British Columbia Provincial Council, United Fishermen and Allied Workers' Union and Canada Labour Relations Board *Appellants*;

and

British Columbia Packers Limited, Nelson Bros. Fisheries Ltd., The Canadian Fishing Company Limited, Queen Charlotte Fisheries Limited, Tofino Fisheries Ltd., Seafood Products Limited, J. S. McMillan Fisheries Ltd., Norpac Fisheries Ltd., The Cassiar Packing Co. Ltd., Babcock Fisheries Ltd., Francis Millerd & Co. Ltd., Ocean Fisheries Ltd. *Respondents*;

and

Native Brotherhood of British Columbia, Fishing Vessel Owners Association of British Columbia, Pacific Trollers Association, Attorney General for British Columbia, Attorney General for Newfoundland, Attorney General for Nova Scotia
Interveners.

1977: May 3, 4; 1977: December 14.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Labour relations — Applications for certification in respect of crews of fishing vessels — Prohibition proceedings — Operations involving "federal work, undertaking or business" — Fishing crew members and fish processors not brought into employee-employer relationship under Canada Labour Code — Canada Labour Board not authorized to entertain applications — Canada Labour Code, R.S.C. 1970, c. L-1, Part V (rep. & subs. 1972, c. 18, s. 1).

Prohibition proceedings were brought against the appellant Canada Labour Relations Board which had before it several applications by the appellant Union for certification as bargaining agent of the crews of fishing vessels whose catch was being sold to the respondents under certain arrangements with the owners, captains and crews of the vessels as to the remuneration receivable for their catches of fish. The respondents are

processors of fish which they pack and sell within and outside of British Columbia.

Addy J., before whom the motion for prohibition was brought, granted that relief on two grounds; he held that (a) the *Canada Labour Code* did not by its terms embrace the relations of fishing crews as employees and the respondents as their employers since the fishermen were not employed upon or in connection with the operation of any federal work, undertaking or business, within s. 108 of the *Canada Labour Code*; and (b) if the Code did embrace them, its provisions were in that respect *ultra vires*. The Federal Court of Appeal affirmed the judgment of Addy J. on the constitutional ground taken by him. Jacket C.J., speaking for the Court and proceeding on the basis that the *Canada Labour Code* brought fishing crews and fish processors such as the respondents within its terms, concluded "with considerable hesitation ... that, as framed, such law is not a law in relation to a subject falling within the class of subjects 'seacoast and inland fisheries' [under s. 91(12) of the *British North America Act*]".

Held: The appeal should be dismissed.

As to the main question posed by s. 108 (the operative section respecting the jurisdiction of the Board), *i.e.*, whether the operations in respect of which the certification applications were brought, involve a "federal work, undertaking or business", the relevant parts of the definition given in s. 2 of the Code are the opening words ("any work, undertaking or business that is within the legislative authority of the Parliament of Canada") and cl. (*i*) ("a work, undertaking or business outside the exclusive legislative authority of provincial legislatures"). On the other issues of construction, *i.e.*, the definitions of "employee" and "employer", the conclusion was reached that Part V of the *Canada Labour Code* does not bring crew members and fish processors into an employee-employer relationship so as to authorize the Canada Labour Board to entertain applications for certification in respect of such fishermen and the respondent processors.

Section 107(1) of Part V defines "employee" both generally and specially. The included special extension of the term "employee", namely "dependent contractor", is defined to include, *inter alia*, a fisherman, as spelled out in cl. (*b*) of the definition of "dependent contractor". There was difficulty in bringing the crews of the fishing vessels in the present case under that definition in their relations with the respondent processors who, as "employers", would be "persons who employ one or more employees". If a fisherman means a person who is *not* employed by an employer, how do

they become entitled to the considered employees of the respondents?

The failure to amend the definition of "employer" when a "dependent contractor" was included in the definition of "employee" by 1972 (Can.), c. 18 was undoubtedly a lapse but a Court cannot add words to the statute unless they are implicit. What makes implication difficult is the way in which "dependent contractor" is defined to include a fisherman being a person, not employed by an employer "who is a party to a contract, oral or in writing, under the terms of which he is entitled to a percentage or other part of the proceeds of a joint fishing venture in which he participates with other persons". This appears, at first blush at least, to be a reference to an internal arrangement between the fishing vessel owner, the captain and crew as to how they would apportion among themselves the proceeds of their catch when sold to others. The respondent processors, although in some cases owners of fishing vessels, are not being brought into the certification proceedings in that character. Even if it be the case that they keep the accounts by which the fishing vessel owner, captain and crew are apprised of their shares, and even if they distribute the money to them accordingly, this does not make the processors employers under Part V; and if it makes them members of a joint fishing venture they are then fishermen and hence themselves "employees".

Re Lunenberg Sea Products, Re Zwicker, [1947] 3 D.L.R. 195, referred to.

APPEAL from a judgment of the Federal Court of Appeal[1] affirming a judgment of Addy J. prohibiting the Canada Labour Relations Board from proceeding with applications by the appellant Union for certification under the *Canada Labour Code*. Appeal dismissed.

S. R. Chamberlain, for the appellant Union.

D. H. Aylen, Q.C., and *D. F. Friesen*, for the Canada Labour Relations Board.

W. G. Burke-Robertson, Q.C., and *G. S. Levey* for the respondents.

J. W. Kavanagh, Q.C., and *C. A. McCulloch*, for the Attorney General of Nova Scotia.

J. A. Nesbitt, Q.C., for the Attorney General of Newfoundland.

[1] [1976] 1 F.C. 375, 64 D.L.R. (3d) 522.

S. Kelleher and *S. Gudmundseth*, for the Native Brotherhood of British Columbia.

W. K. Hanlin, for the Fishing Vessel Owners Association of British Columbia.

P. Fraser, for the Pacific Trollers Association.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—This appeal from the judgment of the Federal Court of Appeal, which is here by leave of that Court, arises out of prohibition proceedings against the appellant Canada Labour Relations Board which had before it eleven applications by the appellant Union for certification as bargaining agent of the crews of fishing vessels whose catch was being sold to the respondents under certain arrangements with the owners, captains and crews of the vessels as to the remuneration receivable for their catches of fish. The twelve respondents (two of whom were joined in one of the certification applications as the "employer") are processors of fish which they pack and sell both within and outside of British Columbia.

Addy J., before whom the motion for prohibition was brought, granted that relief on two grounds; he held that (a) the *Canada Labour Code* did not by its terms embrace the relations of fishing crews as employees and the respondents as their employers since the fishermen were not employed upon or in connection with the operation of any federal work, undertaking or business, within s. 108 of the *Canada Labour Code*, set out below; and (b) if the Code did embrace them, its provisions were in that respect *ultra vires*. The Federal Court of Appeal affirmed the judgment of Addy J. on the constitutional ground taken by him. Jackett C.J., speaking for the Court and proceeding on the basis that the *Canada Labour Code* brought fishing crews and fish processors such as the respondents within its terms, concluded "with considerable hesitation . . . that, as framed, such law is not a law in relation to a subject falling within the class of subjects 'seacoast and inland fisheries' [under s. 91(12) of the *British North America Act*]".

Since, as is this Court's practice, it is preferable to avoid constitutional issues where the dispute between the parties can be resolved on other grounds, I turn first to consider whether the *Canada Labour Code*, Part V of which deals with industrial or labour-management relations, authorizes the appellant Board to entertain the certification applications filed by the appellant Union. The operative section respecting the jurisdiction of the Board is s. 108, reading as follows:

> **108.** This Part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

The main question posed by s. 108 in this case is whether the operations, in respect of which the certification applications were brought, involve a "federal work, undertaking or business". I do not ignore the reference in s. 108 to "employees" and "employers", but I am of the opinion that it is open to Parliament to define those terms beyond any common law meaning which they may have if it does so in relation to the regulation of labour-management relations in operations, activities or enterprises over which it has legislative authority. I shall come shortly to the definition of "employee" in Part V of the *Canada Labour Code* but the question whether the members of fishing crews in this case are "employees" under Part V does not arise if they are not employed upon or in connection with a federal work, undertaking or business.

Section 2 of the *Canada Labour Code* defines "federal work, undertaking or business" in terms that appear to embrace the entire range of operations or activities or enterprises that are within federal legislative competence and requires, it seems to me, a constitutional determination. It reads:

> **2.** In this Act
>
> "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including without restricting the generality of the foregoing:

(*a*) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;

(*b*) a railway, canal, telegraph or other work or undertaking connecting any province with any other or others of the provinces, or extending beyond the limits of a province;

(*c*) a line of steam or other ships connecting a province with any other or others of the provinces, or extending beyond the limits of a province;

(*d*) a ferry between any province and any other province or between any province and any other country other than Canada;

(*e*) aerodromes, aircraft or a line of air transportation;

(*f*) a radio broadcasting station;

(*g*) a bank;

(*h*) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces; and

(*i*) a work, undertaking or business outside the exclusive legislative authority of provincial legislatures;

. . .

The relevant parts of this definition in this case are the opening words ("any work, undertaking or business that is within the legislative authority of the Parliament of Canada") and clause (*i*) ("a work, undertaking or business outside the exclusive legislative authority of provincial legislatures").

The only issues of construction that are left are thus the definitions of "employee" and of "employer". Section 107(1) of Part V defines "employee" both generally and specially, as is seen in the following formulation:

"employee" means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations;

The included special extension of the term "employee", namely "dependent contractor", is defined to include, *inter alia*, a fisherman, as

spelled out in clause (*b*) of the definition of "dependent contractor", which is in these words:

. . .

> (*b*) a fisherman who is not employed by an employer but who is a party to a contract, oral or in writing, under the terms of which he is entitled to a percentage or other part of the proceeds of a joint fishing venture in which he participates with other persons;

I must confess to some difficulty in bringing the crews of the fishing vessels in the present case under this definition in their relations with the respondent processors who, as "employers", would be "persons who employ one or more employees". If a fisherman means a person who is *not* employed by an employer, how do they become entitled to be considered employees of the respondents? Addy J. did not consider that any difficulty arose in this respect because he said briefly and without elaboration that

> "Employee" is defined as including a dependent contractor. In other words, the fishermen are, by statute, created employees of the processors.

The problem was, however, noticed by Jackett C.J., and he made assumptions to dissolve it in order to reach the constitutional question. I refer to the following two passages in his reasons:

> A problem arises in this case because Part V of the *Canada Labour Code* contains a definition of "employee" for the purposes of that Part that extends the meaning of "employee" to include "a dependent contractor" which term is defined, for the purposes of Part V, to include a fisherman "who is not employed by an employer" but who is a party to a contract under the terms of which he is entitled to a "part of the proceeds of a joint fishing venture in which he participates". (It is to be noted that there is no corresponding provision adding a similar artificial meaning to the word "employer" or to the expression "terms and conditions of employment" in the definition of "collective agreement" although the power of the Canada Labour Relations Board to deal with the applications for certifications that are the subject matter of the judgment appealed from is dependent upon reading those expressions as though such meanings have been impliedly added.)
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> . . .

At the outset, it must be emphasized that this is not a case where the law attacked is a law regulating relations between an employer and persons employed by that employer under contracts for services. The law attacked in this case is rather a law that, for purposes of the constitutional attack, is assumed to be a law regulating the negotiation of contracts for the sale or other disposition of fish by fishermen who are "not employed by an employer" to a processor who is not their employer. Such law may be regarded, if the necessary assumptions are made to give it the effect that all parties seem to assume that it was intended to have, as a law regulating the sale of fish or as a law regulating that part of the business of fishing or of a "fisheries" business that constitutes disposal of the fish after they have been caught.

The failure to amend the definition of "employer" when a "dependent contractor" was included in the definition of "employee" by 1972 (Can.), c. 18 was undoubtedly a lapse but I do not see how a Court can add words to the statute unless they are implicit. What makes implication difficult is the way in which "dependent contractor" is defined to include a fisherman being a person, not employed by an employer "who is a party to a contract, oral or in writing, under the terms of which he is entitled to a percentage or other part of the proceeds of a joint fishing venture in which he participates with other persons". To me, this is, at first blush at least, a reference to an internal arrangement between the fishing vessel owner, the captain and crew as to how they would apportion among themselves the proceeds of their catch when sold to others. The respondent processors, although in some cases owners of fishing vessels, are not being brought into the certification proceedings in that character. Even if it be the case that they keep the accounts by which the fishing vessel owner, captain and crew are apprised of their shares, and even if they distribute the money to them accordingly, this does not make the processors employers under Part V; and if it makes them members of a joint fishing venture they are then fishermen and hence themselves "employees".

The issue whether the processors were "employers" was raised by their counsel at the beginning of the hearings of the Canada Labour Relations Board: see vol. 1, Case on Appeal, p. 103. The

Board never did come to any conclusion on the question because the hearings were held as special hearings to establish facts bearing on what the Board called its constitutional jurisdiction in order to provide a basis for a reference to the Federal Court of Appeal under s. 28(4) of the *Federal Court Act*. Instead of the reference, a motion for prohibition was brought on July 9, 1974. One of the affidavits on the motion, that of Kenneth MacKenzie Campbell, manager of the national trade association of those engaged in the fish processing industry in Canada, sets out certain facts of the relationship between the crew of fishing vessels and the processors, and Addy J. and the Federal Court of Appeal accepted those facts for the purposes of the motion for prohibition. The affidavit contains the following relevant assertions:

. . .

8. That the applicant companies purchase fish from fishermen on the basis set forth in the following paragraphs, with minor variations depending on the species of fish and gear employed.

9. That fishermen, under the terms of written or oral agreements, providing payment to the said fishermen of a percentage of the proceeds received from the sale of fish delivered to the applicants, are remunerated on a "share basis". The "share" is determined basically as follows: the catch is taken by fishermen to agents or servants of the applicant companies where it is sold by the fishermen and purchased by one of the applicant companies.

10. That each applicant company provides a settlement service whereby an accounting is made to the boat owner and the crew of a fishing vessel, in respect of the sale by the fishermen of the catch to the applicant company purchasing the fish.

11. That by the terms of the said written and oral agreements, which are basically standard, there is deducted from the gross proceeds of the catch, known as the "gross stock" certain operating costs as may be agreed upon. From what is left, there is set aside a percentage share for the boat which is paid or credited to the boat owner, and which is referred to as "the boat share".

12. That from the remainder of the proceeds, referred to in the fishing industry as the "net stock credit", there is then deducted certain other costs including principally, the costs of food for the crew and other crew

personnel expenses incurred on the trip. The remaining balance is divided amongst the crew which includes the captain. If the owner is part of the crew as captain or otherwise, he also gets his share of the last mentioned division.

13. That if there is a loss on a fishing trip, the fishing trip is then referred to as a "hole" trip, the loss on which is charged to the owner and crew in the same ratio as the owner and crew share the "net stock" proceeds. A full accounting with respect to the proceeds of a catch, incorporating all the matters referred to, is made by each of the applicants, as purchaser to the owner and to the crew, including the captain.

14. That all purchases of fish made by the applicant companies from fishermen in respect of whom the applications for certification have been made as aforesaid, occur within the Province of British Columbia.

15. That the foregoing facts are the basic common denominator of the varying relationships between the applicant companies and the fishermen within the scope of the applications for certification referred to hereinbefore.

16. That the oral and written agreements entered into between the applicant companies and fishermen are contracts for the purchase and sale of fish caught by the fishermen, and delineate the minimum prices to be paid for the fish by the applicant companies and the manner and means of the division of the gross stock proceeds of the catch.

Laudable as may be the desire to give fishermen collective bargaining rights in an area alleged to fall within federal competence, there are lessons of history that should have pointed to the proper way to accomplish that object. In *Re Lunenberg Sea Products, Re Zwicker*[2], the Nova Scotia Supreme Court *en banc* granted an application for *certiorari* to quash a certification order of the Nova Scotia Wartime Labour Relations Board, made under the federal *Wartime Labour Relations Regulations*, P. C. 1003 of February 17, 1944, in respect of the members of the crew of fishing vessels in their relations with the owners of such vessels. There were agreements between the fishermen and the owners for provision by each of certain facilities in connection with the fishing operations and for sharing the proceeds of the catch when sold. Althought the Board was authorized to determine

[2] [1947] 3 D.L.R. 195.

who was an "employee" or "employer" for the purposes of the Regulations, the Court held through Doull J. that a jurisdictional question was raised in that determination which was reviewable. The Court then concluded that in the absence of a particular definition of "employee", and "employer" the "general law" applied, and under that law it must be held that the fishermen were engaged in a joint venture with the owners of the vessels, a species of partnership, and that there was no employer-employee relationship to support the certification order.

Whether that case was correctly decided it is unnecessary to say, but it must be noted that the issue of an employer-employee relationship arose as between the crew members and the owners of the fishing vessels on which the fishermen worked, and not as between fishermen and fish processors. Indeed, the definition of "dependent contractor" in Part V in encompassing fishermen appears to me to reflect the situation examined in the *Lunenberg Sea Products* case.

The decision in that case was given on January 14, 1947, and within four months thereafter the Nova Scotia Legislature provided for collective bargaining between vessel owners and fishermen forming the crew of such vessels under *The Fishermen's Federation Act*, 1947 (N.S.), c. 4. The special Act by-passed the traditional employer-employee concepts by recognizing sharing of the proceeds of a catch as a subject of collective bargaining along with working conditions on fishing vessels. This statute endured until 1971 when it was repealed by 1970-71 (N.S.), c. 40 and the collective bargaining relationships of fishermen and fishing vessel owners were brought under the general *Trade Union Act*, 1972 (N.S.), c. 19 through the inclusion of fishermen in the definition of "employee" in the following terms:

> s. 1(1)(k) "employee" means a person employed to do skilled or unskilled manual, clerical or technical work, and includes:
>
> . . .
>
> (ii) a person employed or engaged on fishing vessels of all types or in the operation of these vessels on

> water, if he is paid wages or salary or accepts or agrees to accept percentage or other part of the proceeds of the adventure or of the catch in lieu of or in addition to wages.

"Employer" is defined in s. 1(1) as "any person who employs more than one employee". There are no such words here as appear in respect of fishermen under Part V of the *Canada Labour Code*, namely, a fisherman "who is not employed by an employer".

In Newfoundland, *The Fishing Industry (Collective Bargaining) Act*, 1971, No. 53, purports to do what it is contended by the appellants herein has been done under Part V of the *Canada Labour Code*. It provides expressly for collective bargaining between organizations of fishermen and operators who are fish processors. The definitions of "fisherman" and "operator" are sufficiently indicative of the thrust of the Act. They appear in s. 2 as follows:

> **2.** In this Act
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> . . .
>
> (l) "Fisherman" means a self-employed commercial fisherman (including a sharesman or person agreeing to accept in payment for his services a share or portion of the proceeds or profits of a fishing venture, with or without other remuneration) engaged in fishing for gain, other than for sport, in tidal waters (including fishing for anadromous fish while in such waters) and includes any other commercial fisherman not falling within the definition of employee in The Labour Relations Act;
>
> . . .
>
> (o) "Operator" means any person who purchases fish from a Fisherman or from any person on behalf of a Fisherman for the purpose of being processed in any manner in any plant of such Operator or of any other person;

I say nothing, of course, about the validity of this legislation in this case.

The position of fishermen in respect of collective bargaining under British Columbia legislation turns on whether they are employees within the definition of "dependent contractor", under the *Labour Code of British Columbia Act*, 1973 (B.C.), (2nd Sess.), c. 122, which is as follows:

1. (1) In this Act

. . .

"dependent contractor", means an individual, whether employed by a contract of employment or not, or whether furnishing his own tools, vehicles, equipment, machinery, material, or any other thing or not, who performs work or services for another person for compensation or reward on such terms and conditions that he is, in relation to that person, in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

I need not determine here whether this definition entitles fishermen, who are members of the crew of fishing vessels, to seek collective bargaining rights through trade unions against fish processors as well as against fishing vessel owners. The conditions of their remuneration and their relationship, if any, to fish processors would be relevant. It is enough to say that the position in British Columbia, as in Nova Scotia and Newfoundland, is different from that under Part V of the *Canada Labour Code*, whatever be the scope of the British Columbia statute in relation to fishermen.

I see no escape from the conclusion that Part V of the *Canada Labour Code* does not bring fishing crew members and fish processors into an employee-employer relationship so as to authorize the Canada Labour Board to entertain applications for certification in respect of such fishermen and the respondent processors.

In the result, the appeal is dismissed on a ground other than that taken either by the Federal Court of Appeal or by Addy J. and without reference to any issue of constitutionality. It is not a case for costs in this Court to or against any of the parties or intervenors.

Appeal dismissed.

Solicitors for the appellant, British Columbia Provincial Council, United Fishermen and Allied Workers' Union: Rankin, Robertson & Co., Vancouver.

Solicitor for the appellant, Canada Labour Relations Board: D. S. Thorson, Ottawa.

Solicitors for the respondents: Levy, Samuels & Glasner, Vancouver.