3, to the Labour Relations Board for certification of the Union as its bargaining agent. The Board found a *prima facie* case for certification made out but found further that the secretary-treasurer of the Union, who had organized the local and as its acting secretary-treasurer signed the application, was a Communist and exercised a dominant influence in it. On this ground it refused certification. The respondent appealed to the Supreme Court of Nova Scotia *in banco* for a writ of mandamus which was granted. The company-employer appealed.

Held: (Taschereau, Cartwright and Fauteux JJ dissenting):—That the appeal should be dismissed.

Per: Kerwin, Taschereau, Rand, Estey, Cartwright and Fauteux JJ.—The word “may” in s. 9(2) of the Trade Union Act is to be interpreted as permissive and connoting an area of discretion. *McHugh v. Union Bank* [1913] A.C. 299, applied.

Per: Kerwin, Rand and Estey JJ.—The Board in rejecting the application exceeded the limits of its discretion since it was not empowered by the statute to act upon the view that official association with an individual holding political views considered dangerous by the Board proscribed a labour organization. Before such association would justify the exclusion of employees from the rights and privileges of a statute designed primarily for their benefit, there must be some evidence that with the acquiescence of the members, it had been directed to ends destructive of the legitimate purposes of the Union.

Per: Kellock J.—The plain implication of s. 9(2) is that if the Board is satisfied with the application from the standpoint of the considerations the Statute itself sets forth, the Union is entitled to be certified.

Per: Taschereau, Cartwright and Fauteux JJ. (dissenting)—The Board exercised its discretion on sufficient grounds. *Rex v. London County Council* [1915] 2 K.B. 466, referred to.

APPEAL by the appellant-employer from an order of the Supreme Court of Nova Scotia *in banco* (1) allowing the appeal of the respondents on *certiorari* and ordering a

*PRESENT: Kerwin, Taschereau, Rand, Kellock, Estey, Cartwright and Fauteux JJ.

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peremptory writ of mandamus issued directed to the Labour Relations Board commanding it to exercise the jurisdiction conferred upon it by the *Trade Union Act* in respect of the application for certification of Local No. 18, Industrial Union of Marine and Shipbuilding Workers of Canada and its members as the bargaining agent of a bargaining unit consisting of employees of the appellant.

J. J. Robinette, Q.C. for the appellant.

I. M. MacKeigan and M. Wright for the respondents.

The judgment of Kerwin, Rand and Estey, JJ. was delivered by:

RAND J.:—This is an appeal from a judgment of the Supreme Court of Nova Scotia sitting *in banco* (1) by which an order made by the Labour Relations Board of that province rejecting an application by the Industrial Union of Marine and Shipbuilding Workers of Canada, Local 18, for certification as the bargaining agent of employees in a collective unit was, on *certiorari*, set aside and a mandamus to the Board directed. The latter had found the unit to be appropriate for bargaining purposes and that the other conditions to certification had been met; but, on the ground that one Bell, the secretary-treasurer of the Union, who had organized the local body and as its acting secretary-treasurer had signed the application, was a communist and the dominating influence in the Union, refused the certificate. The court in appeal held the Board to have had, in the circumstances, no discretion to refuse, but that even if it had, the discretion had been improperly exercised.

Before us, Mr. Robinette challenged both of these grounds. The first depends on the interpretation of the word “may” in s. 9(2)(b) of the *Trade Union Act* which reads:—

If a vote of the employees in the unit has been taken under the direction of the Board and the Board is satisfied that not less than 60 per cent of such employees have voted and that a majority of such 60 per cent have selected the trade union to be bargaining agent on their behalf; the Board may certify the trade union as the bargaining agent of the employees in the unit.

(1) [1952] 29 M.P.R. 377; Can. Lab. Law Rep. (C.C.H.C.) No. 15035

The controlling consideration in this interpretation is the express declaration in s. 23(11) of the provincial Interpretation Act (1923 R.S.N.S. c. 1) that "may" shall be construed as being permissive, subject to s. 22(1) which provides that the definitions so given shall apply "except in so far as they are . . . inconsistent with the interest and object" of the acts to which they extend.

S. 9 of the *Trade Union Act*, as well as the statute as a whole, exemplifies strikingly the contrasted uses of both "shall" and "may". For instance, in 9(1) we have "the Board shall determine whether a unit is appropriate"; "the Board may . . . include additional employees in the unit"; "the Board shall take such steps to determine the wishes of the employees"; 9(4) "the Board . . . may, for the purpose . . . make such examination of records or other inquiries, etc."; "the Board may prescribe the nature of the evidence to be furnished"; 9(5) "the Board, in determining the appropriate unit, shall have regard to the community of interest"; 9(7) "if the Board is not satisfied . . . it shall reject the application and may designate the time before a new application will be considered"; s. 11, the Board "may revoke the certificate."

These examples could be multiplied and in the face of them it would, I think, be an act of temerity to hold that in the clause before us the word is to be taken in an imperative sense. The judgment of the Judicial Committee in *McHugh v. Union Bank*, (1) is, in this respect, conclusive. There the language of the ordinance was virtually identical with the interpretation act here, although in the reasons a simpler expression is indicated: but as Lord Moulton puts it, "only a clear case of impelling context would justify giving it an imperative construction." The earlier English cases are of little assistance because of the absence of such a clause, and, again to use Lord Moulton's words, "the object and effect of the insertion of the express provision as to the meaning of 'may' and 'shall' in the Interpretation Ordinance was to prevent such questions arising in the case of future statutes".

I agree, therefore, with Mr. Robinette's first contention that the word is to be interpreted as permissive and as connoting an area of discretion. The remaining question

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(1) [1913] A.C. 299 at 315.

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is whether the Board, in its rejection, acted within the limits of that discretion, in examining which I assume the findings made as to Bell's adherence to the doctrines of communism and the strategy and techniques by which they are propagated.

The "domination" I take to mean not particularly or directly that of the local union. Bell was, by the constitution of the federated body, the provisional secretary-treasurer of every local union until it had elected its own officers, and in fact he had ceased to hold that office of the applicant before the hearing had taken place, although he did not know of it until afterwards. Nor is it to be related to the fact of his having been an or the leading actor in organizing the local: that was part of the duties of his office.

The domination found was evidenced by Bell's forcefulness in the key position of general secretary-treasurer and organizer, by his acceptance of communistic teachings and by the fact that the party espousing those teachings demands of its votaries unremitting pressure, by deceit, treachery and revolution, to subvert democratic institutions and to establish dictatorship subservient to Soviet Russia. That is to say, the circumstance that an officer of a federated labour union holds to these doctrines is, per se, and apart from illegal acts or conduct, a ground upon which its local unions, so long as he remains an officer, can be denied the benefits of the *Trade Union Act*.

No one can doubt the consequences of a successful propagation of such doctrines and the problem presented between toleration of those who hold them and restrictions that are repugnant to our political traditions is of a difficult nature. But there are certain facts which must be faced.

There is no law in this country against holding such views nor of being a member of a group or party supporting them. This man is eligible for election or appointment to the highest political offices in the province: on what ground can it be said that the legislature of which he might be a member has empowered the Board, in effect, to exclude him from a labour union? or to exclude a labour union from the benefits of the statute because it avails itself, in legitimate activities, of his abilities? If it should be shown that the union is not intended to be an instrument of

advantage and security to its members but one to destroy the very power from which it seeks privileges, a different situation is presented and one that was held to justify a revocation of the certificate by the Dominion Labour Board in *Branch Lines Limited v. Canadian Seamen's Union*, (1).

The statute deals with the rights and interests of citizens of the province generally, and, notwithstanding their private views on any subject, assumes them to be entitled to the freedoms of citizenship until it is shown that under the law they have forfeited them. It deals particularly with employees in and of that citizenry and gives to them certain benefits in joint action for their own interests. Admittedly nothing can be urged against the bona fides of the local union; it seeks the legitimate end of the welfare of those for whom it speaks. During 1951, at least two local units of this union were certified by the Board notwithstanding that Bell at the time held the same office and adhered to the same views as found against him. One local includes employees working in the Halifax shipyards. Hubley, the associate of Bell in the application to the Board, who is president of the federated body, has been found by the Department of Defence to be unobjectionable on security grounds and is the holder of a pass to the Dartmouth shipyards; and the federation is affiliated with the Canadian Congress of Labour.

To treat that personal subjective taint as a ground for refusing certification is to evince a want of faith in the intelligence and loyalty of the membership of both the local and the federation. The dangers from the propagation of the communist dogmas lie essentially in the receptivity of the environment. The Canadian social order rests on the enlightened opinion and the reasonable satisfaction of the wants and desires of the people as a whole: but how can that state of things be advanced by the action of a local tribunal otherwise than on the footing of trust and confidence in those with whose interests the tribunal deals? Employees of every rank and description throughout the Dominion furnish the substance of the national life and the security of the state itself resides in their solidarity as loyal subjects. To them, as to all citizens, we must look for the protection and defence of that security within the governmental structure, and in these days on them rests an

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immediate responsibility for keeping under scrutiny the motives and actions of their leaders. Those are the considerations that have shaped the legislative policy of this country to the present time and they underlie the statute before us.

I am unable to agree, then, that the Board has been empowered to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization. Regardless of the strength and character of the influence of such a person, there must be some evidence that, with the acquiescence of the members, it has been directed to ends destructive of the legitimate purposes of the union, before that association can justify the exclusion of employees from the rights and privileges of a statute designed primarily for their benefit.

The appeal must, therefore, be dismissed with costs.

TASCHEREAU J. (dissenting): I agree that by virtue of s. 9(2) of the *Trade Union Act* of Nova Scotia, a discretion is given to the Board to certify or not a Trade Union as the bargaining agent of a group of employees, and that this discretion may be exercised even if all the prescriptions of the Statute have been complied with.

In the case at bar, the Board declined to certify the applicant, because it was satisfied that it would be inconsistent with the principles and purposes of the Act, and contrary to the public interest, to have as bargaining agent a Trade Union whose organizer is a member of the Communist Party.

I believe that in coming to that conclusion, the Board properly exercised its discretion conferred on it by the law, and that it is not the function of this Court to interfere in the matter.

I would allow the appeal with costs here and in the Supreme Court of Nova Scotia.

KELLOCK J.: The statute here in question provides by s. 7(1) that a trade union claiming to have as members in good standing a majority of employees of one or more employers in a "unit" that is "appropriate for collective bargaining", may, subject to the rules and in accordance

with the section, apply to be "certified as bargaining agent" of the employees in the unit.

S. 2(3) defines, for the purposes of the Act, "unit" as a "group of employees" and "appropriate for collective bargaining" as "appropriate for such purposes" whether the unit "be an employer unit, craft unit, technical unit, plant unit, or any other unit and whether or not the employees therein are employed by one or more employer."

"Collective bargaining" is, in turn, defined by s. 2(1)(e) as "negotiating with a view to the conclusion of a collective agreement or the renewal or revision thereof", and "collective agreement" as

an agreement in writing between an employer or an employers' organization acting on behalf of an employer, on the one hand, and a bargaining agent of his employees, on behalf of the employees, on the other hand, containing terms or conditions of employment of employees that include provisions with reference to rates of pay and hours of work.

Where such an application is made under s. 7, the statute, by s. 9(1), requires the board to determine whether the unit in respect of which the application is made is appropriate for collective bargaining, i.e., whether the group is such that a collective agreement between it and the employer or employers should come about. In making that determination the board is required by s.-s. (5) of s. 9 to have regard to

the community of interest among the employees in the proposed unit in such matters as work location, hours of work, working conditions and methods of remuneration.

Although, as already mentioned, a unit is expressly defined by s. 2(3) to be appropriate whether or not the employees therein are employed by one or more employers, in the case of an application for certification with respect to a unit whose members are employed by two or more employers, s. 9(3) prohibits the board from certifying the union as bargaining agent unless (a) all the employers consent, and (b) the board is satisfied that the union could be certified under the section as bargaining agent in the unit of each employer if separate applications for such purposes were made. Moreover, s.-s. (6) of s. 9 prohibits the board from certifying any union "the administration, management or policy of which is, in the opinion of the board, dominated or influenced by an employer, so that its fitness to represent employees for the purpose of collective bargaining is impaired."

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When, therefore, the statute provides by s.-s. (2) of s. 9 that when the board has determined that a unit of employees is appropriate for collective bargaining and is satisfied that the majority of the employees in the unit are members in good standing of the applicant trade union, it "may" certify the union as the bargaining agent of the employees in the unit, the statute contemplates, in my view, that the question of appropriateness of the unit is to be decided with regard to the considerations the statute itself sets forth to which I have referred. Provided that the board, acting upon these considerations, is satisfied that a majority of the members of the unit are members of the applicant union, and that the union itself comes within the definition of "trade union" contained in s. 2(1)(r), other considerations are irrelevant.

While s. 9(2) uses the word "may", that provision does not stand alone. S.-s. (7) provides that

If the Board is not satisfied that a trade union is *entitled to be certified* under this Section, it shall reject the application.

In this language the subsection recognizes that a union can become "entitled" to certification under the section, and this, obviously, before actual certification. This, to my mind, would create a direct contradiction, if the statute were, at the same time, to be construed as giving a discretion to the Board enabling it to reject such a rightful claim. In my view the plain implication of the subsection is that, if the board is satisfied with the application from the standpoint of the considerations to which I have referred, the union is "entitled" to be certified.

I think this view is confirmed by reference to s. 8, which provides that where a group of employees belong to a craft or a group exercising technical skills by reason of which they are distinguishable from the employees as a whole, and the majority of the group are members of one trade union pertaining to such craft or other skills, the trade union may apply to the board, subject to the provisions of s. 7, and if the group is otherwise appropriate as a unit for collective bargaining, the union "*shall* be entitled" to be certified as the bargaining agent of the employees in the group. In my opinion this section, bringing in, as it does, the provisions of s. 7 and those provisions of s. 9 which relate to the appropriateness of a unit for collective

bargaining purposes, provides expressly for the same result which, in the view above expressed, is provided for by s. 9. I do not think that the legislature intended any different result in cases coming within s. 8 from those not within that section. The statute is harmonized by the construction above set forth, and in my opinion should be so construed.

The decision of the Labour Board, accordingly, was reached upon a consideration of extraneous matters. I would therefore dismiss the appeal with costs.

The judgment of Cartwright and Fauteux, JJ. was delivered by:

CARTWRIGHT J. (dissenting): For the reasons given by my brother Rand I agree with his conclusion that on a proper construction of s. 9(2) of *The Trade Union Act* (1947 N.S. 11 Geo. VI c. 3) the Board is given a discretion as to whether or not it will certify a trade union as the bargaining agent of the employees in a unit although, as in the case at bar, all statutory conditions precedent to certification have been fulfilled by the applicant.

The Act does not expressly indicate the principles by which the Board is to be guided in exercising this discretion and these must be deduced from a consideration of the statute as a whole. The view which the Board has taken on this point and its reasons for exercising its discretion against certification are expressed in the following words in its reasons for judgment:—

The main purpose of the Nova Scotia Trade Union Act is to facilitate and encourage collective bargaining in good faith between employers and trade unions representing their employees as a means of attaining peaceful settlement of differences or disputes concerning wages, hours and conditions of work and other matters affecting their employment. The legal effect of certification of a trade union as a "Bargaining Agent" is to confer on the union (a) the power to require the employer of the employees in the "bargaining unit" to bargain exclusively and in good faith with the certified union concerning wages, hours and conditions of work and other employer-employee relations, and (b) the power to represent and hence determine the rights not only of members of the certified union but also of all other employees in the designated "bargaining unit" whether or not they belong to the union. The public interest in good faith exercise of these powers solely for the benefit of the employees as such, and also in the conduct of collective bargaining in good faith by both union and employer is very great.

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The Board finds in this case that:

The Applicant was organized by and is a constituent part of the Maritime Marine Workers' Federation. The Secretary-Treasurer of the Federation, who is its administrative Executive Officer and the principal organizer is J. K. Bell who exercises dominant leadership and direction of the Federation. The application for certification in this case was made and signed by J. K. Bell and M. S. Hubley and J. K. Bell appears as the provisional Secretary-Treasurer of the Applicant Union. J. K. Bell is a member of the Communist party (self-styled in Canada the Labour Progressive Party).

The Communist party is a highly disciplined organization, the actions of whose members are rigidly controlled by its leaders who require the policies and aims laid down by them to be slavishly followed by party members.

The Communist party differs essentially from genuine Canadian political parties in that it uses positions of trade union leadership and influence as a means of furthering policies and aims dictated by a foreign government. Statements and actions of Communists show that their policy is designed to weaken the economic and political structure of Canada as a means of ultimately destroying the established form of government.

Consequently to certify as bargaining agent a union while its dominant leadership and direction is provided by a member of the Communist party would be incompatible with promotion of good faith collective bargaining and would confer legal powers to affect vital interests of employees and employer upon persons who would inevitably use those powers primarily to advance Communist aims and policies rather than for the benefit of the employees.

Therefore, exercising the discretion conferred by the *Trade Union Act* on the Board to refrain from certifying an Applicant as Bargaining Agent when the Board is satisfied on reasonable grounds that certification would be inconsistent with the principle and purpose of the Act and contrary to the public interest, the Board denies certification to the Applicant herein.

The legislature has not given any right of appeal from a decision of the Board and the question to be decided is whether, in the case at bar, sufficient grounds have been shewn to warrant the Court interfering by way of mandamus with the exercise of the Board's discretion. The following passage in Halsbury (2nd Ed.) Vol. 9, p. 764 appears to me to state accurately the general rule governing such cases as this:—

In cases where application is made for the issue of a writ of mandamus to tribunals of a judicial character, the writ will only be allowed to go commanding such tribunals to hear and decide a particular matter. No writ will be issued dictating to them in what manner they are to decide. Where, accordingly . . . any . . . tribunal of a judicial character have in fact heard and determined any matter within their jurisdiction, no mandamus will issue for the purpose of reviewing their decision. The rule

holds good even though such decision is erroneous, not only as to facts, but also in point of law; . . . The Court will only interfere when the tribunal has not properly exercised its jurisdiction and has not heard and determined according to law, because it has taken into account extraneous matters and allowed itself to be influenced by them.

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For the purposes of this branch of the matter the Supreme Court of Nova Scotia *in banco* has accepted the findings of fact made by the Board. These findings were challenged before us by counsel for the respondent. Assuming that the Court is entitled to examine the evidence which was before the Board, and having in mind the wide power given to the Board by s. 55(7) to receive evidence whether admissible in a Court of law or not, I am unable to say that there was no evidence before the Board to support the conclusions of fact upon which its decision is founded and it is not for the Court to weigh the evidence.

The judgments delivered in *Rex v. London County Council* (1), by the Divisional Court (Lord Reading C.J. and Bray and Shearman JJ.) and by the Court of Appeal (Buckley, Pickford and Bankes LL.JJ.) are most helpful. In that case rules *nisi* were obtained directed to the Council to show cause why a writ of mandamus should not issue commanding them to hear and determine certain applications for the renewal of music and cinematograph licences, which they had refused, upon the ground that they were actuated by extraneous considerations namely the shareholding and nationality of shareholders in the applicant, which was an English company. It appeared that the majority of such shareholders were alien enemies. The rules were discharged. I quote the following passages, with all of which I respectfully agree:—

From the judgment of Lord Reading C.J. at page 475:—

. . . It must be borne in mind that this Court, in determining whether or not the mandamus should issue, is not exercising appellate jurisdiction. We are not entitled to decide according to the view we should have taken in the first instance had the matter come before us. We should only order the mandamus to issue if we came to the conclusion that the Council, by taking into consideration the enemy character of the constitution of the company, had allowed their minds to be influenced by extraneous considerations. The Council in these matters are the guardians of the public interest and welfare.

(1) [1915] 2 K.B. 466.

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From the judgment of Bray J. at page 479:—

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... In considering the fitness of the persons the Council must not be guided by extraneous considerations. It is clear that in this case the Council were guided by the consideration that the large majority of the shareholders were alien enemies, and the question for us is whether this was an extraneous consideration. It seems to me to be clearly permissible for the Council to consider when a company is the applicant who are the persons who control the company. If it clearly appeared that such persons were not fit persons to have the licences the licences ought not to be granted. Next, is it permissible to consider whether such persons are alien enemies? These exhibitions have a strong influence on the minds of the spectators—in some cases a bad influence. Alien enemies have a strong motive to injure this country, and there would be a risk of their exercising this influence contrary to the interests of this country. It is said that there must be evidence that such an injury ought to be anticipated. It is impossible that there should be such evidence. There has been no experience which could afford such evidence. Is it not sufficient that in the opinion of the members, or the majority of the members, of the London County Council there is such a risk? They cannot wait and see. The licence is for a year. If there is such a risk, why is the risk to be run? It seems to me to be entirely a matter for the Council in their discretion to say whether or not it is desirable in the interest of the public that licences should be granted to a company controlled by alien enemies. It is not, in my opinion, an extraneous consideration. The Legislature has thought fit to leave it to the Council to say whether the applicants are fit persons, and we cannot direct them to hear and determine the matter because we might think—and I am far from saying I do so think—that these were fit persons.

From the judgment of Buckley L.J. at page 488:—

... The Lord Chief Justice was well founded in saying:— "If the Council are of opinion that the exhibition of cinematograph films accompanied by music should not be entrusted to a company so largely composed of persons whose interest or whose desire at the present time is or may be to inflict injury upon this country, can it be held as a matter of law that the Council have travelled beyond the limits allowed to them? I think not." The Council had to consider whether they would give a license to a company, in the name of an agent, which might be controlled or influenced by persons actuated by hostility to this country. If acting bona fide they thought that was a circumstance which ought to guide them in the exercise of their discretion, it was for them and not for us to determine. The only question we have to determine is whether the body with whom exclusively the determination of that matter lies has acted fairly and according to law.

In the case at bar, the Board was guided by the fact, as found by it, that the dominant leadership and direction of the applicant union was provided by a member of the Communist party, to the conclusion that certification would be inconsistent with the principle and purpose of the Act and contrary to the public interest. I am quite unable to

say as a matter of law that this was an extraneous consideration. It must not be forgotten that under s. 11 certification once granted may be revoked but only after it has been in effect for not less than ten months. It is not necessary that I should express an opinion as to whether the decision of the Board was right or wise. It appears to me to be a decision made in the bona fide exercise of a discretion which the legislature has seen fit to commit to it and not to the courts.

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Counsel for the respondent submitted that we should not entertain this appeal because no appeal was taken from the order of the Supreme Court *in banco* quashing the order of the Board, but this does not seem to me to relieve us of the duty of dealing with the order for the issue of a mandamus which is properly before us.

I would allow the appeal and set aside the order of the Supreme Court of Nova Scotia *in banco* directing the issue of a writ of mandamus. The appellant is entitled to its costs of this appeal and in the Supreme Court of Nova Scotia.

Appeal dismissed with costs.

Solicitor for the appellant: *C. B. Smith.*

Solicitor for the respondents: *I. M. MacKeigan.*
