1953

*Feb. 13, 16, 17
*June 8

IN RE THE ONTARIO LABOUR RELATIONS BOARD

TORONTO NEWSPAPER GUILD, Local 87, AMERICAN NEWSPAPER GUILD (C.I.O.) (APPLICANT) ..... APPELLANT;

AND

GLOBE PRINTING COMPANY (RESPONDENT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Certiorari—Labour Law—Powers and duties of Ontario Labour Relations Board—Certification of bargaining agent—Prior ascertainment of facts—Obligation to exercise judicial functions—The Labour Relations Act, 1948 (Ont.) c. 51—Regulations, 1948, ss. 7-10.

The appellant union as provided by *The Labour Relations Act, 1948,* applied to the Ontario Labour Relations Board to be certified as the bargaining agent for certain of the respondent's employees, alleging the majority of them to be members of its union in good standing. At a hearing before the Board counsel for the respondent sought to cross-examine the union secretary to show that since the filing of the application a number of the employees had resigned. On the ground that this matter was irrevelant, the Board refused permission and also refused to question the witness itself, to examine the documents filed, or to order a vote of the employees in question, and granted certification. Notwithstanding that s. 5 of the Act provides that orders, decisions and rulings of the Board shall be final nor shall the Board be restrained by certiorari or otherwise by any court, respondent applied by way of certiorari to quash.

Held: (Rand and Cartwright JJ. dissenting) That the Board had declined jurisdiction and that its order should accordingly be quashed. *The Queen v. Marsham* [1892] 1 Q.B. 371, followed. *Rex v. Murphy* [1922] 2 I.R. 190, distinguished.

Decision of the Court of Appeal for Ontario [1952] O.R. 345, affirmed.

APPEAL from a judgment of the Ontario Court of Appeal (1), dismissing an appeal from the order of Gale J. (2), quashing a certificate granted to the appellant by the Ontario Labour Relations Board.

F. A. Brewin, Q.C. and *J. H. Osler* for appellant.

C. F. H. Carson, Q.C., C. H. Walker, Q.C. and *Allan Findlay* for the respondent.

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

(1) [1952] O.R. 345; 102 C.C.C. 318; [1952] 2 D.L.R. 302.
(2) [1951] O.R. 435; 100 C.C.C. 301; [1951] 3 D.L.R. 162.

KERWIN J.—By leave of the Court of Appeal for Ontario, the Toronto Newspaper Guild, Local 87, American Newspaper Guild (CIO) appeals from a judgment of that Court affirming an order of Gale J. The latter had granted an application by the respondent Globe Printing Company by way of certiorari for an order bringing into the Supreme Court of Ontario and quashing a certificate of the Ontario Labour Relations Board dated July 20, 1950. That certificate recited that the appellant's application for certification as a bargaining agent had come on for hearing in the presence of representatives of the parties; that the Board had satisfied itself that the appellant was a trade union within the meaning of the Regulations made under *The Labour Relations Act, 1948,* of the Province of Ontario, that all employees in the respondent's Circulation Department, with certain named exceptions, constituted a unit appropriate for collective bargaining, and that a majority of such employees were members in good standing of the appellant. The Board then proceeded to certify that the appellant was the certified bargaining agent of such employees. While the Board's proceedings were attacked on various grounds stated in the notice of motion, in my view it is necessary to consider only one, i.e., that the Board had exceeded its jurisdiction.

It is important to emphasize immediately one matter referred to in the reasons for judgment of Chief Justice Robertson, speaking on behalf of the Court of Appeal. In the Province of Ontario certiorari may be granted upon a summary application by originating notice (Rule 622), and no writ of certiorari shall be issued but all the necessary provisions shall be made in the judgment or order (Rule 623), and a form of order (82) is provided in these words:—

> "Upon the application of , and upon reading the affidavit of filed, and upon hearing the solicitor (or counsel) for .
>
> 1. It is ordered that do send to the Registrar's Office at Osgoode Hall, Toronto (or as may be necessary) forthwith (or on the day of) the , with all things touching the same, as fully and entirely as they remain in his custody, together with this order, that this Court may further cause to be done thereupon what it shall see fit to be done."

1953

IN RE ONTARIO LABOUR RELATIONS BOARD

TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kerwin J.

There would appear to be no doubt that if in any case the Court considered that "all things touching the same, as fully and entirely as they remain in his custody" had not been sent, the Court could remit the return to the inferior tribunal for completion. In the present case no return was made because, as the Chief Justice points out, the original of the Board's certicate was deposited with the Registrar of the Court by officers of the appellant, apparently after the delivery of judgment by Gale J. Affidavits were filed on behalf of the respondent on its motion for certiorari and in addition to making a copy of the Board's certificate an exhibit, the affidavits set out what had occurred at the hearing. It should be taken that the affidavits and exhibit referred to constituted the record as if it had been formally returned by the Board. Certiorari will lie if the Board exceeded its jurisdiction, and I understand that proposition is not denied.

The Board was established pursuant to s-s. 1 of s. 2 of the Act, and by s-s. 2 thereof the Board was authorized to exercise such powers and perform such duties as might be vested in or imposed upon it by the Act or the regulations made thereunder. By s-s. 7, 8 and 9 of s. 3:—

(7) The Board and each member thereof shall have the power of summoning any person and requiring him to give evidence on oath before the Board and to produce such documents and things as may be deemed requisite for the full investigation of any matter coming before the Board and shall have the like power to enforce the attendance of witnesses and to compel them to give evidence and to produce documents and things as is vested in any court in civil cases.

(8) The Board and each member thereof may receive and accept such evidence and information on oath, affidavit or otherwise as in its or his discretion it or he may deem fit and proper whether admissible as evidence in a court of law or not.

(9) Subject to the approval of the Lieutenant-Governor in Council, the Board may make rules governing its procedure which are not inconsistent with the regulations and may by such rules provide for the taking of votes on the premises of employers during working hours.

By section 4:—

4. If in any proceeding before the Board a question arises as to whether,—

.....

(*h*) a person is a member in good standing of a trade union,

the Board shall decide the question and, subject to such right of appeal as may be provided by the regulations, its decision shall be final and conclusive.

No applicable right of appeal is provided by the regulations. S. 5 provides:—

5. Subject to such right of appeal as may be provided by the regulations, the orders, decisions and rulings of the Board shall be final and shall not be questioned or reviewed nor shall any proceeding before the Board be removed, nor shall the Board be restrained, by injunction, prohibition, mandamus, quo warranto, certiorari or otherwise by any court, but the Board may, if it considers it advisable to do so, reconsider any decision or order made by it and may vary or revoke any such decision or order.

Pursuant to the Act, regulations were made by the Lieutenant-Governor in Council. The appellant is a trade union as defined by regulation 1(1) (o), and under regulation 1(3) the Circulation Department of the respondent is a unit appropriate for collective bargaining. Regulation 3(1) provides:—

3. (1) Every employee has the right to be a member of a trade union and to participate in the activities thereof.

Paragraph 1 of regulation 4 reads in part:—

4. (1) No employer or employers' organization and no person acting on behalf of an employer or employers' organization, shall participate in or interfere with the formation or administration of a trade union, or contribute financial or other support to it.

Regulation 7(1) provides:—

7. (1) 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 of procedure of the Board and in accordance with this regulation, make application to the Board to be certified as bargaining agent of the employees in the unit.

and in accordance therewith the appellant filed with the Board an application to be certified as the bargaining agent of the employees (with certain exceptions) of the respondent's Circulation Department. Paragraphs 1, 2 and 4 of regulation 9 read as follows:—

9. (1) Where a trade union makes application for certification under these regulations as bargaining agent of employees in a unit, the Board, in determining whether the unit in respect of which the application is made is appropriate for collective bargaining, may, before certification, if it deems it appropriate to do so, include additional employees in, or exclude employees from, the unit, and shall take such steps as it deems appropriate to determine the wishes of the employees in the units as to the selection of a bargaining agent to act on their behalf.

(2) When, pursuant to an application for certification under these regulations by a trade union, the Board has determined that a unit of employees is appropriate for collective bargaining.

(a) if the Board is satisfied that the majority of the employees in the unit are members in good standing of the trade union; or

1953

IN RE ONTARIO LABOUR RELATIONS BOARD — TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY — Kerwin J.

(b) if, as a result of a vote of the employees in the unit, the Board is satisfied that a majority of them have selected the trade union to be a bargaining agent on their behalf;

the Board may certify the trade union as the bargaining agent of the employees in the unit.

(4) The Board may, for the purposes of determining whether the majority of the employees in a unit are members in good standing of a trade union or whether a majority of them have selected a trade union to be their bargaining agent, make or cause to be made such examination of records or other inquiries as it deems necessary.

By regulation 11 the Board has power to revoke a certificate where in its opinion a bargaining agent no longer represents a majority of employees in the unit for which it was certified.

Pursuant to s. 3(9) of the Act, the Board made rules which were approved by the Lieutenant-Governor-in-Council. In accordance with these rules the application by the appellant for certification as a bargaining agent for the employees (with certain exceptions) in the respondent's Circulation Department said to number 80, was verified by affidavit, and notice of the filing of application was given to the respondent. Also in conformity with the rules the respondent filed its reply, verified by affidavit. In this reply, after giving as 93 the number of employees in the unit, claimed by the respondent to be suitable for collective bargaining, paragraph 11 stated:—

"11. Any other relevant facts:

The Respondent respectfully requests that the Board determine if the Applicant represents a majority of the Respondent's employees within the appropriate bargaining unit herein as members in good standing within the meaning of the Regulations of the Board.

The Respondent further requests that this Board direct and conduct a vote by secret ballot of said employees in order to conclusively determine if they desire to be represented by the Applicant in their collective dealings with the Respondent.

Rule 12 provides:—

12. After the expiration of the time for receiving a report or for filing reply, intervention or statement of objections, as the case may be, the Registrar shall serve a notice of hearing in form 17 upon each of the parties to the proceeding, not less than 7 clear days from the date fixed in the notice.

and in accordance therewith the Registrar gave the respondent the prescribed notice (Form 17) of the hearing of the appellant's application.

Under the regulations and rules the Board was therefore obliged to conduct a hearing upon that application and, when it had determined that the Circulation Department was appropriate for certified bargaining, then, by regulation 9(2) (*a*):—

> (*a*) if the Board is satisfied that the majority of the employees in the unit are members in good standing of the trade union;
>
> (*b*) . . . the Board may certify the trade union as the bargaining agent of the employees in the unit.

Disregarding paragraph (*b*), since the Board refused to order a vote as requested by the respondent, this means that the Board's jurisdiction to certify depended upon its being satisfied that the majority of the employees in the Circulation Department were members in good standing of the appellant Union. But the Board said that it was irrelevant whether certain individuals had resigned from the Union and it therefore declined to investigate that all important question. In proceeding to certify, it exceeded its jurisdiction and excess of jurisdiction has invariably been held to be a ground upon which a Superior Court could quash an order of an inferior tribunal.

We start with the proposition that when an administrative tribunal has been set up by a paramount legislative body it is the intention that such tribunal keep within the powers conferred upon it. In England and in Canada the decisions have been uniform that a Superior Court is invested with the power and duty of seeing that such a tribunal as the Ontario Labour Relations Board does not act without jurisdiction.

Although a case of mandamus, the decision and reasoning in *The Queen* v. *Marsham* (1), is instructive. The clerk to the Lewisham Board of Works having been called before a magistrate to prove the execution of certain works and the amount of an apportionment, the applicants desired to cross-examine him as to whether the whole sum expended was paving expenses. The magistrate agreed with the contention of the Board that the apportionment of their surveyor could not be questioned, and refused to allow the clerk to be cross-examined or substantive evidence to be given by the applicants upon the point. An ex parte application for an order nisi for a mandamus had been

(1) [1892] 1 Q.B. 371.

1953

IN RE ONTARIO LABOUR RELATIONS BOARD

TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kerwin J.

refused by a Divisional Court but was subsequently granted by the Court of Appeal. Upon cause being shown, the Court consisting of Lord Halsbury L.C., Lord Esher M.R. and Fry and Lopes L.JJ., made the rule absolute. At page 375 Lord Halsbury stated that the act of the magistrate was not a mere rejection of evidence but amounted to a declining to enter upon an inquiry on which he was bound to enter. Lord Esher, at 378, having stated that the application for a mandamus was made upon the ground that the magistrate declined to exercise the jurisdiction given him by law, continues:—

> Now, the form in which he is said to have declined jurisdiction is, that he refused to hear certain evidence which was tendered before him, and it is suggested on behalf of the board that such refusal, at the most, only amounted to wrongful refusal to receive evidence, and not to a declining of jurisdiction. The distinction between the two is sometimes rather nice; but it is plain that a judge may wrongly refuse to hear evidence upon either of two grounds: one, that even if received the evidence would not prove the subject-matter which the judge was bound to inquire into; the other, that whether the evidence would prove the subject-matter or not, the subject-matter itself was one into which he had no jurisdiction to inquire. In the former case the judge would be wrongly refusing to receive evidence, but would not be refusing jurisdiction, as he would in the latter. Here the magistrate does not say that the evidence tendered would not prove the fact that the claim of the board included matters outside the statute; he has refused to hear the evidence, even though it would prove that fact; he has, therefore, declined jurisdiction.

The other two members of the Court concurred.

Lord Esher's judgment, I think, sets forth the test to determine whether there be, in any particular case, a mere rejection of evidence or a refusal of jurisdiction. There is nothing inconsistent in it and the judgment of the Judicial Committee in *Rex* v. *Nat Bell Liquors,* (1); but I might point out two things in connection with the latter. When the occasion arises, it may be necessary to read it in the light of the judgment of Lord Goddard, speaking on behalf of the King's Bench Division in *Rex* v. *Northumberland Compensation Appeal Tribunal* (2), affirmed by the Court of Appeal (3); and that we are not concerned with the applicability of the *Nat Bell* judgment to a motion "to quash a conviction, order, warrant or inquisition" as those words are used in s. 65 of the Ontario Judicature Act, R.S.O. 1950, c. 190.

(1) [1922] 2 A.C. 128. (2) [1951] 1 K.B. 711.
(3) [1952] 1 K.B. 338.

The decision in *Nat Bell* was that a conviction by a magistrate for an offence under the Alberta Liquor Act could not be quashed on the ground that the depositions showed that there was no evidence to support the conviction or that the magistrate had misdirected himself in considering the evidence. The decision in *Rex* v. *Murphy* (1), relied on by the appellant, is referred to in the *Nat Bell* case at 152 where it is said that it appears from the very full and able discussion of all the authorities therein:—

> To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all.

The Irish case is distinguishable because while there had been a refusal at a court-martial to allow cross-examination of two witnesses it was held that the court-martial had jurisdiction.

The judgment of the Judicial Committee in *Wilson* v. *Esquimalt Railway Co.* (2), was also relied upon by the appellant. There an action had been brought by the Railway Company to establish its title to coal and other minerals underlying certain lands on Vancouver Island and for a declaration that a grant authorized by the Lieutenant-Governor in Council of British Columbia was null and void. The latter was given power, if he was reasonably satisfied of certain conditions, to direct the issuance of the grant, and it was held by the Judicial Committee that a court of law, dealing with actions of the Executive, could not say that there was no evidence upon which it could be so satisfied. That conclusion was arrived at notwithstanding the fact that the Privy Council, while thereby disagreeing with the trial judge and the Court of Appeal for British Columbia, agreed with the majority of the latter that no complaint could be made of the circumstance that the Lieutenant-Governor in Council declined to adjourn the hearing before him in order to permit the Railway Company to cross-examine certain deponents. The decision on this last point was particularly relied upon by counsel for the appellant but it might be pointed out that it was only necessary that the Lieutenant Governor in Council be reasonably satisfied of the conditions specified.

(1) [1921] 2 I.R. 190. (2) [1922] 1 A.C. 202.

1953

IN RE ONTARIO LABOUR RELATIONS BOARD

TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kerwin J.

Sections similar to s. 5 of the Act, although differing in form, have been enacted by legislative bodies from time to time but it is unnecessary to set forth the decisions in which they have been considered because, if jurisdiction has been exceeded, such a section cannot avail to protect an order of the Board; and I understood that to be conceded by counsel for the appellant. Since in my view the Board exceeded its jurisdiction, s. 4 of the Act, also relied upon by counsel for the appellant, does not assist him. Finally, it is stated in the Board's reasons, which I hold to be a part of the return, that the Board "further finds on the basis of the documentary evidence submitted by the parties." There is nothing to justify the suggestion that the Board, or any member thereof, was even purporting to act under the provisions of s-s. 7 or 8 of s. 3, or that they had any evidence other than the Union records placed before it by the appellant.

The appeal should be dismissed with costs.

RAND J. (dissenting): The complaint here is that the courts have exceeded their authority in setting aside an order of the Labor Board certifying a bargaining agent for a group of employees in Toronto. The immediate question involved a finding by the Board that the required number of persons employed within the unit were members of the applicant union. On the hearing, the employer raised the question of resignations made prior to the hearing but subsequently to the filing of the application, and on this he was denied the right to cross-examine a representative of the union who was present and had submitted undisclosed evidence to the Board. The reason given by the Board, after considerable argument, was that the matter proposed was irrelevant. During the discussion, counsel made a reference to the constitution of the union, implying that in some way it affected the issue raised. There had been placed before the Board, evidently, the application cards for memberships, but in accordance with its practice these were not shown to counsel for the employer. There may have been no objection to placing the constitution before the Board at the hearing, but it was neither asked for nor produced, nor did the Board in its decision refer to it.

By s. 4 of *The Labour Relations Act, 1948,* where a question is raised whether "a person is a member in good standing of a trade union", the Board shall decide it, and, subject to such right of appeal as may be provided by the regulations, its decision shall be final and conclusive. S. 7 authorizes the Lieutenant-Governor in Council among other things to make regulations generally for carrying out provisions of the Act into effect but no regulation has been passed giving a right of appeal.

S. 5 enforces this conclusiveness by providing that subject to any such right of appeal,

> the orders, decisions and rulings of the Board shall be final and shall not be questioned or reviewed, nor shall any proceeding before the Board be removed, nor shall the Board be restrained by injunction, prohibition, mandamus, quo warranto, certiorari or otherwise by any court;

but the Board may reconsider any decision or order made.

By s. 3 s-s. (3) each member of the Board must take an oath to execute his office "faithfully, truly and impartially" and that he will not, except in the discharge of his duties, "disclose to any person any of the evidence or any other matter brought before" the Board. By s-s. (8) the Board and each member of it "may receive and accept such evidence and information on oath, affidavit or otherwise as in its or his discretion it or he may deem fit and proper, whether admissible as evidence in a court of law or not."

S. 9 excludes certain classes of employees such as those engaged in farming, members of a police force and of a fire department within the meaning of certain statutes, and employees of municipal corporations, including school boards, having certain statutory powers.

Regulations were made and several of them bear upon the issue. By No. 9(2), upon an application for certification of a union as the bargaining agent of employees in a unit,

> (*a*) If the Board is satisfied that the majority of the employees in the unit are members in good standing of the trade union.

the Board may certify accordingly. Then, in (4) of the same regulation,

> The Board may, for the purposes of determining whether the majority of the employees in a unit are members in good standing . . . make or cause to be made such examination of records or other inquiries as it deems necessary.

1953

IN RE ONTARIO LABOUR RELATIONS BOARD — TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Rand J.

The statute provides in s. 3 s-s. (9) that

> Subject to the approval of the Lieutenant Governor in Council, the Board may make rules governing its procedure which are not inconsistent with the regulations . . .

Exercising this power, the Board promulgated, as rule 12, the following:—

> After the expiration of the time for receiving the report or for filing reply, intervention or statement of objections, as the case may be, the Registrar shall serve a notice of hearing in Form 17 upon each of the parties to the proceeding, not less than seven clear days from the date fixed in the notice.

This is the only reference in either the statute, the regulations or the rules, to a hearing.

S. 9 of the Act on its face contains the seeds of questions of law of some importance and set against s. 5, they present the appearance of conflicting provisions. The Board is admittedly a body with a limited jurisdiction, but a jurisdiction that, in many cases, depends upon the determination of questions of law as well as of fact. There is nothing in the Act expressly giving to the Board exclusive power to decide questions of law; but the writ of certiorari and other special remedies, for centuries the means provided for controlling unauthorized action by inferior bodies exercising the power of law, are forbidden.

How, then, are we to reconcile these apparent contradictions? Every such enactment, consciously or subconsciously, lies with a general and vague but nonetheless real scope of action within which the body created is contemplated and intended by the legislature to act; and the privative provision, s. 5, is designed to exclude the control of the courts within that area. In the absence of a clear expression to the contrary, we are bound by the principle that *ultra vires* action is a matter for the superior courts: the statute is enacted on that assumption. Any other view would mean that the legislature intended to authorize the tribunal to act as it pleased, subject only to legislative supervision: but that is within neither our theory of legislation nor the provisions of our constitution. The acquiescence of the legislatures, particularly during the past fifty years, in the rejection by the courts of such a view confirms the interpretation which has consistently been given to the privative clause.

The real controversy lies in the determination of the boundaries of that contemplated scope; and when, as today, administrative bodies are regulating civil relations which formerly were not within the cognizance of law at all, by what rule or standard are we to test the jurisdictional validity of their decisions? Certainly where the Board is at liberty to inform itself of matters of fact by any means, as it is here, and where it can act if "satisfied" of certain things and where its findings are declared to be final and judicial review excluded, I doubt that the test can be anything less than this: is the action or decision within any rational compass that can be attributed to the statutory language? It is significant here that neither the statute nor the regulations make any reference to a hearing; that step, as has been seen, arises only by way of implication from procedural rules. But assuming such a right, it has been entrusted with so many qualifying powers in the Board that its ordinary function has been virtually emasculated. It is reduced to an opportunity for each side to present its own evidence unilaterally and by its own means only; but even to that extent, in many respects, it is a disclosure to the Board only. There are, undoubtedly, matters affecting interests on which information privately obtained may be more accessible and quite as dependable as any disclosed at a hearing; and seeing that the Board is entitled to the presumption that it acts in good faith and according to the oath of each member, in the simple matter of finding facts, it must be little short of an act of bad faith that can justify a court's interference.

I am fully appreciative of the fact that the safety of permitting action based upon information gathered in the dark depends upon the integrity and the intelligence of those on whom the authority is conferred, and that such a method clashes with the lessons of our law's experience; the best means to truth remain those of open disclosure of the facts. Yet on both sides of these controversies we have the strongest insistence upon the secrecy of what is called "confidential" matter. We need not be warned of the dangers of a hugger-mugger procedure generally; the open public court is the citadel of our legal system. Authority to

1953

IN RE ONTARIO LABOUR RELATIONS BOARD — TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Rand J.

make decisions on matters undisclosed to both sides is the first step toward arbitrary judgment, the final stage of which, if allowed to be pursued, is dictation.

But decisions of this nature on matters of fact and erroneous rulings in the course of a hearing are not, under this statute, for the courts; it is to the legislature that complaints against them must be addressed. It is to no purpose that judicial minds may be outraged by seemingly arbitrary if not irrational treatment of questions raised: these views are irrelevant where there is no clear departure from the field of action defined by the statute.

I would, therefore, allow the appeal and restore the order of the Board with costs throughout.

The judgment of Kellock, Estey and Locke, JJ. was delivered by:

KELLOCK J.: The facts out of which this appeal arises are as follows. On June 7, 1950, the appellant made application in writing, pursuant to regulation 7 under *The Labour Relations Act, 1948* (Ontario), to be certified as bargaining agent for certain employees of the respondent, the appellant claiming that

> the applicant union has a majority of the employees in the Circulation Department as members in good standing.

The regulations empower the board established under the Act to grant certification if "satisfied" that the majority of the employees in a "unit appropriate for collective bargaining" are members in good standing of an applicant trade union. By s. 4 of the statute it is provided that, if in any proceeding "before" the board a question arises as to whether

> (*h*) a person is a member in good standing of a trade union.

the board is to decide the question, such decision to be final and conclusive.

Certification affects substantial legal rights of both employer and employee. Regulation 10 reads:

> 10. Where a trade union is certified under the Act or these regulations as the bargaining agent of the employees in a unit
>
> (*a*) The trade union shall immediately replace any other bargaining agent of employees in the unit and shall have exclusive authority to bargain collectively on behalf of employees in the unit and to bind them by a collective agreement until the certification of the trade union in respect of employees in the unit is revoked;

(*b*) if another trade union had previously been certified as bargaining agent in respect of employees in the unit, the certification of the last-mentioned trade union shall be deemed to be revoked in respect of such employees; and

(*c*) if, at the time of certification, a collective agreement binding on or entered into on behalf of employees in the unit is in force, the trade union shall be substituted as a party to the agreement in place of the bargaining agent that is a party to the agreement on behalf of employees in the unit, and may, notwithstanding anything contained in the agreement, upon two months' notice to the employer terminate the agreement in so far as it applies to those employees.

The application was, as required by rule 3(2) of the rules made by the board, verified by the affidavit of the secretary of the appellant, and, as required by the rules, written notice of its filing was, on June 9th, duly given to the respondent by the registrar of the board.

By its reply, dated June 15th, the respondent requested the board to determine "if the applicant represents a majority of the respondent's employees within the appropriate bargaining unit as members in good standing".

Subsequently, on June 28th, the registrar caused to be served upon the board, pursuant to the rules, a notice of hearing of the application for July 12th. Rule 13 provides that

where any person served with a notice of hearing fails to attend upon the hearing or any adjournment thereof, the Board may proceed in its absence.

The statute contains provisions which indicate the nature of the hearing to be conducted "before" the board. S. 3 provides that

(7) The Board and each member thereof shall have the power of summoning any person and requiring him to give evidence on oath before the Board and to produce such documents and things as may be deemed requisite for the full investigation of any matter coming before the Board and shall have the like power to enforce the attendance of witnesses and to compel them to give evidence and to produce documents and things as is vested in any court in civil cases.

(8) The Board and each member thereof may receive and accept such evidence and information on oath, affidavit or otherwise as in its or his discretion it or he may deem fit and proper whether admissible as evidence in a court of law or not.

1953

IN RE ONTARIO LABOUR RELATIONS BOARD — TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kellock J.

In *Board of Education* v. *Rice*, (1), the House of Lords laid down principles which apply to a tribunal of the nature of that here in question. At page 182 Lord Loreburn L.C., said that in such cases the tribunal

> must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything.

After pointing out the power of the board there in question to obtain information in any way it thought best (a much wider power than the power provided by s-s (8) above quoted), the Lord Chancellor went on to state that in so doing it must always be upon

> giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view . . . But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

These principles were again affirmed in *Local Government Board* v. *Arlidge*, (2).

When the matter here in question came on for hearing on July 12th, the matter of the composition of the bargaining unit having been disposed of, the board proceeded to deal with the claim of the appellant to have a majority of the employees in its membership. Counsel for the appellant stated to the board that appellant claimed to have fifty-nine members and filed with the board a bundle of documents which he stated represented fifty-six members who had paid initiation fees or dues, and one other document stated to represent a member who had mailed a card to the secretary of the appellant without enclosing any money for initiation fees or membership dues, but who subsequently, on request of the secretary of the appellant, had sent the latter $1.00. Counsel further stated that the recording sheets of the applicant union for the month of June, 1950, showed fifty-eight members. The secretary of the appellant, who, as already mentioned, had taken the affidavit of verification of the petition, then made an unsworn statement concerning the document representing the member who had sent in his fee subsequently.

(1) [1911] A.C. 179. (2) [1915] A.C. 120.

The board thereupon requested counsel for the respondent to produce and file lists of employees in its circulation department, showing the occupational classification of individual employees, as required by a requisition previously sent by the registrar of the board to the respondent. Counsel for the respondent thereupon filed lists of employees of the department as of the 7th of June, 1950 and the 5th of July, 1950, as had been requested.

Counsel for the respondent then submitted to the board that the documents filed by counsel for the appellant did not show that the appellant represented a majority of members in good standing and that he wished to cross-examine the secretary of the appellant who had given evidence. In response to a question from the chairman as to the purpose of his submission and of the proposed cross-examination, counsel stated that he had information that a number of employees in the department in question had sent in their resignations as members of the appellant. The chairman stated, however, that "he saw no relevancy to resignations."

Some argument then took place by both counsel in which counsel for the respondent pointed out that to refuse the respondent the right to cross-examine was directly at variance with the board's practice, as previously followed, of checking the membership alleged by an applicant union, with the lists of the employer as of the date of the application for certification and as of the date of the hearing, and that since counsel for the respondent was precluded by previous rulings of the board in similar proceedings from himself examining the membership cards or other evidence filed by the appellant, the right to cross-examine, as asked, was vital in order to bring out the relevant and material facts.

Counsel for the appellant objected to any cross-examination of the union officials and submitted that the matter of resignations was irrelevant and that the documents which had been filed did represent members in good standing according to "the constitution of the applicant union". He, however, refused to deny receipt of resignations from membership in the union of employees in the circulation department, nor did the secretary to the appellant, who had given

1953

IN RE ONTARIO LABOUR RELATIONS BOARD — TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kellock J.

evidence, do so. The chairman of the board ruled against any cross-examination of the witness by counsel for the respondent.

Counsel for the respondent thereupon submitted that since the respondent was precluded by the board's own regulation from soliciting evidence from employees, if it wished to avoid being charged with interference with their rights under the regulations, and since the board had ruled against his right to cross-examine, a heavy onus lay upon the board to make a full and fair investigation in order to satisfy itself that a majority of the employees of the union were members in good standing of the appellant. Counsel submitted that the board itself should question the witness with respect to whose testimony cross-examination had been denied and should itself examine the documents filed. This was also objected to by counsel for the appellant and the board sustained the objection.

Counsel for the respondent then submitted that the board ought to make a full and fair investigation, including the examination of some or all of the employees of the company in the department concerned so that it might be satisfied that a majority of the employees were members in good standing of the appellant. Counsel for the appellant objected to any such investigation on the ground of delay. Counsel for the respondent then submitted that the issue could be resolved by secret ballot, as had been requested by the respondent in its reply.

All these facts are proved by the affidavit of counsel for the respondent. They are not denied and there is no other evidence. Counsel for the appellant in this court submitted that the court should not draw any inferences but should confine its consideration to facts explicitly stated in the affidavit.

The board did not take any secret ballot, and, so far as is disclosed by the record, made no inquiry or investigation beyond what appears above.

It may be observed with respect to the subject-matter of the proposed cross-examination of the appellant's witness, that subsequent to the hearing and prior to the 8th of August, counsel for the respondent was voluntarily furnished by an employee in the department in question with

nineteen certificates of post office registration which the employee instructed counsel were receipts for registered letters of resignation mailed to the secretary of the appellant between the 8th of June and the 10th of July, 1950. Counsel's instructions with respect to the existence of resignations upon which he had acted at the hearing in proposing to adduce evidence with respect to this matter, cannot, therefore, be considered as other than well-founded.

It is plain from this recital of facts that there was no "hearing" of the matter before the board for investigation within any reasonable interpretation of the word. There is nothing in either s-s. (7) or (8) of s. 3 remotely to suggest that a witness giving evidence before the board at a hearing which may not proceed *ex parte,* may give evidence without being liable to be examined by a party adverse in interest. The statute, in my opinion, proceeds upon the view that the hearing is to be a real hearing, fairly conducted as between the opposing parties whatever may be the issue which the board may be called upon to determine in particular circumstances.

In the case at bar it was impossible for the board to determine whether any one of the persons alleged to be members of the appellant was in fact a member in good standing if the board refused to enter upon the question as to whether or not, assuming membership to have originally existed, it had continued. This was the very obligation placed upon the board by the statute. By refusing to enter upon it, the board in fact declined jurisdiction. It is well settled that any order pronounced by an inferior tribunal in such circumstances is subject to the supervising jurisdiction of the superior courts, exercisable by way of certiorari.

The appellant refers to s. 5 of the statute which reads as follows:

> 5. Subject to such right of appeal as may be provided by the regulations, the orders, decisions and rulings of the Board shall be final and shall not be questioned or reviewed nor shall any proceeding before the Board be removed, nor shall the Board be restrained, by injunction, prohibition, mandamus, quo warranto, certiorari or otherwise by any court, but the Board may, if it considers it advisable to do so, reconsider any decision or order made by it and may vary or revoke any such decision or order.

1953

IN RE ONTARIO LABOUR RELATIONS BOARD — TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kellock J.

The appellant, however, admits that this section would not deprive a superior court of jurisdiction "if there were a manifest defect of jurisdiction", but the appellant contends that a mere refusal to permit the cross-examination of a witness does not amount to a "manifest defect of jurisdiction". In support of this contention, reference was made to *Rex* v. *Murphy,* (1) where the refusal of a court-martial to permit cross-examination of two witnesses for the prosecution with respect to certain evidence given by them at a previous proceeding with relation to the accused, was held not enough to invoke the supervising jurisdiction of the court.

The principle laid down in the case just cited may for present purposes be taken as correct in circumstances such as were in question in that case, but the distinction between such a case and the case at bar is that the board here in question, having refused to permit the respondent to examine the documentary evidence filed by the appellant and having by its regulations and the interpretation which it had given them, prohibited the employer from himself inquiring among his employees with respect to union membership, effectively removed from the respondent by its ruling with respect to the proposed cross-examination its only remaining means of knowing what the case of the appellant was. Moreover, the board itself declined to enter into the inquiry which the statute laid upon it. Such arbitrary conduct is not within the principle of the case referred to but, in my view, makes applicable the principle of the decision in *The Queen* v. *Marsham,* (2).

In that case a district board of works had incurred expense under a statute in paving a street and sought to recover against an abutting owner his proportional share. The magistrate before whom the matter came refused to permit cross-examination of the clerk of the board as to whether the whole sum, the proportioned part of which was sought to be recovered from the defendant, included items other than purely paving expenses. It was held by the Court of Appeal that the act of the magistrate was not a mere rejection of evidence but amounted to a declining to

(1) [1921] 2 I.R. 190. (2) [1892] 1 Q.B. 371.

enter upon an inquiry upon which he was bound to enter. What is said by Lord Esher, M.R., at page 378, is pertinent:

> Now, the form in which he is said to have declined jurisdiction is, that he refused to hear certain evidence which was tendered before him, and it is suggested on behalf of the board that such refusal, at the most, only amounted to a wrongful refusal to receive evidence, and not to a declining of jurisdiction. The distinction between the two is sometimes rather nice, but it is plain that a judge may wrongly refuse to hear evidence upon either of two grounds: one, that even if received the evidence would not prove the subject-matter which the judge was bound to inquire into; the other, that whether he evidence would prove the subject-matter or not, the subject-matter itself was one into which he had no jurisdiction to inquire. In the former case the judge would be wrongly refusing to receive evidence, but would not be refusing jurisdiction, as he would in the latter. Here the magistrate does not say that the evidence tendered would not prove the fact that the claim of the board included matters outside the statute; he has refused to hear the evidence, even though it would prove that fact; he has, therefore, declined jurisdiction.

In the course of the argument in this court the possibility was suggested from the bench that the ruling of the board, excluding the subject-matter of resignation from consideration, might have proceeded upon the footing that under the union constitution any withdrawal of membership was ineffective at the time of the hearing.

Nowhere in the proceedings, below was such a point taken on behalf of the appellant, nor is it taken in the factum of the appellant in this court. It is, moreover, to be noted that the board itself was a party to these proceedings in both of the courts below. Neither the board nor the appellant saw fit to file any material but was content to have the case disposed of on the affidavit of counsel for the respondent before the board, and the appellant's position in this court, as already mentioned, is that no inferences should be drawn beyond what is expressly stated in the affidavit.

Had the union constitution contained any such clause, it is inconceivable that the matter would not have been referred to before the board itself or evidence with respect to the point been placed before the court in these proceedings. I do not think, therefore, that this court can be asked to assume anything in this respect. The evidence is that the board ruled that the subject-matter of resignation was quite irrelevant.

1953

IN RE ONTARIO LABOUR RELATIONS BOARD — TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Kellock J.

A provision such as s. 5 of the statute prohibits the court from questioning any decision which has been come to within the structure of the statute itself, but the statute does not endow the board with power to make arbitrary decisions. The legislature must be taken to have been quite familiar with the principles applicable to decisions of inferior tribunals when questioned in the courts. It has not used apt language if it intended, as it cannot be presumed to have intended, to place either of the parties to such a proceeding as that here in question in a position permitting of no relief no matter how arbitrary any particular decision of its creature, the board, may be.

In *The Queen* v. *Wood.* (1) a case of a conviction under a statute which provided that no "proceeding to be had touching the conviction of any offender against this Act, . . . shall be vacated, quashed, or set aside for want of form, or be removed or removable by certiorari or other writ or process whatsoever in any of the superior courts", Lord Campbell C. J., at page 59 said:

> As to the clause taking away the certiorari, we came to the conclusion that the justice had declined jurisdiction and therefore had not properly exercised it.

I would dismiss the appeal with costs.

CARTWRIGHT J., (dissenting): The facts out of which this appeal arises and the relevant provisions of *The Labour Relations Act, 1948,* Ontario, c. 51 and of the regulations and rules made thereunder are set out in the reasons of other members of the Court.

I understood counsel for the appellant to concede the power of the Supreme Court of Ontario in proceedings by way of *certiorari* to set aside the order of the Board if it appeared, (i) that it had failed to perform the duty, stated by Lord Loreburn L.C. in *Board of Education* v. *Rice* (2) to be, to "act in good faith and fairly listen to both sides", or (ii) that it had exceeded its jurisdiction, or (iii) that it had declined jurisdiction.

I am unable to say upon the record before us that the Board did any of these things. It is to be presumed until the contrary appears that the Board acted in good faith and

(1) (1855) 5 E. & B. 49. (2) [1911] A.C. 179.

in the case at bar bad faith is not suggested. What is complained of is that the Board refused to permit cross-examination or to receive or obtain for itself evidence all directed to establishing that between the date of the application for certification and the date of the hearing a number of employees of the respondent who had theretofore been members of the appellant had sent in their resignations and had consequently ceased to be "members in good standing". It is clear that before finally ruling that the fact of such resignations having been sent in was irrelevant to the question whether the senders were members in good standing the Board heard full argument from counsel for both parties. The ruling indicates that the Board reached the conclusion that a member who sent in his resignation during the stated period nonetheless remained a member in good standing at the date of the hearing. If this conclusion was right then the evidence tendered was irrelevant. It may well be that the conclusion was wrong; but that would, or might, depend upon the provisions of the constitution of the appellant which may or may not have been before the Board or upon the contents of the written applications for membership which were before the Board. Assuming, without deciding, that the ruling was wrong it appears to me to have been at the most a wrongful refusal to receive evidence and not a declining of jurisdiction. I respectfully accept as a correct statement of the law the passage from the judgment of Lord Esher M.R. in *The Queen* v. *Marsham* (1) quoted in the reasons of my brother Kerwin and applying it to the facts of the case at bar I think that the ground on which the Board refused to hear the evidence of resignations was the first ground mentioned by Lord Esher, i.e., that even if received it would not prove the subject matter into which the Board was bound to inquire, that is whether those who sent in their resignations ceased to be members in good standing.

I conclude, therefore, that no refusal to hear the parties, or excess of jurisdiction or declining of jurisdiction is made out and that effect must be given to the provisions of the Statute which render the decision of the Board final and forbid its review.

(1) [1892] 1 Q.B. 371 at 378.

1953

IN RE ONTARIO LABOUR RELATIONS BOARD

TORONTO NEWSPAPER GUILD, LOCAL 87, AMERICAN NEWSPAPER GUILD v. GLOBE PRINTING COMPANY

Cartwright J.

While the above reasons appear to me to be sufficient to dispose of the appeal I wish to express my general agreement with the reasons of my brother Rand and I would dispose of the appeal as proposed by him.

FAUTEUX J.: If the controlling power of superior courts over inferior tribunals or administrative bodies performing judicial functions is to be operative in the cases where, in principle, it is conceded to exist, the superior courts must somehow or other be enabled to see that jurisdiction has not been exceeded or has not been declined. In what way they shall so see is not material, provided they do so see. In *Dempster* v. *Purnell,* (1) Tindal, C.J., at page 39, said:—

> I take the rule to be well established by the cases of *Moravia* v. *Sloper,* Willes, 30, and *Titley* v. *Foxall,* Willes, 688, that, where it appears upon the face of the proceedings that the inferior court has jurisdiction, it will be intended that the proceedings are regular; but that, unless it so appears, that is, if it appear affirmatively that the inferior court has no jurisdiction, or if it be left in doubt whether it has jurisdiction or not, no such intendment will be made.

There is no reason why the rule would not obtain in cases where the point as to jurisdiction is focussed to a declining of jurisdiction. In the present instance, it was mandatory for the Board, before concluding that the alleged members of the appellant trade union were in good standing in the union and ultimately that the union was entitled to be certified as bargaining agent of the unit concerned, to decide any question arising as to the particular matter. S. 4 of *The Labour Relations Act, 1948* makes that duty clear. The right of the parties to submit to the Board any such questions is implied and the obligation for the Board to determine them and, consequently, to deal with them judicially before reaching its conclusion on the ultimate point to which they are related, is expressed. On a consideration of the material admittedly showing what took place before the Board, I cannot convince myself that the latter did not decline jurisdiction as a result of its rulings on the various requests made at hearing by the respondent, all of them being directed to the contestation of the right of the appellant trade union to be certified as bargaining agent. In the perspective of all that took place, the ruling as to the evidence is, I think, as much, if not more, consistent with a

(1) (1841) 4 Sc. N.R. 30

declining of jurisdiction than with a wrongful refusal to receive evidence. Bad faith of the Board has not been suggested and only a misinterpretation of the law as to what its duty was may explain this substantive failure to adequately exercise its jurisdiction. The authorities are clear that jurisdiction cannot be obtained nor can it be declined as a result of a misinterpretation of the law, and that in both cases the controlling power of superior courts obtains, notwithstanding the existence in the Act of a *no certiorari* clause.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Jolliffe, Lewis & Osler.*

Solicitors for the respondent: *MacDonald & MacIntosh.*

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*PRESENT: Rinfret C.J. and Kerwin, Rand, Estey and Locke JJ.