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Constitutional Law - Jurisdiction of O.L.R.B. - R. v. O.L.R.B. Ex P. Dunn

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CONSTITUTIONAL LAW — JURISDICTION OF O.L.R.B. — R. v. O.L.R.B. EX P. DUNN.

The problem for determination before the Court was whether the jurisdiction over the labour relations of a subsidiary wholly owned by, and producing mainly for a company whose labour relations are governed by *the Industrial Relations and Disputes Investigation Act*[1] was sufficiently integral to the operation of that company to come also within the Federal jurisdiction.

An application for certification was made to the Ontario Labour Relations Board by the United Electrical Radio and Machine Workers of America with respect to certain employees of Northern Electric Co. Ltd. at its Bramalea plant. A dispute as to the jurisdiction of the Board arose, and an application was made to the High Court for an order or prohibition against the Board.

At the time of the litigation Bell Telephone Co. owned 99% of the shares of Northern Electric and a large percentage of its production was sold to the Bell Co. The Bramalea plant of Northern Electric was exclusively devoted to the manufacture of crossbar automatic switching equipment. 95% of the plant's production was sold to the Bell Co., and 100% of such components used by the Bell Co. were produced at the Bramalea plant.

Chief Justice McRuer held that the Ontario Labour Relations Board had jurisdiction.[2] Labour relations are *prima facie* matters of property and civil rights.[3] However, the Parliament of Canada has competence to enact collective bargaining legislation to govern the labour relations of employees whose operations fall within the works, undertakings, business or activities coming within the classes of subjects assigned by the B.N.A. Act to Parliament. In the words of Mr. Justice Estey:

> This jurisdiction of parliament to so legislate includes those situations in which labour and labour relations are (a) an integral part of or necessarily incidental to the headings enumerated under S. 91; (b) in respect to Dominion Government employees; (c) in respect to works and undertakings under S. 91(29) and S. 92(10); (d) in respect of works, undertakings or business in Canada but outside of any province.[4]

The Dominion Parliament has enacted legislation to cover these situations. *The Industrial Relations and Disputes Investigation Act* provides:

> 53. Part 2 applies in respect of employees who are employed upon or *in connection with* the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including, but not so as to restrict the generality of the foregoing,
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> (b) railways, canals, telegraphs and other works or undertakings connecting a province with any other or others of the provinces, or extending beyond the limits of a province.

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1 R.S.C. 1952, c. 152, s. 53.

2 *R. v. O.L.R.B. ex p. Dunn*, [1963] 2 O.R. 301, 39 D.L.R. (2d) 346. Citations below refer to report in the D.L.R.

3 *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396.

4 *Reference re Industrial Relations, etc.*, [1955] S.C.R. 529, 564.

> (g) such works and undertakings as, although wholly situate within a province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

The words "in connection with" are construed to include no more than that which would form an integral part or be necessarily incidental to the work, undertaking or business within Parliament's competence.[5]

The Bell Co. is governed by the *Industrial Relations and Disputes Investigation Act,* its operation being within S. 92(10), B.N.A. Act, 1867. The question as to whether the operation of Northern Electric was integral to the operation of the Bell Telephone system was decided in the negative.[6]

In approaching this question, the Chief Justice stated:

> The determination of the matter before me is not one confined to abstract discussions of authorities on constitutional law and decided cases. The matter requires proof of facts to show within what jurisdiction the relationship of Northern Electric and its employees at the Bramalea plant falls.[7]

Before discussing the "tests" used in holding the Bramalea operation was not integral to the operation of the Bell Co., some comment seems required on S. 4 of the amending Act[8] to the act of incorporation of the Bell Company.

> 4. The said Act of incorporation as hereby amended, and the works thereunder authorized, are hereby declared to be for the general advantage of Canada.

The Chief Justice followed some dicta of Lord Macnaughton in *City of Toronto v. Bell Telephone Co. of Canada*[9] that the declaration for general advantage is meaningless with respect to the Bell Co. in that it is a company coming within S. 92(10)(a)[10] and therefore is not a work "wholly situate within the Province". But is this declaration of general advantage really superfluous at all? As pointed out by Lord Reid in *C.P.R. v. A.G. B.C. and A.G. Can.*:[11] "A company may be authorized to carry on, and may in fact carry on, more than one undertaking."[12]

If one looks to the powers of the Bell Co. as set out in the amended Act,[13] it is seen that the company has more than the power to operate and acquire telephone communications systems, but has the power to manufacture telephones and other equipment connected therewith.

> 2. The said company shall have the power to manufacture telephones and other apparatus connected therewith, and their appurtenances and

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5 *Supra,* footnote 4, per Estey, J., 566.
6 *Supra,* footnote 2, 359.
7 *Ibid.* 354.
8 Statutes of Canada, 1882, c. 95.
9 [1905] A.C. 52, 60.
10 *Supra,* footnote 2.
11 [1950] A.C. 122.
12 *Ibid.,* 143.
13 *Supra,* footnote 8.

> other instruments, and in connection with the business of a telegraph or telephone company, and also such other electrical instruments and plant as the said company may deem advisable and to purchase, sell or lease the same rights relating thereto . . .

In the C.P.R. case, it was held that the Empress Hotel was not part of the company's railway works and, therefore, was not within S. 92(10)(a). Nor was the hotel within S. 92(10)(c) because the declaration of general advantage in S. 2(2) *The Railway Act,* 1927[14] extended only to "railways" and it was held that the hotel did not come within that definition.

By the words of S. 2 of the amending Act, Bell Co. has the right and the power to operate a manufacturing plant for producing telephone components. The jurisdiction in respect to the labour relations of such a plant would likely meet the fate of the Empress Hotel, if the general declaration in S. 4 did not include "and the works thereunder authorized". For these reasons the writer submits that the declaration of general advantage for Canada in S. 4 is not meaningless.

However, the question whether a declaration of general advantage within S. 92(10)(c) may be made in broad generic terms *i.e.,* a class of works, or as to specify particular works, still remains an open constitutional question.[15]

In arriving at his decision, three considerations seemed to have been applied: (1) that this was a manufacturing operation;[16] (2) that if Northern Electric ceased such production a substituted manufacturer could produce the particular unit;[17] and (3) the Court will not deal with facts to the extent of examining the destination of output.[18]

The writer disputes the soundness of these "tests" for determining whether an operation is indeed "sufficiently integral". Should different principles apply where one corporate entity happens to be a manufacturing company and another a stevedoring company?[19] Is not the purpose of the *Industrial Relations and Disputes Investigation Act,* to provide machinery at a national level for arbitration and conciliation of labour disputes which could severely interfere with a Dominion interest? Surely a strike in a manufacturing company producing a unit which happens to be integral to the operation of the Bell system would be within the scope—the purpose—of the legislation, just as much as a strike by the Eastern Canada Stevedoring Co. Ltd.[20] Yet the situation in *Reference re Industrial Relations, etc.*[21] was distinguished on this basis:

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14 R.S.C. 1927, c. 170.
15 *Luscar Collieries v. McDonald,* [1927] A.C. 925, 933. See also article by Phineas Schwartz, *Fiat by Declaration,* 2 O.H.L.J. 1.
16 *Supra,* footnote 2, 357.
17 *Ibid.,* 357.
18 *Ibid.,* 359.
19 *Supra,* footnote 4.
20 *Ibid.,* 529.
21 *Ibid.,* 529.

> It seems to me that it is a very different thing to seek to apply the principles of that case to a manufacturing operation whereby articles that are produced by a subsidiary company are used in telephone communication.[22]

Yet it seems that in questions as to whether there is in fact interprovincial or international trade within the Trade and Commerce clause of S. 91, B.N.A. Act, there is no differentiation of principles applied. Mr. Justice Rand sets up a test:

> That demarcation must observe this rule, that if in a trade activity, including manufacture or production, there is involved a matter of extra-provincial interest or concern its regulation thereafter in the aspect of trade is by that fact put beyond Provincial power.[23]

It would seem strange that there should be a differentiation on the basis of manufacturing when trying the question as to whether in fact an operation is integral to the operation of the company governed by the *Industrial Relations and Disputes Investigation Act.*

One of the reasons the Chief Justice used this manufacturing test was based on his interpretation of *C.P.R. v. A.G.B.C. and A.G. Can.*[24]

> The principles of the C.P.R. case do not permit me to bring the proceess of manufacturing articles by a subsidiary of the Bell Company within the ambit of S. 4.[25]

The C.P.R. case can be distinguished in that the keeping of hotels was held to be a separate undertaking on the part of the C.P.R. not within S. 92(10)(a), and that this aspect of their undertaking was not within the declaration of general advantage in the *Railway Act* which only extended to railways. As has been pointed out, in the case of the Bell Co., the declaration of general advantage applied to *all* the works authorized under the amendment Act of incorporation. Thus, even though a manufacturing operation on the part of the Bell Co. would be a separate undertaking, it would still be within the declaration of general advantage. It is submitted that there is no authority in fact or law in the C.P.R. case that precluded this Court from finding of fact that the manufacturing operation of Northern Electric was sufficiently integral to the Bell Telephone system as to come within the Federal jurisdiction.

After pointing out that the operation at the Bramalea plant was manufacturing, the Chief Justice then stated:

> The manufacturing of crossbars at the Bramalea plant does not necessarily become an integral part of telephone communication because they are purchased and used by the Bell Company. The process of manufacture could be carried on by any other company, or crossbars could be purchased, no doubt, in many countries of the world if Northern Electric ceased to manufacture them.[26]

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22 *Supra,* footnote 2, 357.
23 *Reference re The Farm Products Marketing Act,* [1957] S.C.R. 198, 210.
24 [1950] A.C. 122.
25 *Supra,* footnote 2, 359.
26 *Supra,* footnote 2, 357.

Just the possibility that another company could be substituted to do the same operation does not cause that *operation* to cease to be an integral part of a system. Could not some other stevedoring company have equally well carried on the business of servicing the same steamship lines if the Eastern Canada Stevedoring Co. had ceased to operate? Yet in that case it was held that the *Industrial Relations and Disputes Act* applied.[27] It seems that the Privy Council has taken an approach which differs from this substitution test. In *S.M.T. (Eastern) Ltd. v. Winner*[28] the Privy Council was required to determine whether a Provincial Act had any application to a motor bus system that operated from Massachusetts through New Brunswick to a destination in Nova Scotia. The respondent carried not only through passengers on his system but also transported passengers between intermediate points, including points entirely within the bounds of New Brunswick. The argument that there were two separate undertakings — one interprovincial and one provincial — was answered thus:

> The question is not what portion of the undertaking can be stripped from it without interfering with the activity altogether; it is rather what is the undertaking which is in fact carried on.[29]

It is submitted that "stripping" and "substitution" are analogous, and therefore the possibility of substitution ought not to be a test at all. American courts, in applying their *National Labour Relations Act,* have held that it is immaterial that should operations cease, substitute services might be obtained elsewhere.[30]

In his approach to the problem the Chief Justice stated that the issue before the Court was to be determined on the facts. However, his concluding words leave the impression that only some facts are to be considered:

> If I adopted the argument of the applicant it seems to me that this result would follow: in every case that comes before the Ontario Labour Relations Board there must be a minute examination of the output of the company to see what the destination of that output is. The adoption of the principle contended for by the applicant in my view would create chaos in the administration of the *Ontario Labour Relations Act.*[31]

The writer can see no reason why chaos would be created. Even in this case where, as the Chief Justice points out, the evidence was very deficient, the information that was before the Court consisted mainly of information regarding percentages and distribution of the output of the Bramalea plant. The information was neither confusing nor complicated. The writer does not suggest that such percentages should be the determining factor, but it is submitted that such figures should at least be a factor in the consideration of the Court.

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[27] *Supra,* footnote 4.
[28] (1954), 13 W.W.R. (N.S.) 657.
[29] *Ibid.,* 679.
[30] *N.L.R.B. v. Bank of America National Trust and Saving Ass'n.,* 130 F. (2d) 624, 63 S. Ct. 992, 318 U.S. 791.
[31] *Supra,* footnote 2, 359.

Indeed there is Canadian caselaw where percentages, figures, and destination of produce were definitely factors in the consideration of the Court when determining questions of jurisdiction. In the case *In Re The Grain Marketing Act, 1931*[32] the Saskatchewan Legislature had passed the *Grain Marketing Act* which established the Saskatchewan Grain Co-operative and constituted it the agent of the growers with the exclusive right to sell all grain grown in Saskatchewan and destined to be marketed either within or without the province. Evidence was introduced to show:

> (1) That Canada exports annually about 270,000,000 bushels of wheat and flour; (2) that 60% of the Canadian wheat crop is grown in Saskatchewan; (3) (inferentially) that by far the greater part of Saskatchewan wheat is exported from the province; and (4) that, of the quantity exported, 15% is consumed in Canada and 85% in Great Britain and in foreign countries.[33]

The evidence established that the great majority of the grain grown in Saskatchewan was exported to other provinces or foreign countries. The scheme was struck down as *ultra vires* on the ground that it was directed mainly to "Trade and Commerce".

In a recent Saskatchewan case,[34] lack of evidence in regard to a company's operation and connection with Eldorado Mining, caused the failure on behalf of Bachmeier Diamond Co. to successfully dispute the jurisdiction of the Saskatchewan Labour Relations Board. Eldorado is a Crown corporation incorporated for the purpose of refining and treating uranium ore under the *Atomic Energy Control Act,* and declared by such Act to be a work for the general advantage of Canada. It was held that the fact that the appellant was under a contract to the Crown corporation did not in itself render its activities sufficiently integral to fall under Federal jurisdiction. But it was pointed out that the lack of evidence demonstrating that the drilling done by the Bachmeier Co. was an integral part of the producing, refining or treatment of uranium ore, was fatal to their application. Surely such information would include statistics on what the operation was, the necessity of exploration, and to what extent drilling was required in a mining operation.

> In the absence of some evidence to establish this position, it is impossible for me to say that the work of the applicant company is such as to bring it within the ambit of the Federal legislation . . .[35]

Again the use of statistics in determining jurisdiction was demonstrated in the *Reference re The Farm Products Marketing Act.*[36] The jurisdiction depended upon whether the products were sold or were intended for sale within the province or, whether some of them

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32 [1931] 2 W.W.R. 146 (Sask. C. of A.).
33 *Ibid.,* 147.
34 *Bachmeier Diamond v. Beaverlodge,* (1962), 35 D.L.R. (2d) 241.
35 *Ibid.,* 244.
36 (1957), 7 D.L.R. (2d) 257.

were sold or were intended for sale beyond provincial limits. In the words of the Chief Justice of Canada:

> It is, I think, impossible to fix any minimum proportion of such last mentioned sales (*viz.*: sales beyond the province) or intended sales as determining the jurisdiction of Parliament.[37]

The American position on this point is stated in *N.L.R.B. v. Flainblatt*.[38] It was there pointed out that no restrictions on the National Labour Relations Board's jurisdiction are to be determined or fixed exclusively by reference to the volume of interstate commerce involved, except insofar as the maxim *de minimis* applies. But note that such information is definitely a factor that American courts consider in a situation like this case.

For these reasons, the writer submits that in future problems regarding jurisdiction in labour relations, the courts of our Canadian jurisdictions should not follow the "tests" that seem to have been applied in this case.

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