Privy Council Appeal No. 13 *of* 1948

No. - - -

The Labour Relations Board Of Saskatchewan - - *Appellant*

AND

John East Iron Works Limited - - - - - *Respondent*

AND

The Attorney General Of Canada, The Attorney General Of Saskatchewan, The Attorney General Of Ontario and The Attorney General Of Nova Scotia *Interveners*

FROM

THE COURT OF APPEAL FOR SASKATCHEWAN

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH OCTOBER, 1948

Present at the Hearing:

LORD PORTER
LORD SIMONDS
LORD OAKSEY
LORD MORTON OF HENRYTON
LORD MACDERMOTT

[*Delivered by* LORD SIMONDS]

In this appeal, which is brought from a judgment of the Court of Appeal for Saskatchewan, a question of constitutional importance is raised whether certain provisions of the Trade Union Act 1944 of the Province of Saskatchewan, which will be referred to as " the Act ", are within the legislative powers of that Province under the British North America Act 1867.

The facts of the case upon which the question arises are not in dispute and can be shortly stated.

On the 15th May, 1947, the respondent, John East Iron Works Limited, which carries on business in Saskatchewan, dismissed from its employment six of its employees. Thereupon the United Steel Workers of America, a trade union, complaining that the respondent in dismissing these employees had been guilty of an unfair labour practice within the meaning of section 8 (1) (*e*) of the Act applied to the appellant, the Labour Relations Board of Saskatchewan, for orders requiring the respondent to reinstate them and to pay them the monetary loss suffered by them by reason of their dismissal. On the 10th, 11th and 12th June, 1947, the union's applications were heard by the appellant Board and in the course of the hearing the application in respect of one of the six employees was withdrawn. Both the union and the respondent appeared by counsel before the appellant Board and called evidence. The appellant Board, having heard evidence and argument, found that the respondent had 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 organisation (the applicant trade union) " and had discharged them contrary to the provisions of the Act.

On the 8th July, 1947, the appellant Board issued orders requiring the respondent to reinstate each of the five employees and to pay each of them the sum of $200.80, being the sum which each of them would have received for his services if he had remained in the employment of the respondent continuously from the 23rd May, 1947 (up to which date he had been paid) until the date of that decision.

On the 6th November, 1947, the respondent filed a notice of motion in the Court of Appeal for Saskatchewan giving notice of intention to move the Court for an Order quashing the Orders of the appellant Board. The notice stated six grounds of application of which only one has been considered by the Court of Appeal and by their Lordships. That ground is that the Act in so far as it purports (*a*) to make the Orders of the appellant Board enforceable as Orders of the Court of King's Bench, and (*b*) to give to the appellant 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 superior, district or county court or 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."

On the 15th December, 1947, the Court of Appeal (Martin C.J. and Gordon, Macdonald and Anderson J.J.), upholding this plea, gave judgment quashing the Orders of the appellant Board. Hence this appeal to His Majesty in Council.

It is now necessary to recur to the terms of the Act the validity of which is impeached, but before doing so it is proper to recall the salient provisions of the British North America Act 1867. Under that Act, while by section 92 there was exclusively reserved to the Provincial Legislatures *legislative* power in respect of " (14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organisation of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil matters in those Courts." yet by Part VII, entitled " Judicature ", the following provisions are made, which must be stated in full:

> " Section 96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.
>
> Section 97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.
>
> Section 98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.
>
> Section 99. The Judges of the Superior Courts shall hold office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.
>
> Section 100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada."

It is in the application of these sections to the constitution and functions of the appellant Board that the problem lies which their Lordships have to determine and they would at the outset emphasise that its solution is not to be found by answering the question whether in certain of its functions the appellant Board exercises judicial power. It may do so

and yet have constitutional validity. For, whatever doubts may at one time have been entertained, two propositions cannot now be challenged (1) that it is not only Courts which are designated " superior " or " district " or " county " Courts that are within the ambit of the sections that have been cited, (2) that not all tribunals which exercise judicial power are within their ambit. It is this consideration that led the respondent in challenging the Orders made by the appellant Board to use the expression " a tribunal analogous thereto ", thus echoing the language used by Lord Atkin in delivering the opinion of their Lordships in *Toronto* v. *York* 1938 A.C. 415. The question for determination is therefore a double one (*a*) whether the appellant Board exercises judicial power and (*b*), if so, whether in that exercise it is a tribunal analogous to a superior, district or county Court.

The Act, which is Chapter 69 of the Statutes of Saskatchewan 1944 (Second Session) as amended by Chapter 108 of the Statutes of 1945, Chapter 98 of the Statutes of 1946 and Chapter 102 of the Statutes of 1947, had as its original title " An act respecting Trade Unions and the Right of Employees to organise in Trade Unions of their own choosing for the purpose of bargaining collectively with their employers ". Herein its purpose is apparent, a purpose, it may be observed, that would have sounded strange to the ears of the Legislature of 1867.

Section 2 contains certain definitions of which the following may be noted:

> " ' bargaining collectively ' means negotiating in good faith with a view to the conclusion of a collective bargaining agreement . . . and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement.
>
> ' board ' means the Labour Relations Board constituted by this Act.
>
> ' collective bargaining agreement ' means an agreement in writing between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions.
>
> ' employee ' means any person in the employment of an employer, except any person having authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, and includes any person on strike or locked out in a current labour dispute who has not secured permanent employment elsewhere."

There are definitions also of " employer ", " employer's agent ", " labour organization ", " minister " and " trade union " which need not be set out.

Section 3 gives employees the right to organise in trade unions and to bargain collectively through representatives of their own choosing and provides that the representatives selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for such purpose shall be the exclusive representatives of all employees in such unit for the purpose of bargaining collectively.

Section 4 (which is all important for the purpose of this appeal) prescribes that there shall be a Board to be known as the Labour Relations Board composed of seven members appointed by the Lieutenant Governor in Council at such salaries or remuneration as he deems fit, that the Lieutenant Governor in Council shall name a chairman and vice-chairman of the board, and that the members of the board shall be equally representative of organised employees and employers, and, if the Lieutenant Governor in Council deems it desirable, of the general public. The same section lays down rules of procedure for the Board.

Section 5 defines the power of the Board. It has power to make orders

> " (*a*) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;

(*b*) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;

(*c*) requiring an employer to bargain collectively;

(*d*) requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice;

(*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;

(*f*) requiring an employer to disestablish a company dominated organization;

(*g*) rescinding or amending any order or decision of the board."

Sections 6 and 7 give directions as to the mode of ascertaining what trade union represents a majority of employees in an appropriate unit.

Section 8 defines in great detail what is an unfair labour practice for (1) an employer or his agent and (2) an employee or any person acting on behalf of a labour organisation respectively. It is necessary for the present purpose to refer only to subsection (1) (*e*), by which it is made an unfair labour practice for an employer or his agent:

" to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind with a view to encouraging or discouraging membership in or activity in or for a labour organization or participation of any kind in a proceeding under this Act; and if an employer or employer's agent discharges an employee from his employment and it is alleged by a trade union that such employer or employer's agent has thereby committed an unfair labour practice within the meaning of this clause, it shall be presumed, unless the contrary is proved, that such employer or employer's agent has discriminated against such employee "

in manner aforesaid.

Section 9 provides that a certified copy of any order or decision of the board shall within one week be filed in the office of the registrar of the Court of King's Bench and shall thereupon be enforceable as a judgment or order of the court, but the Board may nevertheless rescind or vary any such order.

Section 10 provides (1) that in any application to the court arising out of the failure of any person to comply with the terms of any order filed in pursuance of section 9, the court may refer to the Board any question as to the compliance or non-compliance of such person or persons with the order of the board and (2) that the application to enforce any order of the Board may be made to the court by and in the name of the Board, any trade union affected or any interested person, and upon such application being heard the court shall be bound absolutely by the findings of the Board and shall make such order or orders as may be necessary to cause every party with respect to whom the application is made to comply with the order of the Board and (3) that the Board may in its own name appeal from any judgment, decision or order of any court affecting any of its orders or decisions.

Section 11 provides for the imposition of penalties on any person who takes part in, aids, abets, counsels or procures any unfair labour practice, section 12 for the appointment by the Lieutenant Governor in Council in certain events of the controller of a business, and section 13 for the making of rules and regulations.

Section 14 gives to the Board and the members thereof the power of a commissioner under the Public Inquiries Act with liberty to receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not.

Finally, section 15 enacts that there shall be no appeal from an order or decision of the Board under the Act and that the Board shall

have full power to determine any question of fact necessary to its jurisdiction and that its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari*, *mandamus*, prohibition, injunction or other proceeding whatsoever.

Their Lordships have thought it proper to set out in some detail the relevant provisions of the impugned Act inasmuch as upon the question that they must determine it is inevitable that fine distinctions should be drawn. The borderland in which judicial and administrative functions overlap is a wide one and the boundary is the more difficult to define in the case of a body such as the appellant board, the greater part of whose functions are beyond doubt in the administrative sphere. Nor can a more difficult question be posed (but their Lordships can find no easier test) than to ask whether one court is " analogous " to another.

The question for determination has been stated as a double one. And so logically it is. For it should first be asked whether the appellant Board when it makes an order under section 5 (*e*) of the Act is exercising judicial power. If it is not, then it is not a court at all and cannot be a " superior, district or county court ", or a court analogous thereto.

Their Lordships, however, think it unnecessary finally to answer this question. Without attempting to give a comprehensive definition of judicial power, they accept the view that its broad features are accurately stated in that part of the judgment of Griffith, C.J. in *Huddart, Parker & Co. Proprietary Ltd.* v. *Moorehead*, 8 C.L.R. 330 at 357, which was approved by this Board in *Shell Company of Australia Limited* v. *Federal Commissioner of Taxation*, 1931 A.C. 275. Nor do they doubt, as was pointed out in the latter case, that there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also.

Whether in the present case the power exercised by the appellant Board under section 5 (*e*) of the Act is a judicial power, their Lordships do not decide. For the elements in its constitution and functions which at least make it doubtful whether it is in the strict sense a court exercising judicial power at all appear to lead conclusively to the opinion that it is not a superior, district or county court or a court analogous thereto.

It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between Crown and subject or between subject and subject, and that it is the duty of the Court to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings. Here at once a striking departure from the traditional conception of a Court may be seen in the functions of the appellant Board. For, as the Act contemplates and the Rules made under it prescribe, any trade union, any employer, any employers' association or any other person directly concerned may apply to the Board for an order to be made (*a*) requiring any person to refrain from a violation of the Act or from engaging in an unfair labour practice, (*b*) requiring an employer to reinstate an employee discharged contrary to the provisions of the Act and to pay such employee the monetary loss suffered by reason of such discharge, (*c*) requiring an employer to disestablish a company dominated organisation or (*d*) requiring two or more of the said things to be done. Other rules provide for the discharge by the Board of other functions. It is sufficient to refer only to (*b*) *supra*, which clearly illustrates that, while the order relates solely to the relief to be given to an individual, yet the controversy may be raised by others without his assent and, it may be, against his will, for the solution of some far-reaching industrial conflict. It may be possible to describe an issue thus raised as a " lis " and to regard its determination as the exercise of judicial power. But it appears to their Lordships that such an issue is indeed remote from those which at the time of confederation occupied the superior or district or county courts of Upper Canada.

In the Court of Appeal for Saskatchewan the learned Chief Justice (in whose opinion the other Judges concurred) accepted the view that the board exercised a judicial power analogous to that of the Courts named on the ground that such Courts always had jurisdiction in connection with the enforcement of contracts of hiring and awarding damages for the breaches thereof. But, as their Lordships think, this view ignores the wider aspects of the matter. The jurisdiction of the Board under section 5 (*e*) is not invoked by the employee for the enforcement of his contractual rights: those, whatever they may be, he can assert elsewhere. But his reinstatement, which the terms of his contract of employment might not by themselves justify, is the means by which labour practices regarded as unfair are frustrated and the policy of collective bargaining as a road to industrial peace is secured. It is in the light of this new conception of industrial relations that the question to be determined by the Board must be viewed, and, even if the issue so raised can be regarded as a justiciable one, it finds no analogy in those issues which were familiar to the courts of 1867.

This matter may be tested in another way. If the appellant Board is a court analogous to the superior and other courts mentioned in section 96 of the British North America Act, its members must not only be appointed by the Governor General but must be chosen from the Bar of Saskatchewan. It is legitimate therefore to ask whether, if trade unions had in 1867 been recognised by the law, if collective bargaining had then been the accepted postulate of industrial peace, if, in a word, the economic and social outlook had been the same in 1867 as it became in 1944, it would not have been expedient to establish just such a specialised tribunal as is provided by section 4 of the Act. It is as good a test as another of " analogy " to ask whether the subject matter of the assumed justiciable issue makes it desirable that the judges should have the same qualifications as those which distinguish the judges of superior or other courts. And it appears to their Lordships that to this question only one answer can be given. For wide experience has shown that, though an independent president of the tribunal may in certain cases be advisable, it is essential that its other members should bring an experience and knowledge acquired extra-judicially to the solution of their problems. The members of the Board are to be equally representative of organised employees and employers and in a certain event of the general public. That does not mean that bias or interest will lead them to act otherwise than judicially, so far as that word connotes a standard of conduct, but it assuredly means that the subject matter is such as profoundly to distinguish such a tribunal from the courts mentioned in section 96.

It is relevant too to consider the alleged judicial function of the Board under section 5 (*e*) of the Act in relation to its other duties. It is not impossible, as the case of *Toronto* v. *York* [1938] A.C. 415 illustrates, for a body to be validly established for administrative purposes and yet to be unconstitutionally clothed with a judicial power. It is not therefore conclusive of the constitutionality of the Board that in the main it is an administrative instrument and that its judicial function is designed to implement administrative policy. But, once more seeking an analogy with the Courts mentioned in section 96, their Lordships must observe that the feature of the Board's constitution, which is conspicuously shown in the power vested in it by section 10 (3) of the Act to appeal in its own name from any judgment of any Court affecting any of its orders or decisions, emphasises the dissimilarity from those Courts.

On behalf of the respondent stress was laid upon the provisions of section 15 of the Act. It was urged that a tribunal, whose decisions were not subject to appeal and whose proceedings were not reviewable by any court of law or by any *certiorari* or other proceeding whatsoever, must be regarded as a " superior " court or a court analogous thereto. But the same considerations which make it expedient to set up a specialised tribunal may make it inexpedient that that tribunal's decisions should be reviewed by an ordinary court. It does not for that reason become itself a " superior " court. Nor must its immunity from *certiorari* or other proceedings be pressed too far. It does not fall to their Lordships upon

the present appeal to determine the scope of that provision but it seems clear that it would not avail the tribunal if it purported to exercise a jurisdiction wider than that specifically entrusted to it by the Act.

At this stage their Lordships reach the conclusion that the jurisdiction exercisable by the Board is not such as to constitute it a court within section 96 of the British North America Act. They do not think it necessary to consider whether it is a jurisdiction more nearly analogous to that exercised at the time of confederation by justices of the peace—a matter to which much argument was directed—nor would they pursue the comparison with the jurisdiction of the Workmen's Compensation Board, which was also pressed upon them by counsel. It is sufficient to say that it is not in their opinion analogous to that of a superior, district or county Court.

But before parting with the case their Lordships think it proper to observe upon two cases which have recently come before them, *Martineau* v. *City of Montreal*, 1932 A.C. 113, and *Toronto* v. *York* (*supra*), of which passing mention has already meen made, and more particularly also upon *re Adoption Act of Ontario*, 1938 S.C.R. (Canada) 398, in which will be found a judgment of Sir Lyman Duff, lately Chief Justice of Canada, so exhaustive and penetrating both in historical retrospect and in analysis of this topic, that their Lordships would respectfully adopt it as their own, so far as it is relevant to the present appeal.

In *Martineau's* case, where the question was as to the constitutionality of the Quebec Public Service Commission in that its members exercised certain judicial functions but were not appointed by the Governor General, it would appear that the decision of this Board in favour of the validity of the awards made by the Commission was largely determined by the fact that this Commission was itself the successor of a body which was in existence at the date of Confederation and then exercised a similar jurisdiction. Apart therefore from any other consideration its constitutionality appeared to be preserved by section 129 of the British North America Act. But in the course of delivering the judgment of the Board Lord Blanesburgh, referring to a decision of Drake J. in a British Columbia case, *Burk* v. *Tunstall*, 2 B.C.R. 12, approved the following words used by that learned Judge:

> " . . . But in the section itself, after the special Courts thus named, the Courts of Probate in Nova Scotia and New Brunswick are excepted from the operation of the clause, thus showing that section 96 was intended to be general in its operation."

It appears from cases cited upon the present appeal and from the judgment of Duff C.J. in *re the Adoption Act* that this passage has been made the basis for the proposition that it is incompetent for provincial legislatures to legislate for the appointment of any officer of any provincial court exercising other than ministerial functions. Their Lordships agree with the learned Chief Justice in thinking that this is a wholly unwarranted view of *Martineau's* case, which was directed neither to courts of summary jurisdiction of any kind nor to tribunals established for the exercise of jurisdiction of a kind unknown in 1867.

In *Toronto* v. *York* it was decided that the Ontario Municipal Board was primarily an administrative body but that certain sections of the Act by which it was established purported to clothe it with the functions of a Court and to vest in it judicial powers and that *pro tanto*, since its members were not appointed by the Governor General, the Act was invalid. But it is clear that in that case the question did not arise for argument, as it arises in the case under appeal, whether, upon the assumption that judicial power was vested in the Board, the Board was thereby brought within the ambit of section 96. It is true that at an early stage in the judgment delivered by Lord Atkin the question was asked " Is, then, the Municipal Board of Ontario a Superior Court, or a tribunal analogous thereto? " But it seems to have been assumed by their Lordships that if the power vested in it was judicial, it was such a tribunal, for (as

Duff C.J. pointed out in the case cited) it is obvious that their Lordships did not consider, because presumably there was no occasion to do so, the distinction between the courts that come within the intendment of section 96 of the British North America Act and other courts and tribunals.

Finally, in *re the Adoption Act* it fell to the Supreme Court of Canada to determine the constitutionality of a number of Acts which beyond question purported to vest judicial power in various judicial officers to be designated by the Lieutenant Governor in Council. In point of substantive law the subject matter of these Acts lay within the legislative power of the Provinces just as does the subject matter of the present appeal. The question then was, whether the judicial bodies thus established were courts within the intendment of section 96, and the answer was in the negative. It was sufficient for the purpose of that case for the learned Chief Justice to pose this question " Does the jurisdiction conferred upon magistrates under these statutes broadly conform to a type of jurisdiction generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of section 96? ", and, answering that question in the affirmative, to pronounce for the validity of the statutes. And, if in this case the same alternative was presented to their Lordships, they might well answer it in the same way, for at least from the earliest times the administrative and judicial duties of justices of the peace have been curiously blended: that feature a court of summary jurisdiction has in common with the appellant Board. But they would prefer to put the question in another way, which may be more helpful in the decisions of similar issues, viz., " Does the jurisdiction conferred by the Act upon the appellant Board broadly conform to the type of jurisdiction exercised by the superior, district or county Courts? " In their view, for the reasons already stated, it does not do so. They do not think it necessary to say whether it conforms more nearly to any other jurisdiction existing in 1867.

Their Lordships conclude that the judgment of the Court of Appeal for Saskatchewan cannot be maintained. But that does not end the matter. For apart from the plea of unconstitutionality of the Act the respondent claimed to have the orders of the appellant Board quashed on two other grounds (*a*) that in their assessment of the monetary loss suffered by the discharged employees the Board proceeded upon an error in law so fundamental as to deprive the Board of jurisdiction, and (*b*) that the conduct of the Chairman of the Board disqualified him by bias or the reasonable apprehension of bias from taking part in the enquiry and the Board as constituted at the hearing was thereby also disqualified. The Court of Appeal, being in favour of the respondent on the constitutional plea, did not think it necessary to consider these grounds and their Lordships are not prepared to do so until at least the Court of Appeal has pronounced upon them. Therefore, while the present appeal must be allowed, the case must be remitted to the Court of Appeal for re-hearing upon the footing that the Act is not *ultra vires* and that the Board and its members are constitutionally established. Their Lordships will humbly advise His Majesty accordingly.

The respondent must pay the costs of the appellant Board of this appeal and in the Court of Appeal of Saskatchewan but in the latter Court only so far as they may relate to the constitutional issues.

(60642) Wt. 8062—31 150 10/48 D.L.

In the Privy Council

THE LABOUR RELATIONS BOARD
OF SASKATCHEWAN

AND

JOHN EAST IRON WORKS LIMITED

AND

THE ATTORNEY GENERAL OF CANADA,
THE ATTORNEY GENERAL OF
SASKATCHEWAN,
THE ATTORNEY GENERAL OF ONTARIO
AND THE ATTORNEY GENERAL OF
NOVA SCOTIA

DELIVERED BY LORD SIMONDS

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