No. 13 of 1948

In the Privy Council

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

IN THE MATTER of *The Trade Union Act,* Statutes of Saskatchewan, 1944 (second session) Chapter 69, and amendments thereto;

AND IN THE MATTER of certain orders made by The Labour Relations Board of Saskatchewan.

BETWEEN

THE LABOUR RELATIONS BOARD OF SASKATCHEWAN, *Appellant*

—and—

JOHN EAST IRON WORKS, LIMITED, *Respondent.*

CONSOLIDATED RECORD OF PROCEEDINGS

INDEX OF REFERENCE.

In the Privy Council

No. 13 of 1948. 1230

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

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BETWEEN

THE LABOUR RELATIONS BOARD OF SASKATCHEWAN,
Appellant,

—and—

JOHN EAST IRON WORKS, LIMITED,
Respondent

RECORD OF PROCEEDINGS

PART I—PLEADINGS, ETC.

IN THE COURT OF APPEAL FOR SASKATCHEWAN

In the Court of Appeal for Saskatchewan.

No. 1

Notice of Motion of Respondent

No. 1
Notice of Motion of Respondent, November 6, 1947—

IN THE COURT OF APPEAL
(CROWN SIDE)

IN THE MATTER OF *The Trade Union Act,* Statutes of Saskatchewan, 1944 (second session) Chapter 69, and amendments thereto, and in the matter of the Crown Practice Rules, and in the matter of certain orders made by the Labour Relations Board of Saskatchewan.

10

BETWEEN:

JOHN EAST IRON WORKS, LIMITED, an incorporated company having its head office at Saskatoon, in the Province of Saskatchewan, *Applicant*

—and—

LOCAL 3493, UNITED STEEL WORKERS OF AMERICA, *Respondent*

NOTICE OF MOTION

In the Court of Appeal for Saskatchewan.

No. 1
Notice of Motion of Respondent, November, 6, 1947—*—continued.*

TAKE NOTICE that the Court of Appeal will be moved at the Court House in the City of Regina, in the Province of Saskatchewan, on Monday the 17th day of November, A.D. 1947, at the hour of ten o'clock in the forenoon or so soon thereafter as Counsel can be heard by Counsel on behalf of the above named Applicant for an Order that a Writ or Writs of Certiorari do issue out of this Honourable Court for the return to this Court of five certain Orders made on the 8th day of July, 1947, by The Labour Relations Board of Saskatchewan, which Board consisted of W. K. Bryden, Chairman, Elsie M. Hart, W. G. Davies, J. R. Griffith and G. H. Whitter, whereby the said Labour Relations Board ordered the Applicant to reinstate, as of the date of the Order, J. E. Boryski, Harold J. Craigmile, N. Troobitscoff, Peter Troobitscoff and G. M. Svendsen, in their employment with the said Company and to pay to the said J. E. Boryski, Harold J. Craigmile, N. Troobitscoff, Peter Troobitscoff and G. M. Svendsen, the sum of Two Hundred and Eighty ($280.00) Dollars which said Orders were filed with the Local Registrar of the Court of King's Bench, Judicial District of Regina, on the 15th day of July, 1947, and for an Order that the said Orders be quashed and for the costs of this application.

AND FURTHER TAKE NOTICE that the grounds of this application are that the said Orders and each of them were made without jurisdiction in the following, among other respects:

1. The Orders show on their face that the Labour Relations Board erred in that the said Board assumed that the question and the only question for their determination in fixing the monetary loss suffered by the said J. E. Boryski, Harold J. Craigmile, N. Troobitscoff, Peter Troobitscoff and G. M. Svendsen by reason of their discharge from the employment of the Applicant was the amount of wages which they would have earned had they continued in the employment of the Applicant from May 23rd, 1947, until July 8th, 1947.

2. That the said Labour Relations Board acted upon the fundamental error in law referred to in ground 1 hereof and consequently either ignored any relevant evidence in respect of the true basis on which such alleged monetary loss should have been assessed or failed to take any evidence in respect thereto.

3. That the Labour Relations Board's misunderstanding of the law which it should have applied in determining the issue before it was so complete and fundamental as to render its findings of no effect.

4. That the Chairman of the said Board, W. K. Bryden, so acted in relation to these proceedings as to indicate that he was disqualified by bias or by the reasonable apprehension of bias from sitting on the said Board and/or taking part in the inquiry and such disqualification extended to the Board and disqualified it of jurisdiction to make the Orders herein referred to.

No. 1
Notice of Motion of Respondent, November, 6, 1947—
—continued.

5. That no notice of the making of the said Orders of the Labour Relations Board was received by the Applicant until the 18th day of July and it was on that date impossible for the Applicant to comply with them insofar as they ordered the Applicant to reinstate the employees hereinbefore referred to as of the 8th day of July, 1947.

6. That the said *Trade Union Act,* S.S. 1944, Second Session, Chapter 69, as amended, insofar as it purports to (*a*) make the Orders of the Board enforcible as orders of the Court of King's Bench and (*b*) give to the Labour Relations Board the power to make any order under Section 5(*e*) of the said Act is *ultra vires* of the Legislature of Saskatchewan as being legislation setting up a superior, district or county court or a tribunal analogous thereto, the judges or members of which are not appointed by the Governor General of Canada in Council and as purporting to confer judicial power upon a body not so appointed.

7. And upon such further and other grounds as Counsel may advise and the Court permit.

AND FURTHER TAKE NOTICE that on the hearing of this Motion the Applicant will ask that the said Orders be quashed without the actual issue of a Writ or Writs of Certiorari and that the giving of security for costs by the Applicant be dispensed with.

AND FURTHER TAKE NOTICE that on the return of this Motion there will be read the said Orders, the Affidavit of Melville Austin East, the record of the evidence taken before the Labour Relations Board and such further and other material as Counsel may advise.

DATED at the City of Regina, in the Province of Saskatchewan, this 6th day of November, A.D. 1947.

MacPHERSON, MILLIKEN, LESLIE & TYERMAN,

Per: "E. C. LESLIE"

Solicitors for the Applicant.

TO: Local 3493, United Steel Workers of America,
The Chairman of the Labour Relations Board, W. K. Bryden, Esq., and
The Attorney General of Saskatchewan.

In the Court of Appeal for Saskatchewan.

No. 2 Affidavit of Melville Austin East, November, 10, 1947—

No. 2

Affidavit of Melville Austin East

I, MELVILLE AUSTIN EAST, of the City of Saskatoon, in the Province of Saskatchewan, Manager, make oath and say:

1. THAT I am now and have been at all times material to this application General Manager of John East Iron Works, Limited, the above named Applicant, and as such have personal knowledge of the facts and matters herein deposed to except where stated to be on information and belief.

2. THAT hereunto annexed and marked Exhibit "A" to this my Affidavit is a true copy of the Application made by Local 3493, United Steel Workers of America for an Order to be made by the Labour Relations Board of Saskatchewan pursuant to Clause (*e*) of Section 5 of *The Trade Union Act, 1944*, as from time to time amended in respect of J. E. Boryski and the said Application is identical in form with similar Applications made by the said Local 3493, United Steel Workers of America for Orders in respect of Harold J. Craigmile, N. Troobitscoff, Peter Troobitscoff and G. M. Svendsen.

3. THAT I was present throughout the hearing before the Labour Relations Board of Saskatchewan which was held as a result of the Applications made by Local 3493, United Steel Workers of America in respect of the Applications hereinbefore mentioned which said hearing was held at the City of Saskatoon, in the Province of Saskatchewan, on the 10th, 11th and 12th days of June, 1947, and I gave evidence on behalf of the Applicant before the said board.

4. THAT on the said hearing Mr. P. G. Makaroff appeared as Counsel for the Respondent Union Local 3493, United Steel Workers of America and during the course of the hearing he sought to establish that there was a connection with the Blanchard Foundry and Machine Company, Limited and the Applicant, John East Iron Works, Limited, and that the shareholders of the said two companies were the same and he sought to show and did introduce evidence with a view to showing that the Blanchard Foundry and Machine Company, Limited had been opposed to trade unions and that consequently it ought to be inferred that the John East Iron Works, Limited was also opposed to trade unions.

5. THAT during the proceedings before the Labour Relations Board and on the first day of the hearing the Chairman of the said Board, W. K. Bryden, extracted from his brief case certain returns made pursuant to The Companies Act of the Province of Saskatchewan, by the John East Iron Works, Limited and the Blanchard Foundry and Machine Company, Limited and gave them to Mr. Makaroff. I don't remember what subsequently happened to them but they were used by Mr. Makaroff to show that the two Companies had the same

shareholders and directors and from the manner in which they were produced I verily believe that the said W. K. Bryden had obtained the said returns in Regina before the hearing commenced and had brought them with him to the hearing at Saskatoon.

6. THAT hereunto annexed and marked Exhibit "B" to this my Affidavit is a true copy of the Order of the Board bearing date the 8th day of July, 1947, in the matter of the discharge of J. E. Boryski.

7. THAT I am advised by E. C. Leslie of the firm of MacPherson, Milliken, Leslie & Tyerman, my Solicitors, and verily believe that a copy of the Order, a true copy of which is marked as Exhibit "B" to this my Affidavit was filed with the Local Registrar of the Court of King's Bench, Judicial District of Regina, on the 15th day of July, 1947.

8. THAT Orders, each identical in their terms to the Order set out in Exhibit "B" to this my Affidavit were made by the Labour Relations Board bearing date the 8th day of July, 1947, in respect of Harold J. Craigmile, N. Troobitscoff, Peter Troobitscoff and G. M. Svendsen and I am informed by Mr. E. C. Leslie and do verily believe that copies of each of the said Orders were filed with the Local Registrar of the Court of King's Bench, Judicial District of Regina, on the 15th day of July, 1947.

9. THAT hereunto annexed and marked Exhibit "C" to this my Affidavit is a true copy of the Reasons for Judgment of the Labour Relations Board which Reasons were not given to the Applicant or its Solicitors until some weeks after the Orders had been issued.

10. THAT the copies of the Orders of the Board bearing date the 8th day of July, 1947, were mailed to John East Iron Works, Limited by the Secretary of the Labour Relations Board on the 17th day of July, 1947, and were received by the said John East Iron Works, Limited on the 18th day of July, 1947.

11. THAT I make this Affidavit in support of an application for the issue of a Writ or Writs of Certiorari for the return to this Court of the said Orders and for the other relief set out in the Notice of Motion herein dated the 6th day of November, 1947.

SWORN before me at the City of Saskatoon, in the Province of Saskatchewan, this 10th day of November, A.D. 1947.

"W. B. CASWELL"
A Commissioner for Oaths in and for the Province of Saskatchewan, being a Solicitor

"M. A. EAST"

This Affidavit is filed on behalf of John East Iron Works Limited, the above named Applicant.

In the Court of Appeal for Saskatchewan.

No. 3

Notice to the Honourable the Attorney General of Saskatchewan under the Constitutional Questions Act

No. 3 Notice to the Honourable the Attorney General of Saskatchewan under the Constitutional Questions Act, November 18, 1947.

NOTICE is hereby given to the Honourable the Attorney General of Saskatchewan that on an application by John East Iron Works, Limited to the Court of Appeal for Saskatchewan for an Order quashing certain orders made by The Labour Relations Board of Saskatchewan on the 8th day of July, 1947, Counsel for the said John East Iron Works, Limited intends to bring into question the constitutional validity of *The Trade Union Act* being Chapter 69 of the Statutes of Saskatchewan, 1944, Second Session, as amended, insofar as the said Act purports to —(*a*) make the orders of The Labour Relations Board enforcible as orders of the Court of King's Bench and (*b*) give to The Labour Relations Board the power to make any order under Section 5(*e*) of the said Act.

The contention of John East Iron Works, Limited is that the said sections 5(e) and 9 are *ultra vires* of the legislature of Saskatchewan in the foregoing respects as being legislation setting up a superior court or tribunal analogous thereto, the judges or members of which are not appointed by the Governor General of Canada in Council.

AND FURTHER TAKE NOTICE that the said matter will be argued at the sittings of the Court of Appeal fixed to commence on Monday the 17th day of November, 1947.

DATED at the City of Regina, in the Province of Saskatchewan, the 18th day of November, A.D. 1947.

MacPHERSON, MILLIKEN, LESLIE & TYERMAN
Per "E. C. LESLIE",
Solicitors for John East Iron Works, Limited.

TO: The Honourable the Attorney General
for Saskatchewan.

No. 4.

In the Court of Appeal for Saskatchewan.

No. 4
Affidavit of Norman R. Riches. November 22, 1947.

Affidavit of Norman R. Riches

I, NORMAN R. RICHES, of the City of Moose Jaw, in the Province of Saskatchewan, trade union representative, make oath and say:

1. THAT I am a Field Representative of the United Steel Workers of America, which position I have occupied for approximately the past four years, and I am also the Field Representative of Local 3493 of the said The United Steel Workers of America, and have occupied the said position at all times relevant to this action, and as such, I have a personal knowledge of the matters herein deposed to except where otherwise stated;

2. THAT the United Steel Workers of America, and Local 3493 thereof are affiliated to the Congress of Industrial Organizations and the Canadian Congress of Labour;

3. THAT Local 3493 of The United Steel Workers of America is a trade union, but is not incorporated or registered under any law, rule or regulation of the Dominion of Canada or the Province of Saskatchewan, and is not a partnership nor any other person or entity known to the law, and neither The United Steel Workers of America, The Congress of Industrial Organizations nor the Canadian Congress of Labour, nor any of them, is incorporated or registered under any law, rule or regulation of the Dominion of Canada or the Province of Saskatchewan, nor is any of them a partnership or any other person or entity known to the law;

4. THAT among the objects of the said trade union is collective bargaining, by which the members of the trade union combine together for the purpose of increasing their strength in meeting and bargaining with employers to secure higher wages and better conditions of employment collectively, but its objects do not include business or trade for profit.

SWORN before me at the City of Regina, in the Province of Saskatchewan this 22nd day of November, A.D. 1947.
"H. R. MITCHELL"
A Commissioner for Oaths in and for the Province of Saskatchewan.
My Commission expires Dec. 31/50.

"N. R. RICHES"

This affidavit is filed on behalf of The Labour Relations Board of Saskatchewan.

In the Court of Appeal for Saskatchewan

No. 5 Affidavit of Walter Kenneth Bryden, November 24, 1947.

No. 5.

Affidavit of Walter Kenneth Bryden

I, WALTER KENNETH BRYDEN, of the City of Regina in the Province of Saskatchewan, Deputy Minister of Labour for the Province of Saskatchewan, make oath and say:

1. THAT I am Chairman of The Labour Relations Board for Saskatchewan;

2. THAT I sat and acted as Chairman of The Labour Relations Board at the City of Saskatoon on the 10th, 11th and 12th days of June, 1947, and more particularly, I sat and so acted in the matter of six applications of Local 3493 of The United Steel Workers of America, a trade union, alleging that Messrs. T. G. Germaine, G. M. Svendsen, J. H. Craigmile, J. E. Boryski, P. Troobitscoff and N. Troobitscoff, and each of them, being employees of the Applicant herein, an employer, were discharged from the employment of the Applicant herein by the said Applicant effective the 23rd day of May, 1947, because the said employees, and each of them were members of and/or active in the said trade union and that the said employer committed an unfair labour practice within the meaning of clause (*e*) of subsection (1) of section 8 of *The Trade Union Act, 1944*, as from time to time amended, and the said trade union applied to the Labour Relations Board for orders to be made in respect of each of the said employees, pursuant to clause (*e*) of section 5 of the said *The Trade Union Act*, requiring the said employer to reinstate the said employees and to pay them the monetary loss suffered by them by reason of their discharge;

3. THAT at the time aforesaid, and for the same purpose, the following additional members of the said Labour Relations Board sat and acted as members thereof, that is to say, Mrs. Elsie M. Hart (Mrs. Warren Hart), Messrs. W. G. Davies, J. R. Griffith and G. H. Whitter, the same and myself being a majority of the members of the said Board and a quorum;

4. THAT early in the proceedings before the said Board, the said trade union withdrew its application on behalf of Mr. T. G. Germaine, and proceeded with the other five applications herein referred to, together and at one and the same time, with the consent of all of the parties concerned;

5. THAT upon hearing the evidence that was adduced by both the said trade union and the Applicant herein, and upon considering the written representations submitted by Mr. M. A. East on behalf of the Applicant herein, upon hearing counsel as well for the Applicant herein as for the said trade union, and upon considering all of the facts adduced in evidence before the Labour Relations Board and what was urged in argument before the said Board, the Labour Relations Board, on the 8th day of July, 1947, found, with respect to each of the fol-

lowing persons, that is to say, with respect to Messrs. G. M. Svendsen, J. H. Craigmile, J. E. Boryski, P. Troobitscoff and N. Troobitscoff, and each of them, that they and each of them were employed by the Applicant herein; that on the 15th day of May, 1947, the Applicant herein discharged each of the said employees from its employment; that the said trade union had alleged that the Applicant herein, an employer within the meaning of paragraph 6 of section 2 of *The Trade Union Act, 1944,* in discharging the said employees, had committed an unfair labour practice within the meaning of clause (*e*) of subsection (1) of section 8 of the said Act, with respect to each of the said employees, that it was not proved by or on behalf of the Applicant herein, as allowed by the said clause, that the said Applicant herein did not discriminate against each of the said employees or any of them in regard to tenure of employment with a view to discouraging membership in or activity in or for a labour organization; that the Applicant herein did discriminate against the said employees and each of them, and did thereby commit an unfair labour practice against the said employees and each of them, within the meaning of clause (*e*) of subsection (1) of section 8 of the said Act; and that the said employees and each of them were therefore discharged contrary to the provisions of the said Act;

6. THAT the Labour Relations Board further found that immediately prior to the date of the discharge of the said employees and each of them, the said employees and each of them were employed by the Applicant herein at a rate of wages of 80 cents per hour for a work-week of 44 hours; that upon the discharge of the said employees and each of them, they and each of them were paid in full at their regular rates of wages, effective to the 23rd day of May, 1947; that if the said employees and each of them had been employed continuously by the Applicant herein at the rate of wages applicable to each of the said employees immediately prior to his discharge, from the 23rd day of May, 1947, until the 8th day of July, 1947, and had not been discharged by the Applicant herein contrary to the provisions of the said Act, each of the said employees would have received as payment for services rendered the sum of $200.80; and that the monetary loss suffered by each of the said employees by reason of his discharge amounted to $200.80;

7. THAT in virtue of the aforesaid findings of the Labour Relations Board, the said Board ordered that the Applicant herein should: (*a*) reinstate, as of the 8th day of July, 1947, the aforesaid employees and each of them, in the employment with the Applicant herein, of each of them respectively; and (*b*) pay to the aforesaid employees and to each of them, the monetary loss suffered by reason of the discharge of each of them respectively, being the sum of $200.80; and now produced and shown to me and marked Exhibits "A", "B", "C", "D" and "E", are the orders of the said Board made as afore-

In the Court of Appeal for Saskatchewan

No. 5 Affidavit of Walter Kenneth Bryden, November 24, 1947—*continued.*

said with respect to Messrs. G. M. Svendsen, J. H. Craigmile, J. E. Boryski, P. Troobitscoff and N. Troobitscoff, respectively;

8. THAT certified copies of the aforesaid orders of the Labour Relations Board and each of them, were filed in the office of the Registrar of the Court of King's Bench at the City of Regina on the 15th day of July, 1947, pursuant to section 9 of *The Trade Union Act, 1944*, and I am advised by Mrs. M. Stuart, Secretary to the said Board that certified copies thereof were mailed to all interested parties before the Board, including their counsel;

9. THAT a decision of the Labour Relations Board once arrived at by the members or a majority of the members of the said Board is public knowledge, and any interested person is free to request the Board, the members thereof, or any officer or employee thereof authorized in that behalf, and to receive a copy of any decision to which the Board has come or any order which the Board has made or to peruse the same, and mailing of copies of the decisions or orders of the Board to parties or their counsel is not required of the Board by statute or by regulation of the Board, the sole publication of decisions and orders of the Board being provided by section 9 of *The Trade Union Act, 1944;*

10. THAT the reasons for the decision of the Labour Relations Board in the matter of the five applications with which it dealt were written and submitted to all interested parties, and now produced and shown to me and marked Exhibit "F" to this, my Affidavit, is a true copy of the said reasons;

11. THAT I am advised by Dr. M. C. Shumiatcher, Counsel to the Labour Relations Board, and I verily believe that on or about the 9th day of July, 1947, Mr. P. G. Makaroff, K.C., counsel for the aforesaid trade union communicated with Dr. Shumiatcher at Regina and advised him that he proposed to submit evidence to the said Board concerning the directors and shareholders of the Applicant herein and of the Blanchard Foundry and Machine Company, Limited, and requested that steps be taken to subpoena the Provincial Secretary or his Deputy for the purpose of producing the returns filed in the office of the Provincial Secretary by the Applicant herein and the said Blanchard Foundry and Machine Company, Limited, and that for the purpose of expediting the proceedings, the files containing the said returns were delivered by the Deputy Provincial Secretary to Dr. Shumiatcher;

12. THAT the said files were delivered by Dr. Shumiatcher to me on the 9th day of July, 1947, and the said files were in my custody and control at all relevant times, and were handed by me to Mr. Makaroff at his request, in the course of the hearing before the said Board in the afternoon of the 10th day of July, 1947, and were referred to by Mr. Makaroff in the course of his cross-examination at the

hearing on the 10th day of July, 1947, and the said files were then and there shown to Mr. E. C. Leslie, K.C., counsel for the Applicant herein, by Mr. Makaroff in the course of the said hearing and in the presence of all of the members of the Board, and no objection whatsoever was taken by Mr. Leslie or by any other person on behalf of the Applicant herein, to the presence of the files before the said Board, to the act whereby I handed the said files to Mr. Makaroff as aforesaid, to the reading of extracts therefrom by Mr. Makaroff or to the return of the said files to me;

13. THAT at no time whatsoever did I discuss with Mr. Makaroff or with any party to these proceedings, the files of the Provincial Secretary referred to in paragraphs 11 and 12 of this, my Affidavit;

14. THAT for the purpose of expediting the procedure of the Labour Relations Board and of preserving a measure of informality in its proceedings, it is the policy of the Board to assist all parties before it in producing and presenting evidence touching applications with which it is required to deal.

SWORN before me at the City of Regina, in the Province of Saskatchewan, this 24th day of November, A.D. 1947.
"DOROTHY M. GERMAN"
A Commissioner for Oaths in and for the Province of Saskatchewan.
My commission expires Dec. 31/49.

"W. K. BRYDEN"

This affidavit is filed on behalf of the Labour Relations Board of Saskatchewan.

NOTE: The exhibits to this affidavit are omitted from the Record by consent of the parties.

In the Court of Appeal for Saskatchewan

No. 6 Affidavit of Morris C. Shumiatcher, November 25, 1947.

No. 6.

Affidavit of Morris C. Shumiatcher

I, MORRIS C. SHUMIATCHER, of the City of Regina, in the Province of Saskatchewan, Barrister-at-law, make oath and say:

1. THAT I am counsel to the Labour Relations Board for Saskatchewan and as such, I have a personal knowledge of the matters herein deposed to;

2. THAT I have read paragraph 11 of the Affidavit of Walter Kenneth Bryden dated the 24th day of November, A.D. 1947, and filed in the above noted action, and the facts and all of them contained therein are true in substance and in fact.

SWORN before me at the City of Regina, in the Province of Saskatchewan, this 25th day of November, A.D., 1947.
"J. M. TELFORD"
A Commissioner for Oaths in and for the Province of Saskatchewan, being a Solicitor.

"MORRIS C. SHUMIATCHER"

This affidavit is filed on behalf of The Labour Relations Board of Saskatchewan.

In the Court of Appeal for Saskatchewan

No. 7 Order, December 15, 1947.

No. 7.

Order

Before:

THE HONOURABLE THE CHIEF JUSTICE OF SASKATCHEWAN

THE HONOURABLE MR. JUSTICE GORDON

THE HONOURABLE MR. JUSTICE MACDONALD

THE HONOURABLE MR. JUSTICE ANDERSON

Monday, the 15th day of December, A.D. 1947.

UPON THE APPLICATION of the above named John East Iron Works, Limited and upon reading the Notice of Motion herein on behalf of the said Applicant returnable on Monday, the 17th day of November, A.D. 1947; and upon reading the Notice to the Honourable the Attorney General of Saskatchewan under *The Constitutional Questions Act*, dated the 18th day of November, A.D. 1947, respectively; and upon reading the affidavit of Melville Austin East and the exhibits thereto, filed on behalf of the Applicant herein; and upon reading the affidavits of Walter Kenneth Bryden with exhibits thereto, of Morris

In the Court of Appeal for Saskatchewan

No. 7
Order, December 15, 1947—*continued.*

C. Shumiatcher and of Norman R. Riches filed herein on behalf of the Labour Relations Board of Saskatchewan; and upon hearing Counsel for the Applicant herein, and Counsel for the Attorney General of Saskatchewan and for the Labour Relations Board of Saskatchewan on the 17th day of November, A.D. 1947, and upon hearing Counsel further for the said parties on the 26th and 27th days of November, A.D. 1947; and this Honourable Court having been pleased to reserve its decision until this day and the Court having on this day rendered its decision:

IT IS THIS DAY ORDERED AND ADJUDGED that the orders of The Labour Relations Board of Saskatchewan of July the 8th, 1947, requiring the Applicant herein to reinstate J. E. Boryski, Harold J. Craigmile, M. Troobitscoff, Peter Troobitscoff and G. M. Svendsen, and to pay each of them the sum of $200.80 as monetary loss be and the same and each of them are quashed without the actual issue of a writ or writs of certiorari;

AND IT IS FURTHER ORDERED that the giving of security for costs by the Applicant be dispensed with;

AND IT IS FURTHER ORDERED AND ADJUDGED that the Applicant herein, John East Iron Works, Limited, do recover its costs against The Labour Relations Board of Saskatchewan to be taxed.

"A. C. ELLISON"
Registrar.

In the Court of Appeal for Saskatchewan

No. 8
Reasons for Judgment of the Court of Appeal, December 15, 1947.

No. 8.

Reasons for Judgment of the Court of Appeal.

E. C. Leslie, K.C., for the applicant.

P. G. Makaroff, K.C., for the Attorney General.

M. C. Shumiatcher for the Labour Relations Board.

JUDGMENT OF THE COURT

MARTIN, C.J.S.

This is an application for an order that a writ of *certiorari* do issue for the return to this Court of five certain orders made by the Labour Relations Board on July the 8th, 1947, directing the applicant hereinafter referred to as "the Company", to reinstate in their employment with the applicant as of the date of the orders, J. E. Boryski, Harold J. Craigmile, N. Troobitscoff, Peter Troobitscoff and G. M. Svendsen, and to pay each of the said named the sum of $200.80, and for an order that the said orders be quashed without the actual issue of a writ or writs of *certiorari.*

In the Court of Appeal for Saskatchewan

No. 8
Reasons for Judgment of the Court of Appeal, December 15, 1947—*continued.*

The orders of the Labour Relations Board in question were on July 15th, 1947, filed with the Local Registrar of the Court of King's Bench at Regina pursuant to the provisions of *The Trade Union Act,* section 9 of Chapter 69 of the Statutes of Saskatchewan, 1944 (Second Session).

The five orders are identical in terms and were made by the Labour Relations Board as the result of applications by the United Steel Workers of America Local 3493, on behalf of each of the five employees of the Company. In the application made on behalf of J. E. Boryski it is alleged that he was an employee, within the meaning of *The Trade Union Act* of 1944, of the Company since January the 13th, 1947, that the said employer or employer's agent had discharged the said Boryski on the said date because he was a member of and active in the trade union and that the employer thereby committed an unfair labour practice within the meaning of Section 8, subsection (1) clause (*e*) of *The Trade Union Act, 1944,* Local 3493 of the United Steel Workers of America accordingly asked for an order of the Labour Relations Board pursuant to the provisions of section 5, clause (*e*) of *The Trade Union Act, 1944,* requiring the employer to reinstate the said Boryski and to pay him the "monetary loss" suffered by him by reason of his discharge. A similar application was made on behalf of Harold J. Craigmile, N. Troobitscoff, Peter Troobitscoff and G. M. Svendsen.

By consent of the parties the five applications were heard by the Labour Relations Board together and evidence taken in regard to all of them at the same time. Each of the employees was discharged on May the 15th, 1947, and on that date each was given pay in lieu of notice for the period from May the 15th to May the 23rd. Each man immediately prior to his discharge was employed on machine work and was paid at the rate of eighty cents an hour. The order made by the Labour Relations Board in regard to Boryski (and the same order was made with respect to each of the four other employees) was in part as follows:

> "The Board having found that J. E. Boryski was employed by the respondent company; that on the fifteenth day of May, A.D. 1947, the respondent Company discharged the said J. E. Boryski from his employment; that the applicant trade union alleged that the respondent company, an employer within the meaning of paragraph 6 of section 2 of *The Trade Union Act, 1944,* in discharging the said J. E. Boryski from his employment, committed an unfair labour practice within the meaning of clause (*e*) of subsection (1) of section 8 of the said Act; that it was not proved by or on behalf of the respondent company, as required by the said clause, that the said company did not discriminate against the said J. E. Boryski in regard to tenure of employment with a view to discouraging membership in or activity in

or for a labour organization; that the said company did discriminate against the said J. E. Boryski as aforesaid and thereby committed an unfair labour practice within the meaning of clause (*e*) of subsection (1) of section 8 of the said Act; and that the said J. E. Boryski was therefore discharged contrary to the provisions of the said Act;

"The Board having found further that immediately prior to the date of his discharge, the said J. E. Boryski was employed by the respondent company at a rate of wages of eighty cents per hour for a work-week of forty-four hours; that upon his discharge the said J. E. Boryski was paid in full at his regular rate of wages effective to the twenty-third day of May, A.D. 1947; that if the said Boryski had been employed continuously by the respondent company at the rate of wages applicable to him immediately prior to his discharge, from the twenty-third day of May, A.D. 1947, until the date of this order, he would have received as payment for services rendered the sum of Two Hundred Dollars and Eighty cents and that the monetary loss suffered by the said J. E. Boryski by reason of his discharge amounted to Two Hundred Dollars and Eighty cents;

"In virtue of the authority vested in it by section 5, clause (*e*) of *The Trade Union Act, 1944*, being chapter 69 of the Statutes of Saskatchewan, 1944 (Second Session), as from time to time amended:

"The Labour Relations Board orders that The John East Iron Works, Limited, a body corporate, incorporated under the laws of Saskatchewan with head office in the City of Saskatoon, in the Province of Saskatchewan, shall:

(*a*) reinstate, as of the date of this order, J. E. Boryski in his employment with the said company; and

(*b*) pay to the said J. E. Boryski the monetary loss suffered by reason of his discharge, being the sum of Two Hundred Dollars and Eighty Cents."

In section 8, subsection (1) clause (*e*) it is an unfair labour practice for an employer or an employer's agent to discriminate in regard to "hiring or tenure" of employment or to use coercion or intimidation of any kind with a view to encouraging or discouraging membership in a trade union or in any other labour organization; and if an employer discharges an employee and it is alleged by a trade union that the employer or employer's agent has thereby committed an unfair labour practice, it shall be presumed unless the contrary is proved that the employer or employer's agent has discriminated against the employee in regard to tenure of employment with a view to discouraging membership in or activity in a labour organization.

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From the orders made by the Labour Relations Board one of which is in part set out above, it is clear that the Board concluded that the Company had failed to discharge the onus placed upon it, and had been guilty of an unfair labour practice, and that the five employees had accordingly been discharged contrary to the provisions of the Act. Having so found the Board applied section 5 (*e*) of *The Trade Union Act, 1944* which is as follows:

"5. The Board shall have power to make orders:—

. . . . . .

(*e*) requiring an employer to reinstate any employee discharged contrary to the provisions of this Act and to pay such employee the monetary loss suffered by reason of such discharge."

Acting under the provisions of Section 5(*e*) the Board issued its orders requiring the Company to reinstate the five discharged employees who were found to have been discharged contrary to the provisions of the Act and also required the Company to pay to each discharged employee the "monetary loss" which was fixed by the Board in each case at $200.80.

In the notice of motion launched on behalf of the applicant asking for an order for the issue of the writ of *certiorari* for the return of the five orders to this Court and for an order quashing the said orders, the grounds of the application are stated as follows: (1) That the orders show on their face that the Labour Relations Board erred in that they assumed that the only question for determination in fixing monetary loss suffered by reason of their discharge from employment was the amount of the wages which they would have earned had they continued in employment from May the 23rd, 1947, to July the 8th, 1947; (2) That the Chairman of the Board so acted in relation to the proceedings as to indicate that he was disqualified by bias or by a reasonable apprehension of bias from taking part in the inquiry and that such disqualification extended to the Board and deprived it of jurisdiction to make the orders referred to; (3) That *The Trade Union Act,* Chapter 69 of the Statutes of 1944 (Second Session) in so far as it purports to (*a*) make orders of the Board enforceable as orders of the Court of King's Bench, sections 9 and 10, and (*b*) give to the Labour Relations Board the power to make any order under section 5(*e*) of the Act is *ultra vires* of the Legislature of Saskatchewan as being legislation setting up a Supreme, District or County Court or a tribunal analogous thereto, the members whereof are not appointed by the Governor-General in Council and as purporting to confer judicial powers on a Board not so appointed.

Notice was given to the Attorney General of Saskatchewan under the provisions of section 8, of *The Constitutional Questions Act,* R.S.S., 1940, Chapter 72, and he was represented on the argument.

It is contended by counsel for the Company that section 5(*e*) is *ultra vires* because it is legislation conferring upon the Labour Relations

Board judicial powers with respect to contracts of hiring and breaches thereof, powers which are exercised and which have always been exercised by the Superior, District and County Courts, the judges of which are appointed by the Governor General. Section 96 of the *British North America Act, 1867*, provides that the judges of the Superior, District and County Courts shall be appointed by the Governor General; section 99 provides that the judges of the Superior courts shall hold office during good behaviour and section 100 states that the salaries, allowances and pensions of these judges shall be fixed and provided by the Parliament of Canada. Legislative power in relation to the constitution, maintenance and organization of provincial courts of civil and criminal jurisdiction including procedure in civil matters is confided to the provinces by section 92, clause 14 of the *British North America Act, 1867*, and under clause 13 of section 92 the legislature in each province may exclusively make laws in relation to property and civil rights in the Province. As was stated by the Privy Council in *Martineau and Sons, Ltd.*, v. *City of Montreal*, [1932] A.C., 113, at pages 121 and 122, these exclusive provincial powers make it extremely difficult to draw a line between legislation which is within the power of the province under section 92 and legislation which is beyond its powers because of section 96. The provisions of sections 96 to 100 inclusive however were intended to provide for the independence of the judges of the courts therein referred to and as was stated by Lord Atkin in the Privy Council in *Toronto (City)* v. *York (Tp.) and Attorney General for Ontario*, [1938] A.C., page 415, at page 426 "are not to be undermined."

The Trade Union Act, 1944, deals with the right of employees to organize and an obligation is placed upon employers to bargain collectively with a collective bargaining agency representing the majority of employees in an appropriate bargaining unit and machinery is set up to determine and certify whether the bargaining agency enjoys the requisite support. The Act defines unfair labour practices on the part of employers and employees and section 11 provides that anyone who takes part in, aids, abets, counsels or procures any unfair labour practice shall in addition to any other penalty which he has incurred or had imposed upon him under the provisions of the Act, be guilty of an offence and liable on summary conviction to certain fines and imprisonment as therein specified. The Labour Relations Board is primarily an administrative body and so far as it is an administrative body its constitution is within provincial powers for there is no doubt that legislation such as is contained in the Act and which confers administrative powers, except so far as it relates to works and undertakings within the exclusive jurisdiction of the Dominion, is within the powers conferred upon the provinces by section 92(13) to enact laws with respect to property and civil rights within the Province and is not within any of the enumerated powers of the Dominion as set out in Section 91: *Toronto Electric Commissioners* v. *Snider*, [1925] A.C., 396; *Attorney General for Canada* v. *Attorney General for Ontario* [1937] A.C. 326.

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The important matter for consideration here is whether the Provincial Legislature, by enacting section 5(*e*) of *The Trade Union Act, 1944,* has conferred upon the Labour Relations Board judicial powers which it is incapable of receiving as it was not appointed by the Governor General. The courts mentioned in section 96 of the *British North America Act, 1867,* have always had jurisdiction in connection with the enforcement of contracts of hiring and awarding damages for the breaches thereof. In this Province the Court of King's Bench is possessed of jurisdiction similar to that of the Courts referred to in section 96. The Court of King's Bench was created by Provincial Statutes in 1916 and took the place of the Supreme Court of Saskatchewan, provided for by Statute in 1907 to succeed the Supreme Court of the North-west Territories which was in existence prior to 1905, the date when the Province was created by act of the Dominion Parliament. The Supreme Court of the North-West Territories was established by *The North-West Territories Act* of 1886, a statute enacted by the Parliament of Canada, and was given civil and criminal jurisdiction similar to that exercised by the superior courts in England and this jurisdiction was carried forward by the legislature of the province in creating the Supreme Court of Saskatchewan in 1907 and the Court of King's Bench in 1916. The District Court in the Province was also provided for in 1907 with certain limited jurisdiction and continued by the Legislature in 1916. These Courts have exercised jurisdiction in actions founded on the laws of Canada and of the Provinces and generally speaking have the same jurisdiction as the courts named in section 96 of the *British North America Act, 1867.*

That the Courts in England have jurisdiction to deal with the enforcement of contracts of hiring or breaches thereof is clear, and as before stated the jurisdiction of the Superior Courts of England was conferred upon the Supreme Court of the North-West Territories by *The North-West Territories Act* of 1886. It is the law of England and the law of this Province that an employee wrongfully dismissed may treat the contract of service as continuing and may bring an action against the employer under the general legal rule that an action will lie for the unjustifiable repudiation of a contract; in such an action the employee sues not for the services he has rendered but for injury he has suffered by reason of the discharge and the measure of damages is his actual loss which may be much less than the wages he would have earned had he continued in his employment if other work might have been obtained as he is bound to minimize his loss. The Courts have however refused to grant the specific performance of a contract of hiring and service, not because they have no jurisdiction to do so but because the relationship is of so personal a character that such contracts cannot be specifically enforced against an unwilling party with any hope of real success. In *Lumley* v. *Wagner, (1852),* 42 E.R., 687, the defendant agreed to sing at the plaintiff's theatre during a cer-

tain period of time and also agreed that she would not sing elsewhere. The Court granted an injunction restraining the defendant from singing elsewhere but refused to enforce the specific performance of the entire contract. *Vide* remarks of Lord Justice Knight Bruce in *Johnson* v. *Shrewsbury & Birmingham Railway Company, (1853)* 43 E.R., 358; *Stocker* v. *Brockelbank, (1850)*, 20 L.J. Ch., 401, at page 409; *Smith on Master and Servant,* 8th edition, page 119; *Fry on Specific Performance,* 6th edition, pages 50 *et seq.* Counsel for the Labour Relations Board contended that because the Courts refused to grant specific performance of contracts for hiring that this was not a part of their judicial functions and that the Legislature could validly confer upon the Labour Relations Board the power to require an employer to reinstate an employee. As pointed out above, however, the Courts do not refuse specific performance, because they do not possess jurisdiction to grant it but because of the personal relationship such contracts cannot be enforced with any hope of success. In earlier times the courts in England appear to have made orders for specific performance of contracts of personal service. *Ball* v. *Coggs,* (1710) 1 E.R., 471; 1 Brown 140; *East India Company* v. *Vincent,* (1740) 2 Atk. 83, 26 E.R., 451.

In my opinion the Legislature, by enacting section 5(*e*) and empowering the Labour Relations Board to require an employer to reinstate an employee and also to require him to pay the employee his "monetary loss", has conferred upon the Board judicial functions which are exercised by the Courts, the judges of which are appointed by the Governor General under section 96 of the *British North America Act. 1867.* In *Re Toronto (City) and York (Twp.)* [1937] O.R., 177, *supra,* the City of Toronto appealed by special leave to the Court of Appeal of Ontario from an order of the Ontario Municipal Board which directed the City of Toronto to make discovery of documents and to permit inspection of the waterworks system and also directed that the Comissioner of Works for the City be examined for discovery. The Order was made pursuant to the powers contained in *The Ontario Municipal Board Act* of 1932 and in an application made under *The Township of York Act* of 1936. In 1916 the Township made an agreement with the City under the terms of which the City agreed to supply the Township with water at a stated rate and there was a provision that the rate might be altered by agreement or by arbitration, and in the event of disagreement by the arbitrators by a County Court Judge. By the Act of 1936, an *Act respecting the Township of York,* Chapter 88, section 2, it was provided that notwithstanding the agreement of 1916

> ". .... either party to the said agreement may from time to time apply to the Ontario Municipal Board to vary the rates to be charged for water supplied by the said city corporation under the terms of the said agreement *or to settle any differences arising between the parties to the said agreement as to the con-*

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struction thereof, or as to any matters relating to or arising out of the agreement, and the Ontario Municipal Board shall have jurisdiction to vary and fix the said rates, and to hear and determine any such application, and the decision of the said board on any such application shall be final and conclusive and shall not be subject to appeal."

The appellant, the City of Toronto, attacked section 2 on the ground that it was *ultra vires* of the province as the members of the Ontario Municipal Board had no jurisdiction to exercise judicial functions not being appointed by the Governor General in accordance with section 96 of the *British North America Act, 1867.* In giving judgment Rowell, C.J.O., after referring to the jurisdiction of the province to create courts and to that of the Dominion to appoint the judges thereof, stated that the success of the system depended upon the faithful performance of the fundamental principle that purely judicial functions should be conferred upon tribunals the judges of which are appointed by the Governor General. After a reference to the constitution of the Ontario Municipal Board which consists of three members appointed by the Lieutenant Governor in Council and to the administrative duties placed upon the Board by the statute of 1932, he stated that the question in regard to section 2 of the statute of 1936 was whether a board so constituted can validly be given power "to settle any differences arising between the parties to the said agreement and the construction thereof or as to any matter relating to or arising out of the agreement." The learned Chief Justice quoted at length the remarks of Lord Blansborough speaking for the Privy Council in *Martineau and Sons, Ltd.* v. *Montreal (City)* [1932] A.C., page 113, at page 120, and referring to sections 96 to 100 of the *British North America Act, 1867,* Lord Blansborough emphasized the importance of these sections in part as follows:

> ". . . . . it cannot be doubted that the exclusive power by that section (96) conferred upon the Governor General to appoint [the judges of] the Superior, District and County courts is a cardinal provision of the statute. . . . . a Court of construction would accordingly fail in its duty if it were to permit these provisions and the principle therein enshrined to be impinged upon in any way by provincial legislation."

Reference was also made to the decision of the Ontario Court of Appeal in *Re McLean Gold Mines, Limited* v. *Attorney General of Ontario,* (1923) 54 O.L.R., 573. In that case Hodgins, J.A., stated at page 574:

> "To appoint a commissioner and then to invest him with powers exercisable by a Superior Court, as that term is understood in the *British North America Act, 1867,* is to enable the Province in effect to appoint a judge of a Superior Court, for what else is he notwithstanding his designation if in fact he

exercises the jurisdiction, powers and functions of a Supreme Court Judge?"

MacLaren and Magee, JJ.A., agreed with Hodgins, J.A., and Ferguson, J.A., said at page 577:

> "The clear effect, meaning and intent of these two sections, and particularly of the amending Act, 1921, was to take jurisdiction from the Superior Court of this Province and vest it in a Commissioner (Judge) named, appointed, paid and subject to dismissal by the Province. In my opinion, this is contrary to the provisions of sections 96, 99 and 100 of the *British North America Act* and *ultra vires* of the Provincial Legislature; and, therefore, the judgment appealed from is without force and effect as being pronounced by one having no power or jurisdiction in the premises."

Reference was also made by the learned Chief Justice to *In re Town of Sandwich and Sandwich, Windsor & Amherstberg Railway Company,* (1910) 2 O.W.N., 93; *Toronto Railway Company* v. *Toronto (City)* (1918) 44 O.L.R., 381; *Re County of Welland and City of Niagara Falls,* [1933] O.W.N., 470; *The King ex rel. Township of Stemford,* v. *McKeown,* [1935] O.R., 109. From the authorities cited he drew the following conclusions. (1) That the province is competent to create and appoint an administrative tribunal and to confer upon it all the powers necessary to enable it to effectively discharge the administrative duties imposed upon it. (2) The province is not competent to confer upon a tribunal created and appointed by it power to determine purely judicial questions such as are normally determined by courts of justice. He therefore held that conferring on the Ontario Municipal Board power "to settle any differences arising between the parties to the said agreement as to the construction thereof or as to any matters relating to or arising out of the agreement" was conferring judicial functions rather than administrative duties and was therefore *ultra vires* the Legislature of Ontario. He held however that the provisions were severable from other portions of the Act. *Vide* also Middleton, J.A., at page 198, and Henderson, J. A., at page 199. The decision of the Ontario Court of Appeal was, by special leave, appealed to the Privy Council and the result of the appeal is reported in [1938], A.C. page 415. The Privy Council held that the powers of examination, inspection and discovery of documents were not inconsistent with the powers of an administrative body whose duties it may be to ascertain the facts with which they are dealing. *Proprietary Articles Trade Association* v. *The Attorney General for Canada,* [1931] A.C. 310, and *O'Connor* v. *Waldron* [1935] A.C. 76.

As to section 2 of Chapter 88 of the Statutes of 1936, the Privy Council agreed with Rowell, C.J.O., that it was in part *ultra vires* of the Province, and also agreed that it was severable. On the argument

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counsel for the City of Toronto contended that Part III of *The Ontario Municipal Board Act, of 1932*, sections 41 to 46, and 54 to 59, which deal with general jurisdiction and powers were *ultra vires* as conferring upon the Board powers similar to those of a superior court and were not severable. Section 41 of Part III provided that the Board "shall for all the purposes of this Act have all the powers of a court of record," and section 42 "shall as to all matters within its jurisdiction under this Act have authority to hear and determine all questions of law or of fact." After a reference to these provisions and to the contention that the Board was thereby entrusted with the jurisdiction and powers of a superior court and was in fact constituted a superior court, Lord Atkin speaking for the Judicial Committee said:

> "It is difficult to avoid the conclusion that whatever be the definition given to the Court of Justice, or judicial power, the sections in question do purport to clothe the Board with the functions of a Court, and to vest in it judicial powers. But, making that assumption, their Lordships are not prepared to accept the further proposition that the Board is therefore for all purposes invalidly constituted. It is primarily an administrative body. So far as legislation has purported to give it judicial authority that attempt must fail. It is not validly constituted to receive judicial authority. So far as the Act therefore purports to constitute the Board a Court of Justice analogous to a Superior, District or County Court, it is *pro tanto* invalid: not because the Board is invalidly constituted, for as an administrative body, its constitution is within the provincial powers, nor because the Province cannot give the judicial powers in question to any court, for to a court complying with the requirements of ss. 96, 99 and 100 of the *British North America Act* the Province may entrust such judicial duties as it thinks fit; but because to entrust these duties to an administrative board appointed by the Province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to. The result is that such parts of the Act as purport to vest in the Board the functions of a Court have no effect. They are, however, severable; there is nothing to suggest that the Board would not have been granted its administrative powers without the addition of the judicial powers complained of."

Lord Atkin also stated that it was unnecessary to discuss in detail how far some of the powers alleged to be judicial were in fact administrative; the question did not arise because the order complained of was within the administrative powers of the board and the provisions complained of were severable from the portions alleged to be invalid. As before stated, however, agreement was expressed with the judgment of Rowell, C.J.O., in holding that part of section 2 of the Statute of 1936 was *ultra vires* of the province as conferring judicial powers upon the board.

The decision of the Privy Council in the *Toronto (City)* v. *York (Tp.) and Attorney General for Ontario, supra,* is binding upon this Court and the only conclusion which can be drawn from it is that judicial authority usually exercised by Superior, District or County Courts cannot validly be conferred upon a board set up by a province and whose members are appointed by the province. The decision has been referred to by the several Courts in Canada. *Ladore* v. *Bennett,* [1938] O.R., 324, Henderson, J. A., in delivering the judgment of the Court of Appeal for Ontario; in *Re Deronin and Cornwall (Town),* [1940] 4 D.L.R., 410, Riddell, J.A., at page 413 but citing it only as authority for severing the invalid part of a bylaw from the valid; *Attorney General Alberta* v. *Atlas Lumber Company,* [1941] 1 D.L.R., 625. In this last case Hudson J., in the Supreme Court of Canada at page 640 cited *Toronto (City)* v. *York (Tp.) and Attorney General for Ontario, supra,* in support of the following statement:

> "Normally the administration of justice should be carried on through the established courts, and the Province although it has been alloted power to legislate in relation to the administration of Justice and the right to constitute courts, cannot substitute for the established courts any other tribunal to exercise judical functions."

In *North American Life Assurance Company* v. *McLean,* [1941] 1 W.W.R. 430, O'Connor J., of the Supreme Court of Alberta, referred to the decision of the Privy Council as authority for the proposition that any provisions of the Ontario Municipal Board Act, 1932 Chapter 27, which purported to vest in the Municipal Board the functions of a Court had no effect but that the board was primarily an administrative body. *In Re Township of York Bylaw,* [1942] 4 D.L.R., 380, Fisher, J.A., in the Ontario Court of Appeal referred to the decision of the Privy Council as holding that the Ontario Municipal Board was an administrative body and to the extent that the Act conferred upon the Board judicial powers it was *ultra vires. Vide* also remarks of Gillanders, J.A., at page 388. In *Waterloo* v. *Kitchener,* [1945] 2 D.L.R., 133, Roach, J., of the Ontario High Court quoted portions of the statements of Lord Atkin in the *Toronto (City)* v. *York (Tp.) and Attorney General for Ontario, supra,* as to the conferring of judicial functions upon the Ontario Municipal Board and held that the relief claimed in the action did not fall within the administrative functions of the Board but was within the jurisdiction of the court.

While the matters before the Supreme Court of Canada in *Reference re the Adoption Act, Children's Protection Act,* etc. [1938] S.C.R., 398, are not in issue in the present case, I think some reference should be made to statements contained in the judgment of Duff, C.J.C., because of the importance attached to them on the argument. In that case the powers conferred by the provincial legislature upon police magistrates, justices of the peace, and judges of the juvenile courts to perform certain

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continued.

functions vested in them were considered. Duff, C.J.C., in delivering the judgment of the Court referred to statements of Lord Blansborough in *Martineau* v. *The City of Montreal, supra,* and said that the statements had been misunderstood as they had been cited again and again as authority for the proposition that a provincial legislature is incompetent to legislate for the appointment of any officer of any provincial court exercising other than ministerial functions and also for the proposition that section 96 is general in character in the sense that all provincial courts come within its scope including courts of summary jurisdiction such as justices of the peace and that as regards all such courts exercising at all events civil jurisdiction, the appointment of judges and officers presiding over them is vested exclusively in the Dominion. The learned Chief Justice however pointed out that the view generally accepted is that it is competent to the provinces to legislate for the appointment of justices of the peace and invest them as well as other courts of summary jurisdiction with civil and criminal jurisdiction, and he expressed the opinion that the observations of the Privy Council in the *Martineau* case were not directed to magistrates' courts and courts of justices of the peace or to courts of summary jurisdiction of any kind and that such courts remained outside the scope of section 96. In support of this conclusion he referred to section 129 of the *British North America Act, 1867,* the effect of which is that the authority of magistrates and justices of the peace as well as all judicial officers not within section 96 continued after Confederation. It should here be noted that the similar provisions are contained in section 16 of *The Saskatchewan Act,* 1905, passed by the Parliament of Canada to establish and provide for the government of the Province of Saskatchewan.

There is however a statement made by Duff, C.J.C., in Reference *Re The Adoption Act, supra,* with respect to section 96 of the *British North America Act, 1867,* and section 92 (14) which I think should be quoted in full because of the fact that he states that his remarks are not in substance inconsistent with what was laid down by Lord Atkin speaking for the Judicial Committee in the *Toronto (City)* v. *York (Tp.) and Attorney General for Ontario, supra.* This statement is as follows:

> "My view of the effect of s. 96 as regards such courts existing at the date of Confederation (that is to say outside the scope of that section) is this: the provinces became endowed with plenary authority under s. 92(14) but a province is not empowered to usurp the authority vested exclusively in the Dominion in respect of the appointment of judges who, by the true intendent of the section fall within the ambit of s. 96, or to enact legislation repugnant to that section; and it is too plain for discussion that a province is not competent to do that indirectly by altering the character of existing courts outside that section in such a manner as to bring them within the intendment

of it while retaining control of the appointment of the judges presiding over such courts. That, in effect, would not be distinguishable from constituting a new court as, for example, a Superior Court, within the scope of section 96 and assuming power to appoint the judge of it. In principle, I do not think it is possible to support any stricter limitation upon the authority of the provinces, and I do not think what I am saying is in substance inconsistent with what was laid down by Lord Atkin speaking on behalf of the Judicial Committee in *Toronto* v. *York, supra.*"

I am of the opinion therefore, founded upon the decision of the Privy Council in the *Toronto (City)* v. *York (Tp.) and Attorney General for Ontario, supra,* and the other authorities referred to, that Section 5(*e*) of *The Trade Union Act, 1944,* is *ultra vires* of the Province, conferring as it does judicial powers exercised by the courts named in section 96, upon the Labour Relations Board. It is unnecessary for me to consider the contention of counsel for the company that the orders are invalid because the board assumed that the only question for determination in fixing the "monetary loss" of the five men discharged from their employment was the amount of wage which each of them would have earned had they continued in the employment of the company from the date of discharge till July the 8th when the orders were made. Nor is it necessary to consider the validity of sections 9 and 10, subsections (1) and (2), nor to consider the contention that the chairman of the board so acted in relation to the proceedings that he was disqualified by bias or a reasonable apprehension of bias from taking part in the inquiry and that such disqualification extended to the board and deprived it of jurisdiction to make the orders referred to.

The orders of the Board of July 8th, 1947, requiring the company to reinstate J. E. Boryski, Harold J. Craigmile, N. Troobitscoff, Peter Troobitscoff and G. M. Svendsen, and to pay each of them the sum of $200.80 as monetary loss should be quashed with costs without the actual issue of a writ or writs of *certiorari.*

Given at Regina, this 15th day of December, 1947.

"W. M. MARTIN,"
C.J.S.

In the Court of Appeal for Saskatchewan

No. 9 Notice of Motion for Special Leave to Appeal, December 19, 1947.

No. 9.

Notice of Motion for Special Leave to Appeal.

TAKE NOTICE that this Honourable Court will be moved on Monday, the 22nd day of December, 1947, at the Court House at the City of Regina in the Province of Saskatchewan at the hour of eleven o'clock in the forenoon or so soon thereafter as counsel can be heard, by the Labour Relations Board of Saskatchewan, the Appellant herein, for an order granting special leave to appeal to His Majesty in Council from the Judgment of this Honourable Court in the above cause given on the 15th day of December, 1947, and fixing the conditions upon which the said leave to appeal shall be granted pursuant to Rule 5 of the Rules regulating appeals to His Majesty in Council from the Court of Appeal of the Province of Saskatchewan as set forth in His Majesty's Order in Council dated the 4th day of June, 1918;

AND FURTHER TAKE NOTICE that on and in support of the said motion will be read the pleadings and proceedings herein, the affidavit of Morris C. Shumiatcher filed, and such further and other material as counsel may advise.

DATED at Regina, Saskatchewan, this 19th day of December, A.D., 1947.

"MORRIS C. SHUMIATCHER,"
B.A., LL.B., LL.M., Doc. Jur.,
Solicitor for the Labour Relations Board of Saskatchewan, whose address for service is the office of the said Solicitor, at 220 Legislative Building, Regina, Saskatchewan.

To: The Applicant (Respondent) and its solicitors, Messrs. MacPherson, Milliken, Leslie and Tyerman, Regina;

To: The Respondent, Local 3493, United Steel Workers of America;

To: The Honourable the Attorney General for Saskatchewan.

No. 10

Order Granting Conditional Leave to Appeal.

Before:

THE HONOURABLE THE CHIEF JUSTICE OF SASKATCHEWAN

THE HONOURABLE MR. JUSTICE GORDON

THE HONOURABLE MR. JUSTICE ANDERSON

Wednesday, the 31st day of December, A.D. 1947.

UPON THE APPLICATION of the above named Appellant, and upon reading the notice of motion filed herein on behalf of the said Appellant returnable on Monday, the 22nd day of December, A.D., 1947; upon reading the pleadings and proceedings in this action and the judgment of this Honourable Court bearing date the 15th day of December, A.D., 1947; upon reading the affidavit of Morris C. Shumiatcher, filed; upon hearing read the Order of His Majesty in Council relating to appeals from this Honourable Court dated the 4th day of June, A.D., 1918; and upon hearing counsel for the said Appellant and for the Applicant (Respondent) herein on the 22nd day of December, A.D., 1947; and it appearing to the Court that the matter in dispute is one of great general and public importance, and that leave to appeal from the decision of this Honourable Court dated the 15th day of December, A.D., 1947, in the above cause, to His Majesty in Council should be granted;

1. IT IS ORDERED that the above named Appellant have leave to appeal to His Majesty in Council from the said judgment or order of this Court bearing date the 15th day of December, A.D. 1947;

2. AND IT IS FURTHER ORDERED that the said leave to appeal is granted on the following conditions:

That the above named Appellant do within three months from the date upon which its application for leave to appeal as aforesaid was returnable, that is to say, within three months from the 22nd day of December, A.D., 1947, do enter into good and sufficient security, either by the payment of money into Court or by furnishing the bond of a responsible guarantee company to the satisfaction of the Court, in the sum of Twenty-five Hundred Dollars ($2,500.00) for the due prosecution of the said appeal and the payment of all such costs as may become payable to the Applicant (Respondent) in the event of the said Appellant's not obtaining an Order granting it final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the said Appellant to pay the Applicant's (Respondent's) costs of the appeal, as the case may be;

3. AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs to the successful party in the

In the Court of Appeal for Saskatchewan

No. 10
Order Granting Conditional Leave to Appeal, December 31, 1947—*continued.*

cause, subject to such order as His Majesty in Council may make as to the general liability of the parties or either of them for costs.

"A. C. ELLISON",
Registrar.

[Seal]

No. 11.

Reasons for Judgment of Court of Appeal.

M. C. Shumiatcher for the Applicant.
E. C. Leslie, K.C., for the Respondent.

JUDGMENT OF THE COURT
MARTIN, C.J.S.

In the Court of Appeal for Saskatchewan

No. 11
Reasons for Judgment of Court of Appeal, Martin, C. J. S., December 31, 1947.

This is an application by the Labour Relations Board for an order granting special leave to appeal to His Majesty's Privy Council from the judgment of this Court given on December the 15th, 1947, and fixing the conditions upon which the said leave should be granted pursuant to rule 5 of the rules regulating appeals to the Privy Council from the Court of Appeal of the Province of Saskatchewan. The ground of the application is that the questions involved in the said judgment and in the appeal are of "great general and public importance."

The rules governing appeals to the Privy Council from the Court of Appeal of this Province are contained in the order of the Privy Council dated June the 4th, 1918. In Rule 2(*a*) it is provided that an appeal shall lie as of right from any final judgment of the Court of Appeal where the matter in dispute is of the value of $4,000 or upwards, or where the appeal involves some claim or question to or respecting property or some civil right amounting to or of the value of $4,000 or upwards. Rule 2(*b*) confers a discretion on the Court of Appeal to grant leave where the question involved is of "great general or public importance" and is as follows:

> "Subject to the provisions of these Rules, an appeal shall lie— . . . . . .
>
> (*b*) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the appeal is one which by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision."

The judgment sought to be appealed from involves certain provisions of *The Trade Union Act,* Chapter 69 of the Statutes of Saskatchewan 1944 (Second Session), which were held by this Court to be *ultra vires* of the provincial legislature.

This act deals with the right of employees to organize and an obligation is placed upon employers to bargain collectively with a collective bargaining agency representing the majority of employees in an appropriate bargaining unit and the Act provides machinery for determining and certifying whether the bargaining agency enjoys the amount of support required. A Labour Relations Board is provided for consisting of seven members to be appointed by the Lieutenant Governor in Council. Unfair labour practices on the part of employers and employees are defined and section 11 is as follows:

> 11.—(1) Any person who takes part in, aids, abets, counsels or procures any unfair labour practice shall in addition to any other penalty which he has incurred or had imposed upon him under the provisions of this Act, be guilty of an offence and liable on summary conviction for a first offence to a fine of not less than $25 and not more than $200 if an individual, or not less than $200 and not more than $5,000 if a corporation, and upon a second and subsequent offence, to such fine and to imprisonment not exceeding one year.
>
> "(1*a*) Any person who fails to comply with an order of the board, whether heretofore or hereafter made, shall, in addition to any other penalty he has incurred or had imposed upon him under the provisions of this Act, be guilty of an offence and liable on summary conviction to a fine of $10, if an individual, or $25, if a corporation, for every day or part of a day on which such failure continues.
>
> "(2) No prosecution shall be instituted under this section without the consent of the board."

It will be observed that this section provides that any person who takes part in, aids, abets, counsels or procures any unfair labour practice shall "in addition to any other penalty which he has incurred or had imposed upon him under the provisions of this Act," be liable to certain fines and in the case of a second offence to imprisonment; and section 11 (1*a*) provides that any person who fails to comply with an order of the Board shall in addition to any other penalty he has incurred or had imposed upon him under the provisions of the Act be guilty of an offence and liable upon summary conviction to be fined a certain stated amount for each day or part of a day on which such failure continues; and subsection (2) provides that no prosecution shall be instituted without the consent of the Board.

As before stated unfair labour practices on the part of employers and employees are defined. Section 8(1) defines unfair labour practices on the part of employers, and in clause (*e*) it is provided that an employer commits an unfair labour practice who discriminates in regard to hiring or tenure of employment with a view to encouraging or discouraging membership or activity in or for any labour organiza-

In the Court of Appeal for Saskatchewan

No. 11
Reasons for Judgment of Court of Appeal Martin, C. J. S., December 31, 1947—*continued.*

tion; and if an employer or employer's agent discharges an employee and it is alleged by a trade union that the employer has thereby committed an unfair labour practice, it shall be presumed unless the contrary is proved that the employer has discriminated against such employee in regard to tenure of employment with a view to discouraging membership or activity in or for a labour organization.

On May the 15th, 1947, the respondent company discharged five employees and on that date each employee was paid his wages till May the 23rd, 1947, in lieu of notice. Applications were then made on behalf of each of the employees to the Labour Relations Board by the United Steel Workers of America, Local 3493, the bargaining agent in the respondent's workshop. In each application it was alleged that the respondent employer or the respondent's agent had discharged the employee because he was a member of and active in the trade union and that the employer thereby committed an unfair labour practice within the meaning of section 8, subsection (1), clause (*e*). In each application an order was asked pursuant to the provisions of section 5(*e*) of the Act requiring the respondent to reinstate each discharged employee and to pay each the "monetary loss" suffered by reason of his discharge. Section 5 of the Act provides that the Board shall have power to make orders and clause (*e*) is as follows:

> "5.—(*e*)..requiring an employer to reinstate an employee discharged contrary to the provisions of this Act and to pay such employee the monetary loss suffered by reason of such discharge."

After hearing the applications the Labour Relations Board on July the 8th, 1947, issued five orders in each of which it was recited that the applicant trade union alleged that the respondent company in discharging each of the employees committed an unfair labour practice within the meaning of clause (*e*) of subsection (1) of section 8; and it was then stated that it had not been proved by the respondent company that the employee had not been discriminated against in regard to tenure of employment with regard to discouraging membership in or activity in or for a labour organization. The conclusion was that the respondent had discriminated against each of the five employees contrary to the provisions of section 8(1) (*e*) and had therefore committed an unfair labour practice. The Board then applied the provisions of section 5(*e*) in the case of each application and ordered the respondent to reinstate the five employees and to pay to each the monetary loss suffered by reason of his discharge which was fixed at the amount of $200.80.

Certified copies of the orders were under the provisions of section 9 of the Act filed in the office of the Registrar of the Court of King's Bench and thus, according to the section, became enforceable as judgments or orders of that court. Executions were issued on

behalf of each discharged employee, a seizure was made by the sheriff, and the monies directed to be paid realized. An order was made by this court directing the sheriff to hold the monies realized pending the disposition of the application by the respondent for a writ of *certiorari.*

The notice of motion launched by the respondent under the provisions of Rule 48 of the Rules of the Court of Appeal, asking for an order for the issue of a writ of *certiorari* for the return to the Court of the five orders made by the Labour Relations Board and for an order quashing the said orders, contained several grounds for the application, among them that section 5(*e*) of *The Trade Union Act, 1944,* was *ultra vires* of the Provincial Legislature.

The Court held that section 5(*e*) was *ultra vires* and quashed the five orders of the Labour Relations Board. From this judgment the Board now seeks leave to appeal to the Privy Council. The question involved in the proposed appeal as to the powers of the Legislature to enact section 5(*e*) of *The Trade Union Act, 1944,* is, in my opinion, one of "great general or public importance" and the Court therefore has a discretion to grant leave to appeal under Rule 2(*b*) of the Order of June the 4th, 1918.

Counsel for the respondent in opposing the application for leave argued that the appeal involved a criminal matter and referred to section 1024(4) of *The Criminal Code,* R.S.C., cor. 36, which prohibits appeals to the Privy Council "in any criminal case from any judgment or order of any court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard." This action has been held to be within the powers of the Dominion Parliament since the enactment of *The Statute of Westminster,* 1931: *British Coal Corporation* v. *R.,* 104 L.J.P.C., 58; [1935] A.C., 500; [1935] 2 W.W.R., 564. In support of his contention *Seaman* v. *Burley,* 65, L.J.M.C., 208, [1896] 2Q.B. 344; and to *Amand* v. *Secretary of State for Home Affairs,* [1942] 2 All E.R., 381; [1943] A.C. 147. In *Seaman v. Burley, supra,* the appellant was summoned before Justices for non-payment of poor rates under a local Act for regulating the Parish of Paddington and the justices ordered a distress warrant to issue for the levy of the rate. By a section of the local Act it was provided that the rates might be recovered by distress and, in default of distress, or payment, imprisonment. A case was stated for the opinion of the Divisional Court as to whether the justices were right in point of law. The Court held that the order of the justices was right and the appellant then appealed to the Court of Appeal. It was held that the order of the justices was a "criminal cause or matter" within the meaning of section 47 of *The Judicature Act* of 1873 and that no appeal lay. Lord Esher stated at page 209:

> "The appellant has been summoned before the Justices and they, assuming the rate to be valid, have issued a distress warrant.

In the Court of Appeal for Saskatchewan

No. 11
Reasons for Judgment of Court of Appeal, Martin, C. J. S., December 31, 1947—*continued.*

If this does not produce payment, the Justices will in due course make an order for the imprisonment of the appellant. All the cases—*Mellor* v. *Denham* (1880) 5 Q.B.D., 467, 49 L.J.M.C. 89; *Ex parte Whitechurch* (1881) 7 Q.B.D., 534, 50 L.J.M.C. 99; *Ex parte Schofield* [1891] 2 Q.B. 428, 60 L.J.M.C. 157, and *Payne* v. *Wright* (1892) 61 L.J.M.C. 114, 66 L.T. 148—decide that it is not necessary that the proceedings must end in imprisonment; it is enough if they may end in imprisonment."

And A. L. Smith, L. J., at page 211:

"I should have been inclined to say that the issue of a distress warrant was not of itself necessarily a criminal proceeding; but when it may end in a penalty being imposed, to adopt the phraseology of the Mast of the Rolls in *Payne* v. *Wright, supra,* if that be not a criminal proceeding I cannot understand what it is."

It is important to note that in *Seaman* v. *Burley, supra,* while the Magistrate had issued a distress order this did not necessarily mean imprisonment for the appellant for in case of failure of distress or non-payment it would be necessary for the magistrate to make a further order for commital; but the fact is that the issue of the distress order was a proceeding which might result in imprisonment and accordingly it was held that the issue of the distress warrant was a proceeding in a "criminal cause or matter."

In all the authorities referred to by Lord Esher in *Seaman* v. *Burley, supra,* proceedings had been commenced which might end in a penalty being imposed. In *Mellor* v. *Denham, supra,* an information was preferred against the respondent for neglecting to cause his child to attend school during school hours. The justices dismissed the information but stated a case for the opinion of the Queen's Bench Division. The Queen's Bench Division gave judgment upholding the justices and the Court of Appeal dismissed the appeal on the ground that the information concerned a criminal matter. In *Ex parte Whitechurch, supra,* Whitechurch was served with a notice by the Council of Nottingham requiring him to abate a nuisance under the provisions of *The Public Health Act,* 1875. The notice was not complied with and the town Council served him with a summons under section 95 of the Act with the result that an order was made by the justices requiring him to abate the nuisance. The Queen's Bench Division held that he was entitled to have the order brought up on *certiorari* and quashed. On appeal it was held that the order of the Queen's Bench Division was made in a criminal cause or matter and that no appeal could be brought. In *Ex Parte Schofield, supra,* a magistrate made an order under *The Public Health Act, 1875,* for the abatement of a nuisance and refused to state a case on a point of law. The Divisional Court refused to grant a *mandamus* to the magistrate to state

a case, and it was held by the Court of Appeal that the refusal of the Divisional Court was a decision in a criminal cause or matter and that the court had no jurisdiction. *Vide* remarks of Lord Esher at page 158. In *Payne* v, *Wright, supra,* the appellant Wright was summoned under *The Metropolitan Building Act,* 1855, for having covered the roof of a building with a combustible material contrary to the provisions of the Act to the effect that every building in the metropolis should be covered with slates, tiles, metals or other incombustible materials. The magistrate held that the material used by the appellant was incombustible and dismissed the summons. The Queens' Bench Division in a stated case held that the magistrate was wrong and remitted the case to him to make an order. The appellant appealed and the Court of Appeal held that as the decision of the High Court was "a proceeding or step" in a case the result of which might but not necessarilly must end in a penalty being imposed, there was no jurisdiction to entertain an appeal. At page 115 Lord Esher stated:

> "There is no doubt that the decision of the High Court was a final decision of a question raised in proceedings the subject matter of which is criminal and this court therefore has no jurisdiction to entertain the appeal".

And Fry, L. J., at page 116:

> "The proceeding here was a step towards a punitive remedy—namely the liability to a penalty."

In *Amand* v *The Secretary of State for Home Affairs, supra,* a Netherlands subject who resided in England was called for service in the Netherlands Army in England. On being given leave he failed to return at the expiration of the leave and was arrested under *The Army Act, 1881,* as applied to *The Allied Forces Act* of 1940 and an order-in-council made thereunder; he was taken before the chief magistrate at Bow Street Police Station in London and the magistrate remanded him on bail on being informed that an application had been made for a writ of *habeas corpus.* The application was refused by the Divisional Court and the Court of Appeal dismissed an appeal on the ground that the decision of the Divisional Court was in a criminal cause or matter. On appeal to the House of Lords it was held that in as much as at the date the writ was applied for there were proceedings against him in which he was or might be in danger of being sentenced to some kind of punishment, the appeal related to a criminal cause or matter within the meaning of section 31 of *The Supreme Court of Judicature (Consolidation) Act* of 1925 and was therefore incompetent. Lord Simon (with whom Lord Atkin and Lord Thankerton agreed) stated at page 385:

> "It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court

In the Court of Appeal for Saskatchewan

No. 11
Reasons for Judgment of Court of Appeal, Martin, C. J. S., December 31, 1947—*continued.*

claiming jurisdiction to do so, the matter is criminal. This is the true effect of the 'two conditions' formulated by Viscount Cave in *Re Clifford and Sullivan,* [1921] 2 A.C., 570, at 580.

Applying these tests I cannot doubt that the appellant's application for the writ and the decision of the Divisional Court refusing it were 'in a criminal cause or matter'.....I agree with Goddard, L. J., that it would be unduly pendantic to require formal proof that a Dutch conscript deserting or absent without leave from his unit in time of war is liable to be charged with an offence against the military law of his country. The proceedings in the present case are for the direct purpose of handing the appellant over so that he may be dealt with on these charges. Whether they are hereafter withdrawn or disproved does not affect the criminal character of the matter in the least. See as to this the observations of Lord Esher at page 347 and of A. L. Smith, L. J., at page 351 in *Seaman* v *Burley.*"

The remarks of Goddard, L. J., in the Court of Appeal in the *Amand* case [1942] 1 All E. R., 480, are to be found at page 483 where he is reported as follows:

> "We do not think that this court is bound to require formal proof that a soldier deserting or absent without leave from his unit in time of war is guilty of an offence against the military law of his country would indeed be the height of artificiality to require such proof."

Lord Wright at page 387 of the *Amand* case referred to *Provincial Cinematograph Theatres Limited* v. *Newcastle-upon-Tyne Profiteering Committee,* (1921), 90 L.J.K.B., 1064, in which a local committee charged with the duty of investigating and if necessary initiating proceedings connected with profiteering offences for which fine or imprisonment might be imposed, directed a prosecution. A rule *nisi* for *certiorari* was claimed on the ground that the resolution was invalid because certain members of the committee were disqualified. The rule was discharged by the court. The Court of Appeal held that no appeal lay from that order. Lord Sumner stated that the resolution was a criminal matter because in "one unbroken proceeding although no doubt by various steps or processes the termination of the whole matter was fine or imprisonment". Lord Wright also referred to the decision of the House of Lords in *Re Clifford and Sullivan, supra,* in which Viscount Cave at page 580 stated that two conditions must be fulfilled to satisfy the order, namely, there must be consideration of some criminal offence charged under criminal law and the charge must be preferred or about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. In that case however the military officers who purported to try the men and pass sentence were in no sense a court martial or a court of any kind. From the authorities referred to, Lord Wright concluded as follows:

"The principle which I deduce from the authorities, which I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which if carried to its conclusion may result in the conviction of the person charged and in a sentence of some punishment such as imprisonment or fine, it is a criminal cause or matter. The person charged is thus put in jeopardy."

The Court of Appeal and the House of Lords were of the opinion that Amand's arrest and trial—or pending trial before the police magistrate—were steps in proceedings which might lead to punishment for an offence against the military law of the Netherlands and they so held without actual proof of the military law of that country on the ground that no formal proof was required to the effect that a soldier deserting or absent without leave in time of war is guilty of an offence against the military law of his country.

In all the authorities referred to there was some proceeding in question which, if followed to its conclusion, might lead to the imposition of a penalty; in other words a proceeding which might lead to a fine or imprisonment had been commenced and it was some step in such proceeding which the court was called upon to consider. There are statements in some of the judgments delivered in the cases referred to, which if taken literally appear to warrant the conclusion that the orders of the Labour Relations Board, forming as they do a basis for prosecution under section 11(1a), are a step in proceedings leading to the imposition of a penalty, but these statements must be read having regard to the facts in each case. In the present case all that the Court has before it are the orders of The Labour Relations Board directing the respondent to reinstate certain employees and to pay them the wages they would have earned had they continued in the employment; there is no proceeding which can be called "criminal" involved. The orders of the Board if the respondent fails to comply with them may, with the consent of the Board, become the subject of summary proceedings under section 11, but until such proceedings are commenced there is in my opinion no proceeding involved which if carried to a conclusion might result in a penalty.

As before indicated I am of the opinion that the question involved in the proposed appeal is of "great general or public importance" and leave to appeal should therefore be granted under the provisions of Rule 2(b) on condition of the appellant within three months from the date of the application (December the 22nd, 1947) entering into good and sufficient security to the satisfaction of the court in the sum of twenty-five hundred ($2500) dollars for the due prosecution of the appeal and the payment of all such costs as may become payable to the respondent in accordance with the provisions of Rule 5(a) of the

In the Court of Appeal for Saskatchewan

Order of June the 4th, 1918. The costs of this application should be in the appeal.

GIVEN at Regina, this 31st day of December, 1947.

"W. M. MARTIN"
C.J.S.

No. 11
Reasons for Judgment of Court of Appeal, Gordon, J. A., December 31, 1947.

JUDGMENT—GORDON, J. A.

In this case I have had the advantage of reading the judgment of my Lord the Chief Justice with which my brother Anderson concurs. While not dissenting I wish to state that I have grave doubts as to whether the order of this Court now sought to be appealed against is appealable to His Majesty in Council. The question as to the validity of that part of *The Trade Union Act, 1944* found by this Court to be *ultra vires*, is of supreme importance to every employer and employee in the province to whom it may apply I regret that the cost of such an appeal must be borne by a private litigant. I have not forgotten how expensive such appeals are even to the successful party. A letter from the Minister of Labour to the Saskatchewan Employers' Association was filed before us in which he stated in part as follows:

> "In your second question, you ask if the government will submit *The Trade Unoin Act* to the Court of Appeal to determine its constitutionality. I regret that I overlooked this particular question in the welter of questions which you have referred to me on previous occasions. The answer to the question is quite simple: the government has no intention of referring *The Trade Union Act* or as far as I know any other Act to the Court of Appeal".

If therefore the validity of the Act is to be determined by the highest tribunal it must go by appeal in the ordinary way.

Further, in concurring in the order that leave to appeal should be granted I know that the question of jurisdiction to hear the appeals can be raised again before Their Lordships so that the respondent's rights are not being finally determined on this application. *Bentwich*, 3rd edition, page 191.

In my view the question depends on whether we consider the order of the Labour Relations Board as a step in proceedings in which the respondent may be subject to a fine, or whether, as contended by counsel for the Board, it is only an order in a civil proceeding, the violation of which may result in a prosecution. The distinction between the two is admirably set forth, if I may say so with deference, in the cases of *Rex* v. *Manchester Local Profiteering Committee*, 89 L.J.K.B., 1089,

and *Rex* v. *Newcastle-upon Tyne Profiteering Committee,* 89 L.J.K.B., 1098. The whole question was again considered by the House of Lords in the case of *Amand* v. *Home Secretary,* [1943] A.C., 147. The order of the Labour Relations Board sought to be appealed against is dangerously close to the class of order considered in the case of *Rex* v. *Newcastle-upon Tyne, supra.* There is a great deal to be said for the contention that once the Labour Relations Board has found an employer guilty of an unfair labour practice as defined in the Act a justice of the peace hearing a charge against such employer under section 11(1) of the Act would be bound by this finding of fact by virtue of section 15 of the Act, in which case the only duty left to him would be to determine the amount of the fine to be imposed.

With hesitation and with deference, I agree with the conclusion reached by my Lord the Chief Justice.

GIVEN at Regina, this 31st day of December, 1947.

"P. H. GORDON",
J.A.

In the Court of Appeal for Saskatchewan

No. 12 Notice of Motion for Final Leave, January 3, 1948.

No. 12.

Notice of Motion for Final Leave.

TAKE NOTICE that the Honourable the Chief Justice of Saskatchewan will be moved in Chambers at the Court House in the City of Regina on Wednesday, the 7th day of January, A.D., 1948, at the hour of eleven o'clock in the forenoon, or so soon thereafter as counsel can be heard, on behalf of the above named Appellant, for an order granting final leave to appeal to His Majesty in Council from the judgment of this Honourable Court in the above cause dated the 15th day of December, A.D., 1947;

AND TAKE NOTICE that in support of such motion will be read the order of His Majesty in Council relating to appeals from this Honourable Court dated the 4th day of June, A.D., 1918, the judgment and order of this Honourable Court dated the 31st day of December, A.D., 1947, the pleadings and proceedings in this action, the judgment of this Honourable Court dated the 15th day of December, A.D., 1947, the bond of The Saskatchewan Government Insurance Office filed and approved by the Registrar of this Honourable Court, and the affidavit of Morris C. Shumiatcher filed herein, and such further and other material as counsel may advise.

DATED at the City of Regina this 3rd day of January, A.D., 1948.

"MORRIS C. SHUMIATCHER"
B.A., LL.B., LL.M., Doc. Jur.,
Solicitor for the Labour Relations Board of Saskatchewan, whose address for service is the office of the said Solicitor, at 220 Legislative Building, Regina, Saskatchewan.

To: The above named (Applicant) Respondent and to Messrs. MacPherson, Milliken, Leslie and Tyerman, their solicitors, Regina, Saskatchewan;

To: The Attorney General for Saskatchewan.

In the Court of Appeal for Saskatchewan

No. 13
Bond,
January
5, 1948.

No. 13.

Bond.

THE SASKATCHEWAN GOVERNMENT INSURANCE OFFICE
Head Office—Regina

Bond No. 701,950

IN THE COURT OF APPEAL FOR SASKATCHEWAN

IN THE MATTER OF THE Trade Union Act, Statutes of Saskatchewan, 1944, (second session) Chapter 69, and amendments thereto;

AND IN THE MATTER OF certain orders made by The Labour Relations Board of Saskatchewan;

AND IN THE MATTER OF an application for leave to appeal from the judgment of the Court of Appeal.

Between

THE LABOUR RELATIONS BOARD OF SASKATCHEWAN *Appellant.*

—and—

JOHN EAST IRON WORKS, LIMITED, (*Applicant*) *Respondent.*

BOND FOR SECURITY FOR COSTS

KNOW ALL MEN BY THESE PRESENTS, that we, THE SASKATCHEWAN GOVERNMENT INSURANCE OFFICE, are held and firmly bound unto John East Iron Works, Limited, in the penal sum of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00) in good and lawful money of Canada, to be paid to the said John East Iron Works, Limited, its successors or assigns, for which payment well and truly to be made, we bind ourselves and our successors and assigns firmly by these presents.

SEALED with our seal and dated the fifth day of January, A.D., 1948.

WHEREAS the Labour Relations Board of Saskatchewan, on the 8th day of July, A.D., 1947, made five orders directing John East Iron Works, Limited, to reinstate in their employment with the said Company, as of the date of the said orders, J. E. Boryski, Harold J. Craigmile, N. Troobitscoff, Peter Troobitscoff and G. M. Svendsen, and to pay to each of the said named the sum of $200.80, being the monetary loss suffered by reason of the discharge of each of them, respectively, from such employment;

In the Court of Appeal for Saskatchewan

No. 13
Bond,
January
5, 1948—
continued.

AND WHEREAS John East Iron Works, Limited, by notice of motion applied to the Court of Appeal for the Province of Saskatchewan for an order or orders of the said Court quashing, by issue of a writ or writs of *certiorari*, or otherwise, the said orders of the Labour Relations Board of Saskatchewan, and for the costs of the said application, and in the said notice named Local 3493, United Steel Workers of America, as Respondent;

AND WHEREAS The Labour Relations Board of Saskatchewan was served with notice of the said application, and The Attorney General for Saskatchewan was served with a notice thereof under the provisions of *The Constitutional Questions Act,* and both the Labour Relations Board of Saskatchewan and the Attorney General for Saskatchewan entered appearances and participated in the argument before the Court of Appeal for the Province of Saskatchewan, and the Labour Relations Board of Saskatchewan in addition, filed certain affidavits in the said Court;

AND WHEREAS judgment was given by the Court of Appeal for the Province of Saskatchewan in favour of John East Iron Works, Limited, quashing the aforesaid orders of the Labour Relations Board of Saskatchewan, and further holding unconstitutional certain provisions of *The Trade Union Act, 1944;*

AND WHEREAS The Labour Relations Board complains that in the giving of the said judgment in the said action manifest error hath intervened, wherefore the said The Labour Relations Board of Saskatchewan desires to appeal from the said judgment of the said Court of Appeal for the Province of Saskatchewan to His Majesty in Council;

NOW THE CONDITION OF THIS OBLIGATION is such that if the said The Labour Relations Board of Saskatchewan shall effectually prosecute the said appeal and pay such costs as may become payable to the said John East Iron Works, Limited, in the event of the said The Labour Relations Board's not obtaining an order granting it final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the said The Labour Relations Board to pay the costs of the appeal of the said John East Iron Works, Limited as the case may be, then this obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF the said The Saskatchewan Government Insurance Office has hereunto set its seal attested by its proper officers in that behalf, this fifth day of January, A.D. 1948.

SIGNED, Sealed and Delivered by the above named The Saskatchewan Government Insurance Office the Surety, and countersigned by M. F. Allore . . . . . and J. W. Page . . . . . its Manager and Underwriter respectively, in the presence of "J. A. WATERS"

"M. F. ALLORE,"
Manager.
"J. W. PAGE,"
Underwriter.

Approved as to form:
"E. C. LESLIE",
Counsel for John East Iron Works, Limited.

(SEAL)

In the Court of Appeal for Saskatchewan
No. 13
Bond, January 5, 1948—*continued.*

No. 14.

Order Granting Final Leave to Appeal.

In the Court of Appeal for Saskatchewan
No. 14
Order Granting Final Leave to Appeal, January 7, 1948.

Before:
THE HONOURABLE THE CHIEF JUSTICE OF SASKATCHEWAN
THE HONOURABLE MR. JUSTICE ANDERSON
THE HONOURABLE MR. JUSTICE BIGELOW (*ad hoc.*)

Wednesday, the 7th day of January, A.D., 1948.

UPON THE APPLICATION of the above named Appellant, and upon reading the notice of motion herein on behalf of the said Appellant returnable on Wednesday, the 7th day of January, A.D., 1948; upon reading the pleadings and proceedings in this action and the judgment of this Honourable Court bearing date the 15th day of December, A.D., 1947; upon reading the judgment and order of this Honourable Court dated the 31st day of December, A.D., 1947, granting conditional leave to appeal to His Majesty in Council from the judgment of this Honourable Court dated the 15th day of December, A.D., 1947; upon perusing the bond of the Saskatchewan Government Insurance Office in the sum of Twenty-Five Hundred Dollars ($2,500.00) filed; upon reading the affidavit of Morris C. Shumiatcher, filed; upon hearing read the Order of His Majesty in Council relating to appeals from this Honourable Court dated the 4th day of June, A.D., 1918; and upon hearing counsel for the said Appellant, the Applicant (Respondent) herein and the Attorney-General for Saskatchewan, on the 7th day of January, A.D., 1948;

In the Court of Appeal for Saskatchewan
No. 14
Order Granting Final Leave to Appeal, January 7, 1948—
—continued.

AND IT APPEARING that since the making of the said judgment and order dated the 31st day of December, A.D., 1947, granting conditional leave to appeal to His Majesty in Council, the Appellant has complied with the conditions set out in the said order by filing the bond of The Saskatchewan Government Insurance Office for the sum of Twenty-five Hundred Dollars ($2,500.00) dated the 5th day of January, A.D., 1948, to the satisfaction of and approved by this Honourable Court, in favour of the Applicant (Respondent) for the due prosecution of the said appeal and the payment of all such costs as may become payable to the Applicant (Respondent) in accordance with the said order of His Majesty in Council;

1. IT IS HEREBY ORDERED that the above named Appellant be and is hereby granted final leave to appeal to His Majesty in Council from the judgment, decree or order of this Honourable Court dated the 15th day of December, A.D., 1947;

2. AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs to the successful party in the cause, subject to such order as His Majesty in Council may make as to the general liability of the parties or either of them, for costs.

"A. C. ELLISON"
Registrar.

In the Court of Appeal for Saskatchewan

No. 15 Consent of Parties as to Contents of Consolidated Reecord, January 19, 1948.

No. 15.

Consent of Parties as to the Contents of Consolidated Record

The parties hereto, by the undersigned their Solicitors, hereby agree that the printed Consolidated Record to be transmitted on the appeal herein to His Majesty in His Privy Council shall consist of the documents mentioned in the Index of Reference hereinafter set forth:

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

IN THE COURT OF APPEAL FOR SASKATCHEWAN

PART I—PLEADINGS, &c

No.	Description of Document	Date
1.	Notice of Motion of Respondent	November 6, 1947
2.	Affidavit of Melville Austin East	November 10, 1947
3.	Notice to the Attorney General	November 18, 1947
4.	Affidavit of Norman R. Riches	November 22, 1947
5.	Affidavit of Walter Kenneth Bryden	November 24, 1947
6.	Affidavit of Morris C. Shumiatcher	November 25, 1947
7.	Formal order of the Court of Appeal	December 15, 1947
8.	Reasons for judgment of the Court of Appeal, delivered by Martin, C.J.S.	December 15, 1947
9.	Notice of Motion for special leave to appeal to His Majesty in Council	December 19, 1947
10.	Formal order granting conditional leave to appeal to His Majesty in Council	December 31, 1947
11.	Reasons for judgment of the Court of Appeal granting conditional leave to appeal, delivered by Martin, C.J.S., and reasons delivered by Gordon, J.A.	December 31, 1947
12.	Notice of Motion for final leave to appeal to His Majesty in Council	January 3, 1948
13.	Bond of the Saskatchewan Government Insurance Office	January 5, 1948
14.	Formal order granting final leave to appeal to His Majesty in Council	January 7, 1948
15.	Consent of parties as to contents of Consolidated Record	January 19, 1948
16.	Consent of parties as to omission of documents from Consolidated Record	January 19, 1948
17.	Consent of parties as to preparation of Consolidated Record	January 19, 1948

In the Court of Appeal for Saskatchewan

No. 15
Consent of Parties as to Contents of Consolidated Record, January 19, 1948—*continued.*

PART II—EXHIBITS

18.	EXHIBIT "A" to the Affidavit of Melville Austin East, being application to the Labour Relations Board by United Steel workers of America, Local 3493, with respect to J. E. Boryski	May	17, 1947
19.	EXHIBIT "B" to the Affidavit of Melville Austin East, being order of the Labour Relations Board with respect to J. E. Boryski	July	8, 1947
20.	EXHIBIT "C" to the Affidavit of Melville Austin East, being reasons for decision of the Labour Relations Board	July	8, 1947

STATUTES AND OTHER DOCUMENTS

21. THE TRADE UNION ACT, Statutes of Saskatchewan, 1944 (second session) Chapter 69, as amended.

(separate document)

Dated at the City of Regina, in the Province of Saskatchewan, this 19th day of January, A.D., 1948.

"MORRIS C. SHUMIATCHER,"
B.A., LL.B., LL.M., Doc. Jur.,
Solicitor for the Appellant.
Messrs. MacPherson, Milliken, Leslie and Tyerman,
per: "E. C. LESLIE,"
Solicitors for the Respondent.

In the Court of Appeal for Saskatchewan

No. 16
Consent of Parties to Omission of Documents from Consolidated Record, January 19, 1948.

No. 16.

Consent of Parties to Omission of Documents from Consolidated Record

The parties hereto, by the undersigned their Solicitors, hereby agree that the following documents be omitted from the printed consolidated record to be transmitted on the appeal herein to His Majesty in His Privy Council:

No.	Description of Document	Date
1.	EXHIBIT "A" to Affidavit of Walter Kenneth Bryden, dated November 24, 1947, being order of the Labour Relations Board with respect to G. M. Svendsen.	July 8, 1947
2.	EXHIBIT "B" to the Affidavit of Walter Kenneth Bryden, *supra*, being order of the Labour Relations Board with respect to Harold J. Craigmile.	July 8, 1947
3.	EXHIBIT "C" to the Affidavit of Walter Kenneth Bryden, *supra*, being order of the Labour Relations Board with respect to J. E. Boryski, and the same as Exhibit "B" to the Affidavit of Melville Austin East, dated November 10, 1947	July 8, 1947
4.	EXHIBIT "D" to the Affidavit of Walter Kenneth Bryden, *supra*, being order of the Labour Relations Board with respect to Peter Troobitscoff. . . .	July 8, 1947
5.	EXHIBIT "E" to the Affidavit of Walter Kenneth Bryden, *supra*, being order of the Labour Relations Board with respect to N. Troobitscoff	July 8, 1947
6.	EXHIBIT "F" to the Affidavit of Walter Kenneth Bryden, *supra*, being reasons for decision of the Labour Relations Board, and the same as Exhibit "C" to the Affidavit of Melville Austin East, dated November 10, 1947 . . .	July 8, 1947
7.	Affidavit of Morris C. Shumiatcher.	December 19, 1947

In the Court of Appeal for Saskatchewan

No. 16
Consent of Parties to Omission of Documents from Consolidated Record, January 19, 1948—*continued.*

No.	Description of Document	Date
8.	Affidavit of Morris C. Shumiatcher.....	January 6, 1948

DATED at the City of Regina, in the Province of Saskatchewan, this 19th day of January, A.D., 1948.

"MORRIS C. SHUMIATCHER."
B.A., LL.B., LL.M., Doc. Jur.,
Solicitor for the Appellant.
Messrs. MacPherson, Milliken, Leslie and Tyerman,
per "E. C. LESLIE" 10
Solicitors for the Respondent.

No. 17.

In the Court of Appeal for Saskatchewan

No. 17.
Consent of Parties as to Preparation of Consolidated Record, January 19, 1948.

Consent of Parties as to Preparation of Consolidated Record

The parties hereto, by the undersigned their Solicitors, hereby agree that the consolidated record to be transmitted on the appeal herein to His Majesty in His Privy Council be printed in Canada and that the costs of preparing, printing and transmitting the said record to the Registrar of the Privy Council be taxed by the Registrar of the Judicial Committee.

Dated at the City of Regina, in the Province of Saskatchewan, 20 this 19th day of January, A.D., 1948.

"MORRIS C. SHUMIATCHER"
B.A., LL.B., LL.M., Doc. Jur.,
Solicitor for the Appellant.
"MacPHERSON, MILLIKEN, LESLIE and TYERMAN"
per : "E. C. LESLIE,"
Solicitors for the Respondent.

No. 18.

PART II—EXHIBITS

Exhibit "A" to Affidavit of Melville Austin East.

LABOUR RELATIONS BOARD: APPLICATION TO LABOUR RELATIONS BOARD

Saskatchewan

Application for an Order to be made pursuant to Clause (e) of Section 5 of The Trade Union Act, 1944, as from time to time amended

1. Local 3493, United Steelworkers of America, of the City of Saskatoon, in the Province of Saskatchewan, being a trade union within the meaning of *The Trade Union Act, 1944*, hereby alleges that J. E. Boryski of 222 Ave., D. S., in the City of Saskatoon, in the Province of Saskatchewan, was an employee within the meaning of *The Trade Union Act, 1944.* employed in the employment of John East Iron Works, Limited, Saskatoon, since January 13th, 1942 and up till and immediately prior to the 23rd day of May, A.D. 1947; that the said employer and/or employer's agent/s referred to in paragraph (4) hereof discharged the said employee from the said employment effective on the said date because the said employee was a member of and/or active in the said trade union and that the said employer and/or employer's agent/s (have/has) thereby committed an unfair labour practice within the meaning of clause (e) of subsection (1) of section 8 of *The Trade Union Act, 1944*, as from time to time amended, and the said trade union hereby applies to the Labour Relations Board for an order to be made pursuant to Clause (e) of section 5 (5) of the said *Trade Union Act* requiring the said employer to reinstate the said employee and to pay him the monetary loss suffered by him by reason of his discharge.

2. The said employee is now and was, at the time of the said discharge, a member in good standing of the said trade union.

3. The name and address of the officer of the said trade union who is acting on behalf of the applicant is as follows:

Norman Riches, Office held: Representative, 111 Home St., West, Moose Jaw, Saskatchewan.

4. The name and address of the employer's agent/s referred to in paragraph (1) hereof (is/are) as follows:

M. A. East, Saskatoon, Saskatchewan.

5. The following information relative to the employment of the said employee is tendered:

(*a*) Date of notice of discharge, May 15th, 1947.

(*b*) Date to which pay was effective, May 23rd, 1947.

In the Court of Appeal for Saskatchewan

No. 18
Exhibit "A" to Affidavit of Melville Austin East: Application to Labour Relations Board, May 17, 1947—
continued.

(*c*) Basis of pay, hourly.

(*d*) Rate of pay, 80 cents per hour.

(*e*) Normal hours of work, 44 per week.

(*f*) Do your daily hours (exclusive of overtime) vary? No.

(*g*) Is an incentive and/or other bonus paid in addition to the regular rate of pay? No. If so, state the total amount of the bonus or bonuses paid during the four complete weeks immediately preceding the date of notice of discharge: Nil.

(*h*) If no hourly, weekly or monthly rate of pay has been established by custom, agreement or otherwise, state the total amount of wages paid during the four complete weeks immediately preceding the date of discharge.

(*i*) Further information relative to rate of pay: Said employee was given notice of dissmissal at 12 noon May 15th, given seven days notice with pay.

I, the undersigned do hereby solemnly declare that the statements made herein are true in substance and in fact to the best of my knowledge and belief.

And I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath and by virtue of *The Canada Evidence Act.*

DECLARED before me at Saskatoon, in the Province of Saskatchewan, this 17th day of May, A.D. 1947.

"N. R. RICHES"

"M. G. BARRY"
Commissioner for Oaths in and for the Province of Saskatchewan.
My Commission expires Dec. 31, 1950.

No. 19.

Exhibit "B" to the Affidavit of Melville Austin East: Order of Labour Relations Board.

LABOUR RELATIONS BOARD
Saskatchewan

IN THE MATTER OF an application for an order requiring an employer to reinstate an employee alleged to have been discharged contrary to the provisions of *The Trade Union Act, 1944*, and to pay to the said employee the monetary loss suffered by reason of such discharge;

AND IN THE MATTER OF Section 5, Clause (e) of *The Trade Union Act, 1944*:

AND IN THE MATTER OF the discharge of J. E. Boryski.

Between

UNITED STEELWORKERS OF AMERICA,
Local 3493 - - - - - - - - *Applicant*

—and—

JOHN EAST IRON WORKS, LIMITED, a body corporate, incorporated under the laws of Saskatchewan, with head office in the City of Saskatoon, in the Province of Saskatchewan, *Respondent.*

Before:

W. K. BRYDEN, Chairman,
ELSIE M. HART,
W. G. DAVIES,
J. R. GRIFFITH,
G. H. WHITTER,

A majority of the duly appointed members of the Labour Relations Board.

REGINA, Tuesday the eight day of July, A.D. 1947.

UPON THE APPLICATION OF the United Steelworkers of America, Local 3493, for an order to be made requiring The John East Iron Works, Limited, a body corporate, incorporated under the laws of Saskatchewan, with head office in the City of Saskatoon, in the Province of Saskatchewan, to reinstate J. E. Boryski in his employment and to pay to him the monetary loss suffered by reason of his discharge;

AND UPON CONSIDERING written representations submitted by M. A. East on behalf of the respondent company;

AND UPON HEARING P. G. Makaroff, K.C., counsel for the applicant trade union, in support of the said application, and E. C. Leslie, K.C., counsel for the respondent company, in opposition to the

In the Court of Appeal for Saskatchewan

No. 19
Exhibit "B" to the Affidavit of Melville Austin East: Order of Labour Relations Board, July 8, 1947—
continued.

said application, and certain witnesses called by and on behalf of the parties, at a hearing held in the City of Saskatoon, in the Province of Saskatchewan, on the 10th, 11th, and 12th days of June, A.D. 1947;

AND HAVING REGARD TO all the facts adduced in evidence before the Board and what was urged in argument before the Board;

THE BOARD HAVING FOUND THAT J. E. Boryski was employed by the respondent company; that on the fifteenth day of May, A.D. 1947, the respondent company discharged the said J. E. Boryski from his employment; that the applicant trade union alleged that the respondent company, an employer within the meaning of paragraph 6 of section 2 of *The Trade Union Act, 1944*, in discharging the said J. E. Boryski from his employment, committed an unfair labour practice within the meaning of clause (e) of subsection (1) of section 8 of the said Act; that it was not proved by or on behalf of the respondent company, as required by the said clause, that the said company did not discriminate against the said J. E. Boryski in regard to tenure of employment with a view to discouraging membership in or activity in or for a labour organization; that the said company did discriminate against the said J. E. Boryski as aforesaid and thereby committed an unfair labour practice within the meaning of clause (e) of subsection (1) of section 8 of the said Act; and that the said J. E. Boryski was therefore discharged contrary to the provisions of the said Act;

THE BOARD HAVING FOUND FURTHER THAT immediately prior to the date of his discharge, the said J. E. Boryski was employed by the respondent company at a rate of wages of Eighty Cents per hour for a work-week of forty-four hours; that upon his discharge the said J. E. Boryski was paid in full at his regular rate of wages effective to the twenty-third day of May, A.D. 1947; that if the said J. E. Boryski had been employed continuously by the respondent company at the rate of wages applicable to him immediately prior to his discharge, from the twenty-third day of May, A.D. 1947, until the date of this order, he would have received as payment for services rendered the sum of Two Hundred Dollars and Eighty Cents; and that the monetary loss suffered by the said J. E. Boryski by reason of his discharge amounted to Two Hundred Dollars and Eighty Cents;

IN VIRTUE OF the authority vested in it by section 5, clause (e) of *The Trade Union Act, 1944*, being chapter 69 of the Statutes of Saskatchewan, 1944 (Second Session), as from time to time amended;

THE LABOUR RELATIONS BOARD ORDERS THAT The John East Iron Works, Limited, a body corporate, incorporated under the laws of Saskatchewan with head office in the City of Saskatoon, in the Province of Saskatchewan, shall:

(*a*) reinstate, as of the date of this order, J. E. Boryski in his employment with the said company; and

(*b*) pay to the said J. E. Boryski the monetary loss suffered by reason of his discharge, being the sum of Two Hundred Dollars and Eighty Cents.

"W. K. BRYDEN"

No. 20.

In the Court of Appeal for Saskatchewan

No. 20
Exhibit "C" to Affidavit of Melville Austin East: Reasons for Decision of Labour Relations Board.
July 8, 1947

Exhibit "C" to Affidavit of Melville Austin East: Reasons for Decision of Labour Relations Board.

Six applications were made for orders requiring the respondent company to reinstate Harold J. Craigmile, Peter Troobitscoff, J. H. Boryski, N. Troobitscoff, G. M. Svendsen and T. J. Germaine in their employment and to pay them the monetary loss suffered by reason of their discharge. At the commencement of the hearing, counsel for the applicant trade union reported that T. J. Germaine had left the City of Saskatoon and "there is no longer any interest in his position". The application respecting Germaine was therefore withdrawn. By consent of both parties, the remaining five applications were joined, and evidence with respect to all was heard simultaneously.

Each of the five employees covered by these applications was discharged on May 15, 1947, and on that date each was given pay in lieu of notice for the period May 15 to May 23, 1947. Each man, immediately prior to his discharge, was employed on machine work and was paid wages at the rate of 80 cents per hour. The length of service of these employees with the respondent company ranged from two to more than six years. Craigmile had been employed by the company continuously from August 7, 1940, Peter Troobitscoff from September 27, 1940, Boryski from January 13, 1942, N. Troobitscoff from October 6, 1942 and Svendsen from March 14, 1944.

The applicant trade union alleged that the respondent company, in discharging each of these five employees, committed an unfair labour practice within the meaning of clause (e) of subsection (1) of section 8 of *The Trade Union Act, 1944*. By virtue of clause (*e*) therefore, it is to be presumed, unless the contrary is proved, that the respondent company discriminated against each employee "in regard to tenure of employment with a view to discouraging membership in or activity in or for a labour organization."

There was ample evidence to show that over a period of several years the respondent company and its agents were positively and implacably hostile to any efforts by its employees to form themselves into a trade union of any kind. M. A. East, the general manager of the company, stated under cross examination that he would prefer to negotiate with each employee individually rather than through the applicant trade union, and that, "generally speaking", he would prefer not to have an officer or active member of a union in his shop. He also agreed that his father, John East, the founder of the company, who still participates actively in its affairs, frequently denounced the applicant trade union in violent terms to the employees individually and in groups, and this was confirmed by the evidence of several employees. This attitude was translated into action whenever the employees mani-

In the Court of Appeal for Saskatchewan

No. 20
Exhibit "C" to Affidavit of Melville Austin East: Reasons for Decision of Labour Relations Board, July 8, 1947—*continued.*

fested interest in a trade union from the first occasion (in the spring of 1942) on which they attempted to form a union until the present.

It is necessary at this point to make a brief reference to Blanchard Foundry and Machine Company, Limited, This company is not formally connected with the respondent company, but, according to his own evidence, M. A. East represents it in labour relations, and John East, although he has transferred his financial interest in it to his daughter, still takes an active interest in its affairs. In reply to a question as to whether "the policy of John East Iron Works, Limited and that of the Blanchard Foundry and Machine Company, Limited, with respect to labour and unions, are determined by the same persons" M. A. East answered, "Basically", and confirmed the statement that "the attitude towards unions would be the same on the part of both concerns".

According to an employee, David Buick, who has been employed continuously by the respondent company since May 17, 1941, the employees became interested in the spring of 1942 in a trade union affiliated with the American Federation of Labor. A meeting was held on a Sunday night, at which sixteen or seventeen of the employees were present. The next day, "six men" or "seven men" from among the number who were present at the meeting the night before were discharged, and union activity among the employees thereupon ceased.

No further efforts were made by the employees to form a union until the latter part of 1944 when steps were taken to form a local of the United Steelworkers of America. This local (the applicant trade union) was formally chartered by the United Steelworkers of America on January 4, 1945. Bargaining representatives appointed by it were certified under the *Wartime Labour Relations Regulations* as the bargaining representatives for the employees in a unit consisting of most departments of the respondent company. Negotiations were entered into with a view to the conclusion of a collective bargaining agreement, but these were never brought to a successful conclusion.

The local union covered the employees of both the respondent company and Blanchard Foundry and Machine Company, Limited. The first president was Herbert McBain, who at the time was an employee of the latter company, though he had previously been employed by the respondent company. McBain was also a member of the bargaining committee which entered into negotiations with the respondent company, the other two members being Hazen Clark and John Martens who were employees of the respondent company. McBain had been employed by either the respondent company or Blanchard Foundry and Machine Company, Limited since March, 1942, and his work was apparently satisfactory. After his activity in connection with the applicant trade union commenced, however, he was three times threatened with discharge and he was finally discharged in December, 1946. In the spring of 1945, Hazen Clark succeeded McBain as the president of the appli-

cant trade union, and was discharged while he was still president of the union.

Steve Kerschner was employed by the respondent company in 1942. He voluntarily terminated his employment, but in April 1944, upon the request of John East, he accepted employment with Blanchard Foundry and Machine Company, Limited. It was while he was there that the applicant trade union was organized among the employees of that company and of the respondent company. Some time after its organization, the applicant trade union made application to the Regional War Labour Board, on behalf of the employees of Blanchard Foundry and Machine Company, Limited, for higher wages and shorter hours. Shortly after the application was made, John East called all the employees into the office and informed them that business was slackening off substantially and that it would be necessary to lay off several employees.

Kerschner testified, without contradiction, that a few minutes after the meeting he was approached by East who informed him that there was no shortage of work whatever and that he (East) would hate to see Kerschner go. East then offered to pay Kerschner well for assistance in destroying the trade union existing among the employees of Blanchard Foundry and Machine Company, Limited, stating that if it were destroyed in that company, it would not long survive in the respondent company. Kerschner refused the offer, and he testified that thereafter conditions were gradually made so difficult for him that he finally asked to be discharged.

In 1946, after considerable proceedings before this Board and in the courts, a certain trade union lost its right to represent employees of a business in Saskatoon known as Acme Machine and Electric Company in collective bargaining with their employer. M. A. East thereupon posted on the premises of the respondent company and supplied to each individual employee of the company a notice calling attention to this case. The notice, was addressed "to the staff", was lengthy, but the first two paragraphs indicate its tenor:

> "The purpose of this memorandum is to acquaint you with developments which have taken place in regard to the fact that the employees of the Acme Machine and Electric Company are now dealing directly with that Company, rather than through the Union.
>
> "The Acme case now makes it clear that any body of workmen who were previously associated with a Union can withdraw from such union by merely having a majority of the employees involved sign a petition stating that they no longer wish to bargain through the Union, but wish to bargain with the Company directly."

When asked if that was "the way you would have liked to have it in your shop", East replied, "Yes, generally speaking".

In the Court of Appeal for Saskatchewan

No. 20
Exhibit "C" to Affidavit of Melville Austin East: Reasons for Decision of Labour Relations Board, July 8, 1947—*continued.*

Dmytro Nesdoly entered employment with the respondent company in March, 1942. In June, 1946, he was elected president of the applicant trade union. When asked how it came about that he was chosen for the presidency, he replied:

> "I was trying to nominate the other fellow, but they were all scared of losing their jobs. There were two presidents before that were fired, and I said, 'I'll be a brave guy. I'll take it'.

Subsequently, the applicant trade union applied to this Board, under *The Trade Union Act*, 1944, to be determined as the bargaining agent for the employees in most of the departments in the respondent company.

A copy of this application was forwarded to the respondent company in due course, and M. A. East stated that he "wasn't too pleased" to receive it. The evidence shows—the substance of it confirmed by East himself—that, after receiving the application, he approached Nesdoly in the shop in a high state of excitement and shouted "the fight is on" and further words to that effect. He then called together all the employees in the shop, informed them that an application for "certification" had been made and expressed his opposition to the applicant trade union in no uncertain terms.

The next day, as soon as Nesdoly reported for work, M. A. East called him into the office and gave him notice of termination of his employment. Nesdoly proceeded into the shop to talk to other union members but East followed him, had a truck-driver pick up his tools and had him leave the premises forthwith.

On February 28, 1947, the employees of Blanchard Foundry and Machine Company, Limited signed a document stating that they no longer wished the applicant trade union to represent them in collective bargaining. The document was dictated by M. A. East, and the employees were called into the office of the foundry to sign it. They signed it in the presence of East and a costing clerk employed by the respondent company. Shortly afterwards, an order determining the applicant trade union to be the bargaining agent of these employees was rescinded.

By this time, also, the union was almost completely quiescent in the respondent company. What must have appeared at the time to be the *coup de grace* came early in 1947, when the three employees who were members of the negotiating committee resigned from that committee. All three resigned upon the suggestion of M. A. East. Moreover William Cook who, at the time, was the only member of the committee who was still in the employ of the respondent company, testified that he was twice called into East's office before he consented to resign. His evidence was that on the second occasion East made pointed references to a decline in business, and that "from our chat

about lack of work and so on I took it that it would be very nice on my part if I signed" the resignation.

The union revived, however. The application referred to above which it made to this Board in 1946 had been withdrawn, but in May of 1947 it made a second application. Thereupon, the employees were summoned to a meeting which lasted approximately two or three hours. M. A. East spoke first. He stated that the company had received a copy of the application which had been made to the Board and that, in the words of one employee who was present and whose evidence was confirmed in substance by several others, "he wanted to know what stand we were to take, if we were to be with the company or with the union". John East then addressed the meeting and harangued at some length, among other things, against the union and its representations. After pressing for a decision to be made as quickly as possible, all representatives of the company retired. The employees then discussed the matter among themselves, and drew up certain "points" for presentation to the management. M. A. East returned at the end of the meeting and made a statement on these points. It was arranged that the next day a ballot would be conducted to determine if the employees wished the union to represent them. As they were retiring from the meeting, John East approached several of the employees and further vilified the union.

M. A. East prepared the ballot which was used the next day. It was mimeographed on a plain sheet of paper with words "Are you in favor of having Local 3493, United Steelworkers of America, act as a Bargaining Agency?" appearing at the top, with spaces provided to indicate either "Yes" or "No". Immediately below was a space for a signature. On the bottom half of the sheet was a "Petition", with a space for a signature, the effect of which was that the signatory no longer wished the applicant trade union to bargain for him, that he preferred to bargain directly with the company and that he wished the management to notify this Board that the application before it "be waived". East testified that the space for a signature appearing below the ballot was placed there and that the ballot and the petition were placed on the same sheet in his absence and without his knowledge through an error in judgment on the part of the office manager. The employees marked the ballots without signing them, and the result of the vote was overwhelmingly in favour of the applicant trade union. Some days later, M. A. East called a meeting of the employees and read to them a telegram which he was dispatching to this Board to the effect that the respondent company waived objections to the application which was then before the Board in order to expedite bringing before the Courts a test case on the union security provisions of *The Trade Union Act,* 1944. The application was ultimately granted, an order being made May 27, 1947 determining that the applicant trade union represented a majority of the employees in the main departments of the respondent

In the Court of Appeal for Saskatchewan

No. 20
Exhibit "C" to Affidavit of Melville Austin East: Reasons for Decision of Labour Relations Board, July 8, 1947—
continued.

company's business and requiring the respondent company to bargain collectively with that union.

On May 15, 1947, all five of the employees in respect of whom the instant applications were made were suddenly discharged in quick succession just before noon. All were required to leave the premises immediately, and those of them who had unfinished work in their hands were not allowed to finish it.

During the ensuing two or three weeks John East had the employees called into the office in groups for the purpose of having them sign statements prepared by the respondent company, to the effect that they no longer wished the applicant trade union to represent them. According to the testimony of an employee, David Buick, John East came out into the automotive machine shop one day with the Board's order of May 27, and stated that he would not under any circumstances sign an agreement with the applicant trade union. He also stated that all the employees in the foundry and in the steel shop had withdrawn from the applicant trade union and suggested that the employees in the automotive machine shop might do the same thing. By the first week in June, all but two or three of the employees in the unit determined by the Board's order of May 27 to be appropriate for the purpose of bargaining collectively had signed the statements referred to above indicating that they no longer wished the applicant trade union to represent them. It could be said, then that by that time the applicant trade union had reverted to the moribund state in which it had been some months previously.

In summary, it is clear that the respondent company, and also Blanchard Foundry and Machine Company, Limited whose policy on labour matters was determined basically by the same persons as determine such policy for the respondent company, have during the past number of years persistently and vigorously attempted to thwart the efforts of their employees to form themselves into a trade union. The first essay in trade union organization (in 1942) met sudden death when six or seven employees were abruptly discharged. A new organization was formed at the end of 1944, and three successive presidents of this organization were discharged. Another employee, who refused to assist in the destruction of the applicant trade union, was gradually squeezed out. Moreover, on more than one occasion pointed references were made to shortages of work, suggestions were made to the employees that they should withdraw from the union and pressure was exercised on them. Throughout it all, there was a constant stream of invective against trade unionism in general and the applicant trade union in particular, directed by John East to the employees. It was alleged that at least some of the incidents referred to above were pure coincidences, but the Board was of opinion that the pattern of events was too consistent to permit of any such explanation.

Moreover, the Board was satisfied that the discharge of the five employees covered by the present applications was merely a further development of this pattern. After the discharge of Nesdoly, the applicant trade union entered into a period of decline. It disappeared entirely in Blanchard Foundry and Machine Company, Limited, and for all practical purposes it was apparently dead in the respondent company. Its unexpected revival was a matter of concern to the officers of the respondent company. The employees were summoned to a meeting at which the alternative of being with the company or with the union was placed before them, and after this preparation a vote was held at the instance of the company under most dubious circumstances. If this vote had any purpose at all, it could only have been held in the hope that the company would be provided with the material with which to oppose the application which was then before this Board. The result, however, was the exact opposite, and desperate remedies then became necessary.

The five employees who were discharged all had substantial service with the respondent company. Moreover, all but one of them had been more active than the average employee in the affairs of the applicant trade union and, in particular, had played an important role in its revival. Nick Troobitscoff, the father of Peter Troobitscoff, had apparently been nothing more than a rank-and-file member. However, he has little facility with the English language with the result that he has to rely heavily on his son, and his fate was almost inevitably bound up with that of his son.

The evidence showed that, as one might in any case have expected, the sudden discharge of five such men in the midst of an open conflict between the company and the union had a profound effect on the other employees. After a little more pressure from John East, almost all the employees withdrew their support from the union, although only a month previously they had voted overwhelmingly in favour of it. There can be no question that the discharge of the five employees contributed, and was designed to contribute, materially to this result. The Board was of opinion that, apart from the presumption arising by virtue of section 8(1) (e), there was substantial positive evidence that the respondent company discriminated against these employees "with a view to discouraging membership in or activity in or for a labour organization."

The principal defence raised on behalf of the respondent company was that none of the officers of that company knew that any of the five men concerned was a member of or active in or for any trade union. The only evidence of this consisted of bald assertions by M. A. East, and it would clearly be difficult, if not impossible, to prove that any of the officers of the company in fact knew of the union activity of these employees. The point, however, did not appear to the Board to be relevent. The onus which the respondent company was called upon

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to discharge under section 8(1) (e) was to disprove a presumption not that the employees were discharged because of their membership in or activity in or for a labour organization but that they were discharged "with a view to discouraging membership in or activity in or for a labour organization". It is self-evident that an employer could not discharge an employee beause of that employee's trade union activity if he had no knowledge of such activity. Such knowledge is not necessary, however, if the employer's motive is, by instilling fear, to discourage membership in or activity in or for a labour organization among his employees generally. In this case, the officers of the respondent company had for years devoted their attention to discouraging such activities. At the time the dismissals took place, they had strong reasons for redoubling their efforts in this connection. The dismissals were preceded by strenuous, but unsuccessful, efforts to induce the employees to repudiate the applicant trade union, and were followed by further pressure in the same direction until success was finally achieved. The Board could come to no other conclusion than that these dismissals represented the culmination of a concerted effort by the respondent company to discourage among its employees membership in or activity in or for the applicant trade union.

Another defence raised by the respondent company was that the actual reason for the dismissals was that there had been a decline in the volume of the company's business which necessitated a reduction in staff. The only evidence adduced to show that there was such a decline in business consisted of oral evidence from M. A. East. No records of the company were produced to substantiate East's assertions. Moreover, these assertions were by no means uncontradicted. Nick Troobitscoff, who worked on a machine close to the door of the respondent company's machine shop, testified that not long before the dismissals occured he saw work turned away which was of the same type as is done in the machine shop. East himself admitted that he had remonstrated with a man who voluntarily left the employment of the company at about this same time.

In any case, figures produced by M. A. East showed that the staff on June 9, 1947 (i.e., after the five men had been discharged) had declined by only one as compared with June 9 of the previous year. In fact, there had previously been fluctuations in staff, but the five men now discharged, who were experienced workmen and had substantial service with the respondent company, had never before been affected by such fluctuations. Thus, even a decline in business, if such there was, did not explain adequately why these five men should now have been selected for discharge. A more probable explanation, in view of all the other circumstances referred to above, is that the discharge of these particular men, by virtue of the very fact that they all had long service with the respondent company, would be calculated to have the greatest possible effect on the other employees.

The Board's conclusion was that the respondent company failed to rebut the presumption arising under section 8(1)(e), and that, on the other hand, there was convincing evidence to support this presumption. The respondent company, therefore, discriminated against each of the five employees in regard to tenure of employment with a view to discouraging membership in or activity in or for a labour organization (the applicant trade union). From this it follows that each employee was discharged contrary to the provisions of *The Trade Union Act,* 1944. The decision was unanimous in respect to Craigmile, Boryski and Svendsen, and was by a majority of the members of the Board in respect to the two Troobitscoffs.

The monetary loss suffered was identical in all five cases. Each employee was discharged on May 15, 1947, and received wages in full effective to May 23, 1947. Immediately prior to his discharge, each employee received wages at the rate of 80 cents per hour for a 44 hour week. If any of these employees had been employed continuously from May 23, 1947 until the date of this decision, he would have received as payment for services rendered the sum of $200.80. Therefore, that sum represents the monetary loss suffered by each employee by reason of his discharge.

An order will issue in respect to each of the following employees, namely, Harold J. Craigmile, Peter Troobitscoff, J. E. Boryski, N. Troobitscoff and G. M. Svendsen, requiring the respondent company to reinstate the said employee as of this date and to pay him the monetary loss suffered by reason of his discharge, being the sum of $200.80.

"W. K. BRYDEN,"
Chairman.

July 8, 1947.

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Exhibit "C" to Affidavit of Melville Austin
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continued.

STATUTES AND OTHER DOCUMENTS

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No. 21
Statutes and Other Documents.

No. 21.

The Trade Union Act, Statutes of Saskatchewan, 1944, (second session) Chapter 69, and amendments thereto.

(Separate document)

In the Privy Council

No. 13 of 1948

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

IN THE MATTER OF *The Trade Union Act*, Statutes of Saskatchewan, 1944 (second session) Chapter 69, and amendments thereto;

AND IN THE MATTER OF certain orders made by The Labour Relations Board of Saskatchewan.

BETWEEN

THE LABOUR RELATIONS BOARD OF SASKATCHEWAN, *Appellant*

and

JOHN EAST IRON WORKS, LIMITED, *Respondent*

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