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Therien, Nipissing Hotel-and Then What?

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Notes

THERIEN, NIPISSING HOTEL — AND THEN WHAT?

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The issue raised in the *Nipissing Hotel*[1] case is whether a trade union is a suable entity in the eyes of the Ontario Courts. It must be borne in mind that the Ontario Labour Relations Act[2] does provide certain proceedings and remedies against trade unions which are taken before the Labour Relations Board, an arbitrator, or even a magistrate if the Board allows a prosecution under s. 74. But these proceedings have a very limited scope. They only cover offences defined in the Act itself, and only provide relief for the parties directly involved in the collective bargaining process, viz.: trade unions, employers and employees. This note will focus on the broader aspects of liability of trade unions in the courts of common law. Can a third party sue a trade union in tort, in contract, or for a breach of the Act? Can an employer sue a trade union; or can a trade union sue an employer in a common law action in the ordinary courts?

The liability of a trade union is vitally important to a would-be plaintiff because, if the trade union is not a suable entity then he is left with three unsatisfactory alternatives. First, he can sue the individual trade union officers or members who were responsible for the alleged illegality. However, if substantial sums are involved, the defendants will probably be judgment-proof. Secondly, under s. 75 of the Judicature Act, the claimant can institute a class or representative action against all the members of the trade union. In this way he obtains judgment against the membership fund rather than against the individual member. Theoretically, if he succeeds in the action he should receive full compensation; but, in practice, the "Trust Fund" concept makes it virtually impossible to succeed on a class action in Ontario.[3] Thirdly, a trade union may acquire legal status by estoppel.[4] The gist of the doctrine is that having appeared to defend an

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1 *Nipissing Hotel Ltd. et al. v. Hotel & Restaurant Employees & Bartenders International Union et al.*, [1963] O.R. 169.

2 The Labour Relations Act, R.S.O. 1960, c. 202.

3 Before a representation order will be granted in a money claim, the plaintiff must prove that the union has a trust fund which can be resorted to in satisfaction of his claim. The doctrine was laid down in *Barrett v. Harris* (1922), 69 D.L.R. 503 and *Robinson v. Adams*, [1925] 1 D.L.R. 359.

4 *Krug Furniture Company v. Berlin Union of Amalgamated Woodworkers* (1903), 5 O.L.R. 463.

action in its own name the trade union is thereafter estopped from denying that it is a suable entity. The idea that a rule of evidence, estoppel, can actually create legal responsibility has been severely criticized.[5] Thus it is unlikely that Ontario courts would follow this doctrine today. At any rate, an alert union may avoid this pitfall by not appearing or defending in its own name.

An examination of the policy which underlies the law will aid in understanding the purpose of the present legislation. The purpose of most legislation has been to narrow trade-union liability, whereas the general tendency of the courts is to widen grounds of liability. The courts consider bodies possessing such power, wealth and influence ought to accept corresponding duties and responsibilities. The leading case which first established that trade unions are suable entities was the *Taff Vale Case.*[6] Besides enunciating the above proposition, Farwell, J., whose decision was subsequently affirmed by the House of Lords, made his point very clear denying that by statute:

> . . . the legislature had in fact legalized the existence of such irresponsible bodies with such wide capacity for evil.[7]

In Hohfeldian terms, the courts are unwilling to accept the rights and powers of trade unions without imposing the correlative duties and liabilities. Therefore the courts find that the statutes, by inference, create juridical entities. Reinforcing this is the fact that from a layman's point of view trade unions are naturally accepted as separate entities.

In the infancy of trade unionism it made sense to protect unions from legal actions because one sizeable judgment for damages would have been disastrous to the labour movement. However, now it is contended, that outside of the corporate giants, few business enterprises can match unions the size of the United Steel Workers of America or the International Brotherhood of Teamsters, for wealth and influence. They can afford to pay for their wrongdoings. If corporations are vicariously liable for the torts of their servants, why should not unions bear the same legal responsibility? This is not to suggest that the same legal standards should be applicable. A union could hardly be responsible for every act of its every member. Liability should be limited in the manner indicated by Professor Laskin in the *Polymer* arbitration case.[8] The view expressed there is that only important union officers should bind the union vicariously.

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[5] Sherbaniuk — *Actions By and Against Trade Unions* (1958), 12 U.T.L.J 151 at 152-154. It involves the problem of whether suability is a matter of substance or a mere technical matter. In *Local Union No. 1562, United Mine Workers of America v. Williams and Rees,* 59 S.C.R. 240 the Supreme Court of Canada was split on the estoppel question. In *London Associated for Protection of Trade v. Greenlands Limited,* [1916] 2 A.C. 15, the matter of suability was regarded as a matter of substance; therefore the estoppel argument would not apply.

[6] *Taff Vale Railway Company v. Amalgamated Society of Railway Servants,* [1901] A.C. 426.

[7] *Ibid.,* at 431.

[8] *Polymer Corp. Ltd. and Oil, Chemical & Atomic Workers Int'l. Union Local 16-14* (1959), C.C.H., L.L.R. p. 16, 158.

This immunity of trade unions inflicts the gravest injustice on two classes: (i) third parties, (ii) union members seeking to sue their unions. An example of this injustice is the recent Supreme Court of Canada decision in *Orchard v. Tunney*.[9] There the court held that the trade union was not suable under Manitoba labour legislation with the result that the wronged union member's only recourse lay against the union officers personally.

In favour of the present immunity the trade unions argue that society must accept the fact that the labour movement is sui generis. Labour problems do not fit into the existing legal scheme or thinking. In Ontario, this view is sustained by the fact that a Labour Court was disbanded as unsatisfactory in its first year of operations. In its stead an administrative body—the Labour Relations Board—was set up to handle labour disputes. The Board is more flexible and more knowledgeable in labour relations. The Board's purpose is not merely to adjudicate but as well to promote harmony between employer and employee so that the common venture—the business—will be a success. Any widening of the jurisdiction of the courts, unions contend, will result in a corresponding weakening of the Board's position. In the result the Board's unique ability to reconcile rather than adjudicate, to seek the workable solutions rather than deciding who is right and who is wrong, will be sacrificed. This would throw the baby out with the bathwater and labour relations would sink back into its former chaotic state.

Another union bugbear is their losing record in defending union officers. They feel that this results from the unfair attitudes judges show to trade unions. The unions contend that ordinary rules of law are not designed to umpire the economic struggle waged between capital and labour. Furthermore, the majority of legal actions against union activities are for labour injunctions to prevent picketing and they are so widely phrased now that the inclusion of the union would have no practical significance.

At common law, a trade union was an unincorporated association without legal status. Like the corporation it is a creature of statute but unlike the corporation, legal personality has generally been the result of implied rather than express statutory recognition. In the *Taff Vale* Case the action was brought against a trade union registered under the Trade Unions Acts of 1871 and 1876. At trial Farwell, J. uttered the oft-repeated words which were approved by Lord Haldane in the appeal to the House of Lords:

> Now the legislation in giving a trade union the capacity to own property and the capacity to act by agents has, without incorporating it, given it two of the essential qualities of a corporation—essential I mean in respect to liability for tort.[10]

By giving the union the powers and capacities which companies had, the legislature also by implication intended to confer the same

9 [1957] S.C.R. 436.
10 *Supra*, footnote 6 at 430.

legal liabilities and duties. As a result of this judgment the Trade Disputes Act of 1906 was passed. It amended the earlier labour legislation and declared that no tort actions could be brought against a trade union in any court. This illustrates, in general, the traditional struggle by the courts to widen union liability and the legislature's efforts to restrict it.

If the Canadian courts had wished to restrict *Taff Vale* to its facts, they might have said that it was only intended to apply to registered trade unions under the Trade Unions Acts of 1871 and 1876. (It is arguable that it was this analogy with the registration of companies which prompted Farwell, J.'s decision). Unlike Farwell, J., the Majority of the House of Lords preferred to regard suability as a procedural question stemming from the fact of registration rather than as a substantive question. Either view leads to the same result *if* the trade union is registered. The only Canadian legislation calling for registration of unions is the federal Trade Unions Act[11] which calls for voluntary registration. Naturally very few unions have registered under it. There is the further question that its validity is doubtful under our constitutional arrangements.[12]

However, the Canadian courts have preferred the broad statements made by Farwell, J. at the trial level in the *Taff Vale Case.*

This is best illustrated in the *Therien Case*[13] where Locke, J. expressed the unanimous views of the Supreme Court of Canada in holding that British Columbia labour legislation conferred legal personality on trade unions certified in that province. He said:

> The granting of these rights, powers and immunities to these unincorporated associations or bodies is quite inconsistent with the idea that it was not intended that the should be constituted legal entities . . . .[14]

It is evident then that their legal status is entirely dependent on the labour legislation in force in the particular jurisdiction. *Unfortunately, the courts are inclined to adopt these broad general statements without examining closely the specific legislation involved.*

The *Therien* decision was based on two British Columbia statutes. One statute, the Labour Relations Act,[15] is designed to encourage the collective bargaining process and to achieve this end the Act confers rights, powers, duties and responsibilities on the trade-union itself. The Ontario Labour Relations Act has the same scheme and purpose. Locke, J. decided that: "throughout the Act such organizations are referred to as trade unions *and thus treated as legal entities*".[16]

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[11] R.S.C. 1952, c. 67.

[12] See *Amalgamated Builders Council v. Herman,* [1930] 2 D.L.R. 513 at 520, *Starr v. Chase,* [1924] S.C.R. 495 at 507-508; *Polakoff v. Winters Garment Co.,* [1928] 2 D.L.R. 277 at 290.

[13] *International Brotherhood of Teamsters v. Therien,* [1960] S.C.R. 265.

[14] *Ibid.,* at 277-78.

[15] The Labour Relations Act, Stat. B.C. 1954, c. 17.

[16] *Supra,* footnote 13 at 276.

The other British Columbia statute, is the 1902 Trade Unions Act. The relevant sections are sections 2, 3 and 4.[17]

Commenting on the effect of these sections, Locke, J. said:

> "It will be seen that the British Columbia Act by its reference to trade-unions as such, as well as to the servants and agents of such unions *restricting their liability in tort to the extent defined,* recognized the fact that a trade-union was an entity which might be enjoined or become liable in damages for tort".[18]

This statute expressly limits union liability in three areas including tort. The Supreme Court of Canada invoking the maxim *expressio unius, exclusio alterius* interpreted this as implying that otherwise a trade-union was liable at common law. As this statute emphatically speaks in terms of common law liability it is submitted that it is the backbone of the *Therien* decision. Ontario does not have labour legislation corresponding to the 1902 British Columbia Trade-unions Act. Relying on the combined effect of these statutes, Locke, J. declared:

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[17] Trade Unions Act, R.S.B.C. 1948, c. 342. It is referred to as the 1902 British Columbia Trade-unions Act to distinguish it from 1959 British Columbia Trade-unions Act which substantially amended the 1902 Act.

S. 2. *No trade-union* nor any association of workmen or employees in the province, nor the trustees of any such trade-union or association in their representative capacity *shall be liable in damages for any wrongful act* of commission or omission in connection with any strike, lockout, or trade or labour dispute, unless the members of such trade-union or association, or its council, committee, or other governing body, acting within the authority or jurisdiction given such council, committee or other governing body by rules, regulations, or directions of such trade-union or association, or the resolutions or directions of its members resident in the locality or a majority thereof, have authorized or have been a concurring party in such a wrongful act.

3. *No such trade-union* or association *shall be enjoined* nor shall any officers, member, agent, or servant of such trade-union or association or any other person be enjoined, nor shall it or its funds or any such officer, member, agent, servant or other person be made liable in damages for communicating to any workman, artisan, labourer, employee, or person facts respecting employment or hiring by or with any employer, producer, or consumer or distributor of the products of labour or the purchase of such products, or for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation, or other unlawful acts, such last named workman, artisan labourer, employee or person, at the expiration of any existing contract, not to renew the same with or to refuse to become the employee or customer of any such employer, producer, consumer, or distributor of the products of labour.

4. *No such trade-union* or association, or its officer, member, agent, or servant, or other person, *shall be enjoined or liable in damages,* nor shall its funds be liable in damages for publishing information with regard to a strike or a lockout or proposed or expected strike or lockout, or other labour grievance or trouble, or for warning workmen, artisans, labourers, or employees or other persons against seeking, or urging workmen, artisans, labourers, employees, or other persons not to seek, employment in the locality affected by such strike, lockout, labour grievance or trouble, or from purchasing, buying or consuming products produced, or distributed by the employer of labour party to such strike, lockout, labour grievance or trouble, during its continuance.

[18] *Supra,* footnote 13, at 275.

> Were it not for the provisions of the Trade-unions Act *and* the Industrial Relations Act[19] . . . [the union] would not be an entity which could be sued by name . . .[20]

The issue was squarely faced in Ontario in the *Nipissing Hotel* Case. There Spence, J. simply applied the reasoning of the *Therien* case without making the effort to examine thoroughly and correlate the comparitive statutory basis for finding legal personality in an Ontario trade-union:

> It being admitted, therefore, that the Labour Relations Act of Ontario R.S.O. 1960, c. 202 being in para materia with the British Columbia statutes considered in the last three cited cases, it would appear that a labour union certified under the provisions of the Ontario statute is a juristic person and can sue or be sued, *subject however, to the provisions of The Rights of Labour Act, R.S.O.* 1960, *c.* 354, *s.* 3(2) . . .[21]

The *Rights of Labour Act*[22] in s. 3(2) provides that:

> A trade union shall not be made a party to any action in any court unless it may be so made a party irrespective of any of the provisions of this Act or the Labour Relations Act.

Was Spence, J. correct in *assuming* that the *Therien* reasoning applied to Ontario except for the existence of the Rights of Labour Act.

It is submitted that in Ontario a trade union *is not* a suable entity regardless of the effect of s. 3(2) of The Rights of Labour Act. This is submitted because it is *possible* that s. 3(2) might not have the effect that Spence, J. attributed to it in *Nipissing Hotel.* As well, since this is provincial legislation, even if s. 3(2) does negate the inference of legal personality, it can have no effect on the status of trade unions certified under the federal Industrial Relations and Disputes Investigation Act.[23]

In order to test the validity of Spence, J.'s argument that a trade is a legal entity subject to s. 3(2) of the Rights of Labour Act, it is helpful to answer the following questions:

(1) Are two Acts necessary, as in *Therien,* or is the Ontario Labour Relations Act standing alone sufficient to create legal personality?

(2) If the British Columbia Labour Relations Act *alone* would have been sufficient in *Therien* was Spence, J. correct in assuming that the Ontario Labour Relations Act was in para materia with it?

(3) If one Act (The Ontario Labour Relations Act) is not sufficient, is it arguable that in fact Ontario has two Acts which have the cumulative effect of the two British Columbia statutes?

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[19] The Industrial Conciliation and Arbitration Act, Stat. B.C. 1947, c. 44 has been repealed by The Labour Relations Act. They are in *para materia.* Locke, J. refers to the repealed statute because it was in effect at the time that the British Columbia cases, to which he was referring, were decided.
[20] *Supra* footnote 13, at 277.
[21] *Supra* footnote 1 at 172.
[22] R.S.O. 1960, c. 354.
[23] R.S.C. 1952, c. 152.

ARE TWO ACTS NECESSARY?

The *Therien* case makes it clear that in fact and in law it was based on the combined effect of the two British Columbia statutes, especially the effect of the 1902 Trade Unions Act. One ground for this submission is Locke, J.'s statement in the *Therien Case* reproduced earlier.[24]

Furthermore in *Therien,* Locke, J. distinguished the earlier Supreme Court of Canada decision of *Orchard v. Tunney*[25] on the basis that: ". . . there was no such statute in force in the Province of Manitoba when the cause of action arose in the Orchard Case."[26] He was referring to the 1902 British Columbia Trade-unions Act and noted that there was only one labour statute in existence in Manitoba, viz.: the Labour Relations Act.[27] Admittedly, Locke, J. inferred legal status from each of the Acts[28] but it is submitted that his argument makes it clear that the ratio of the case is founded on the combined effect of both statutes.

Immediately after *Therien* two cases on the precise effect of a single statute, the Labour Relations Act,[29] arose in the Manitoba courts. In the first case,[30] Monnin, J. reversed his own earlier decision,[31] held that *Therien* had re-opened the question, and found that the union was a suable entity. He reasoned that the Manitoba and British Columbia Labour Relations Acts were in para materia. In his opinion the 1902 B.C. Trade-unions Act was not necessary to support the inference of legal personality made in *Therien.* The Labour Relations Act standing alone was sufficient to support such an inference. As a result he said: "it is not necessary that both statutes should co-exist".[32]

In the following year the same question was posed in the same court before Williams, C.J.Q.B.[33]. He disagreed with Monnin, J. Instead he followed the line of pre-*Therien* decisions to the effect that if the legislature intends to impose legal personality on a union, this must be done in clear and unequivocal terms and not by vague implications. But Williams, C.J.Q.B. examined the particular section of the Manitoba Labour Relations Act which governed legal liability:

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24 *Supra,* footnote 20.

25 *Supra,* footnote 9.

26 *Ibid.,* at 275.

27 R.S.M. 1954, c. 132. The Act has since been reversed see *infra* footnote 48.

28 The Labour Relations Act, Stat. B.C. 1954, c. 17. Trade Unions Act, R.S.B.C. 1948, c. 342.

29 *Supra,* footnote 27.

30 *Dusessoys Supremarkets St. James Ltd. v. Retail Clerks Union, Local 832* (1961), 34 W.W.R. 577; 30 D.L.R. (2d) 5.

31 *Nabess & Lynn Lake Base Metal Workers Federal Union No. 292 v. Sherritt Gordon Mines Ltd.* (1959), 67 Man. R. 22.

32 *Supra,* footnote 30 at 598-99.

33 *Re Bakery & Confectionery Workers International Union of America Local 389, Winnipeg, and Brothers Bakery Ltd.,* 37 W.W.R. 413.

> S. 46(1)—A prosecution for an offence under this Act may be brought against . . . a trade union and in the name of the . . . union, and for the purpose of the prosecution a trade union . . . shall be deemed a person.

Applying the "exclusio unius . . ." maxim, the Chief Justice reasoned that since legal status is restricted to prosecution for particular offences committed under the Act, by implication, then, a trade-union will not have legal status for any other purpose.

Of these two conflicting Manitoba decisions, it is submitted that the latter decision is to be preferred. Rather than simply assuming that British Columbia and Manitoba legislation is in para materia, Williams, C.J.Q.B. chose to examine the Manitoba legislation in detail.

In Ontario, three sections in the Labour Relations Act are germane:

> s. 72—A prosecution for an offence under this Act may be instituted against a trade union . . . in the name of the union.
>
> s. 73—Proceedings to enforce a determination of the Board under s. 65, a decision of an arbitrator . . . may be instituted in the Supreme Court by or against a trade union . . in the name of the trade union . . .
>
> s. 74(2)—An application for consent to institute a prosecution for an offence under this Act may be made *inter alia* by a trade union and, if the consent is given by the Board, the information may be laid *inter alia* by any officer, official or member of the trade union.

Section 72 corresponds quite closely with s. 46(1) of the Manitoba legislation. The major difference is that the Ontario section omits the last few words— ". . . that for the purpose the trade union shall be deemed a person . . .". If any importance is to be attached to this omission, it is that it implies that trade unions are not generally cloaked with legal status. The legislature deliberately avoids the statement that a union is to be equated with a natural person. The other variance is that section 72 only refers to proceedings against a trade union. Section 74(2) covers prosecutions brought by a trade union. By focusing on the method of adducing evidence this section supports the contention that it is procedural rather than a substantive declaration of legal status.

Section 73 permits specific proceedings to be instituted in the *Supreme Court of Ontario* by or against trade unions viz.—enforcement of orders made by the Board under s. 65, and by arbitrators. [The orders often involve compensation awards and directives ordering a company to rehire an employee and reimburse him for lost wages.] This, and the fact that the proceedings involve private parties demonstrates a close affinity to civil proceedings. A reasonable interpretation of the section would indicate that this is the only type of civil proceeding that the legislature intended to be brought against trade unions. Consequently, there is less reason to infer legal personality under the Ontario legislation than under the Manitoba legislation which only refers to prosecutions.

In view of the close similarity between the Manitoba and Ontario legislation, it is surprising that Spence, J. did not mention either of the post-*Therien* Manitoba decisions.

ARE THE BRITISH COLUMBIA AND ONTARIO LABOUR RELATIONS ACT IN PARA MATERIA?

Even more surprising is the fact that Spence, J. could arrive at the conclusion that the British Columbia and Ontario Labour Relations Acts were in para materia. Admittedly the general purpose is the same—to establish a workable scheme for carrying out the collective bargaining process. For this purpose, the union as one of the two bargaining parties is by necessity designated a separate entity from the general body of employees. But this should not be construed as indicating it is a suable entity. A separate entity for the purposes of the collective bargaining process and a legal entity in the courts of common law are two entirely different breeds of cat.

Under the British Columbia Labour Relations Act the only section touching on legal liability is s. 60—"Every trade union . . . who does something prohibited by this Act . . . is guilty of an offence and . . . is liable on summary conviction . . .".

The section describes the procedure for penalizing trade unions which are in breach of the Act. It is immediately evident that there is an antithetical approach taken by the two statutes. Whereas the Ontario section states that in certain circumstances proceedings may be brought by or against a trade union in the name of the union, the British Columbia section simply states that every trade union which is guilty of an offence is liable. The British Columbia section *pre-supposes* the right to bring an action against trade unions. This is the crucial distinction between British Columbia legislation on the one hand and Ontario, Manitoba and federal legislation on the other. This difference in attitude by the British Columbia legislature has been evident since the first labour legislation was passed in that province.[34]

This analysis has particular importance to federal trade unions certified under the Industrial Relations and Disputes Investigation Act.[35] Like the provincial Labour Relations Acts, it is designated to promote industrial harmony by the collective bargaining process. The section which expressly defines legal liability is s. 45(1) and its

[34] Carrothers, *The British Columbia Trade-Unions Act, 1959* (1960), 38 Can. Bar Rev. 295 at p. 318. Prof. Carrothers explains the curious history of British Columbia labour legislation. In the same year that *Taff Vale* was decided, the British Columbia courts *erroneously* held that a trade union was a suable entity at common law (*Rossland Miner's case*). The court failed to appreciate that Farwell, J.'s decision was based on a statute. There was no British Columbia labour legislation in existence at that time. On the assumption that the *Rossland Miner's* case was correct in law the legislation enacted the 1902 Trade-Unions Act to relieve unions from liability, not to impose liability. Ironically, by referring to trade unions as such, and by relieving them from specific liabilities, the Supreme Court of Canada in *Therien* was able to infer that except for the enunciated exemptions a trade union is a suable entitly in the British Columbia courts. To quote Carrothers (p. 320): "The result appears to be a macabre illustration of the proposition that *communis error facit jus.*"

[35] *Supra,* footnote 23.

wording is the same as s. 46(1) of the Manitoba Act. As far as the relevant case law is concerned—as well as the Manitoba cases, which have already been referred to, there is a pre-*Therien* decision[36] of the Ontario courts on the effect of s. 45(1) of the Federal Act. Unlike Spence, J. in the *Nipissing Hotel* case, Barlow J. in the *C.S.U.* case[37] examined the pertinent section in detail and held that any legal personality was strictly limited to the express purposes of the act viz. prosecutions for offences under the Act. This is precisely the approach taken by Williams, C.J.Q.B.

It is possible that the opposing lines of authorities can be explained by the different role played by the union in the cases. In *Therien, Nipissing Hotel* and *Dusessoy's Supermarkets*[38] the union was the defendant in the action, whereas, in the *C.S.U.* case and *Brothers Bakery*[39] the union was the plaintiff in the action. It is submitted that this is not a valid distinction. There is no statutory basis for it and not one of the judgments has distinguished the union's role as either plaintiff or defendant.

In summary, it is submitted that where there is only one Act in existence, which is framed in the style of the Manitoba, Ontario, or federal labour Acts, such legislation cannot confer legal personality on a trade union.

This, we submit, should have been the first proposition in the *Nipissing Hotel* case. Only afterwards should Spence, J. have dwelt on the effect of s. 3(2) of the Rights of Labour Act as an alternate ground for the decision.

DOES ONTARIO HAVE TWO ACTS?

In reference solely to Ontario trade unions, it has been suggested that legal status is acquired by the combined effect of two Acts—the Labour Relations Act and the Rights of Labour Act. The argument is that they have the same cumulative effect as the two British Columbia statutes in the *Therien* case. For this purpose, it is assumed, first, that both Labour Relations Acts are in para materia, and, secondly, that the opening words of s. 3(2) of The Rights of Labour Act: "A trade union shall not be made a party to any action in any court unless . . ." have the same consequence as sections 2, 3 and 4 of the 1902 British Columbia Trade-unions Acts. That consequence, it is asserted, is that outside of the exception, a trade union is a legal entity.

The difficulty with relying on s. 3(2) to establish legal personality is that the section *in toto* is judicially interpreted as destroying any right to sue or be sued which might have existed as a result of

[36] *Canadian Seamen's Union v. Canada Labour Relations Board,* [1951] 2 D.L.R. 356.
[37] *Ibid.*
[38] *Supra,* footnote 30.
[39] *Supra,* footnote 33.

the operation of one or both of these Acts. To have the same section both create legal status and destroy it is patently absurd. In fact, a better interpretation of the opening words of s. 3(2) is that the legislature is expressing its uncertainty about the present state of the law, and in order to avoid *Therien*-type decisions, it is making it explicit that neither Act can be relied on to create legal personality.

Finally, assuming that Spence, J. was correct in finding that the Labour Relations Act did confer legal personality at common law on a trade union, does s. 3(2) destroy it? According to Spence, J., by specifically prohibiting any reference to either Act in ascertaining whether it is a legal entity, *s. 3(2) has destroyed the very foundation upon which legal personality has traditionally been decided.*

Another interesting theory[40] is that the intention of the legislature in passing s. 3(2) was not to deny that trade unions were suable entities, but to protect the jurisdiction of the Ontario Labour Relations Board by preventing the courts from entertaining proceedings which expressly fell to the Board under the Labour Relations Act. Under this theory, the traditional common law actions in tort and contract can still be brought against trade unions in the courts of law.

The best way to refute this theory is to trace the legislative history of s. 3(2). The first comprehensive labour legislation in Ontario was the Collective Bargaining Act, 1943.[41] It was not as detailed as successor legislation[42] but it did establish fundamental rules relating to the collective bargaining process and a Labour Court to administer the Act. It contained a s. 3(2) which was essentially the same as the present s. 3(2) of the Rights of Labour Act. As well, under s. 15(1) the Act specified that: "The court *shall have exclusive jurisdiction* to examine into, hear and determine all matters and questions arising under this Act." It is clear that since s. 15(1) expressly protected the Labour Court's exclusive jurisdiction, there was no point in implying that s. 3(2) served the same purpose. During World War II the Ontario labour legislation underwent a curious history. In 1944, the federal government under its general emergency powers, assumed authority in labour relations matters and so the Collective Bargaining Act was repealed by the Labour Relations Board Act, 1944.[43] The effect of this Act was to authorize the application of the federal Wartime Labour Relations Regulations (passed under the War Measures Act) to labour relations in Ontario. At the same time, the Labour Court was replaced by the Labour Relations Board. Only one section of the 1943 legislation was preserved—s. 3, and it was transferred to and became the core of The Rights of Labour Act, 1944.[44]

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[40] A. C. Crysler, *Actions By or Against Trade Unions in Ontario* (1961), 39 Can. Bar. Rev. 30 at 39-40.

[41] Stat. Ont. 1943, c. 4.

[42] The Labour Relations Act, R.S.O. 1960, c. 202, as amended by 1961-62. c. 68.

[43] Stat. Ont. 1944, c. 29.

[44] Stat. Ont. 1944, c. 54.

Thus, for four years, s. 3 was our only meaningful provincial labour legislation. In 1948 the federal government vacated the provincial labour relations field and the Ontario Legislature hurriedly passed the Labour Relations Act, 1948.[45] This Act had nothing to say about the rights and duties of labour and management in the collective bargaining system. It was primarily intended to re-define the powers of the Labour Relations Board. Therefore, it is not very surprising that no mention was made of the Board's exclusive jurisdiction to determine matters arising under this Act. Section 4 in outlining certain powers of the Board stated that the Board "shall decided such questions and . . . its decision shall be final and binding." Section 5 stated that the decisions of the Board should not be questioned or reviewed by the courts. There was nothing as emphatic as the original section 15.

More comprehensive legislation was enacted in the Labour Relations Act, 1950.[46] Sections 68 and 69 (now 79 and 80)[47] reproduced the original section 15 of 1943, together with sections 4 and 5 of the 1948 statute. Therefore, once again it is clear that section 79 protects the Board's exclusive jurisdiction while s. 3(2) is designed to meet the broader problem raised by the *Therien* case.

In the light of the preceding examination it is evident that the provincial and federal legislation defining trade union liability is in an unsatisfactory state. It is submitted that the sensible approach is that taken by Williams, C.J.Q.B. If the legislature intends to displace the common law immunity enjoyed by trade unions it ought to do this by clear and unequivocal legislation. This submission is supported by the fact that both British Columbia and Manitoba have, since *Therien* and the post-*Therien* decisions discussed earlier, enacted legislation[48] which clearly outlines the liability of trade unions in the courts of law.

It is scandalous that the legal status of so basic an institution in our society—the trade union—has not been settled.

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[45] Stat. Ont. 1948, c. 51.

[46] Stat. Ont. 1950, c. 34.

[47] *Supra* footnote 42.

[48] The Manitoba Labour Relations Act 1962, c. 35 adds the following section:

46A(1) Any employers' organization, *trade union,* employer, employee, or person who—

(a) does, or authorizes, or aids or abets the doing of anything prohibited under this Act; or

(b) fails to do anything required to be done under this Act; or

(c) authorizes, or aids or abets in the failure to do anything required to be done under this Act:

is liable for general or special damages, or both, to anyone who is injured or suffers damage by the act or failure.

(2) A party to a collective agreement . . . who or which is in breach thereof, *is liable for general or special damages, or both, and may be sued*

[Footnote continued on page 89.]