Osgoode Hall Law Journal

Volume 3, Number 2 (April 1965)

Article 8

Oil, Chemical and Atomic Workers International Union, v. Imperial Oil Ltd. et al., [1963] S.C.R. 584

A. A. G.

Oil, Chemical and Atomic Workers International Union, v. Imperial Oil Ltd. et al., [1963] S.C.R. 584.

HAM.: Do you see yonder cloud that's almost in shape of a camel?
POL.: By the mass, and 'tis like a camel indeed.
HAM.: Methinks it is like a weasel.
POL.: It is backed like a weasel.
HAM.: Or like a whale?
POL.: Very like a whale.

Hamlet, III:2, lines 380 ff.

Introduction

The Supreme Court of Canada has decided that a provincial government may legislate to clip the wings of its political opponents. In *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*,[1] a divided court dismissed the appeal of the Union attacking the constitutional validity of s. 9(6)(*c*)(i) and (*d*) of the *Labour Relations Act* of B.C.[2] In so doing it affirmed the unanimous decision of a five man B.C. Court of Appeal. That Court in its turn had upheld the decision of Whittaker J. in the B.C. Supreme Court.

On March 27, 1961, subsection 6 was added to section 9 of the *Labour Relations Act*. Subsection 6(*c*)(i) states:

> No trade-union and no person acting on behalf of a trade-union shall directly or indirectly contribute to or expend on behalf of any political party or to or on behalf of any candidate for political office any moneys deducted from an employee's wages under subsection (1) or a collective agreement, or paid as a condition of membership in the trade-union.[3]

As a result the respondent company refused to remit funds in conformity with an existing collective bargaining agreement with

---

[1] [1963] S.C.R. 584.
[2] R.S.B.C. 1960, c. 205, as am. by 1961 c. 31.
[3] *Ibid.*

the appellant union until the appellant supplied a statutory declaration required by clause d declaring that clause 6(*c*) would be complied with. The appellants brought an action claiming specific performance of the check-off clause of the collective agreement. The appellant argued that the legislation requiring such a declaration was *ultra vires* the Legislature of B.C.

I. Property and Civil Rights: (a) Labour relations

Is the impugned legislation within s. 92(13) of the *British North America Act,* 1867,[4] the head of property and civil rights? If the legislation is legislation in relation to labour relations within a province then it is civil rights legislation. To determine this it is proper as Martland J. does, to examine and consider "the true purpose and effect" of the *Labour Relations Act.* Using the Act as a whole as a touchstone, we can discover whether the impugned clauses fall within the spirit of the Act. This spirit is accurately described by McDonald J. in a passage cited with approval by Martland J.

> To my mind the object of the Act is to facilitate collective bargaining and stabilize industrial relations by enabling a Union to establish before the Board its ability to represent a group of employees; . . . generally to ensure a greater measure of industrial peace to the public. Certification is, of course, not necessary for collective bargaining, but the policy of the Act undoubtedly is to promote it as a means to more orderly bargaining.[5]

In fact do the impugned clauses contribute to the fulfillment of the objects outlined above? Does the restriction of the use of union funds for political purposes "facilitate collective bargaining" or "stabilize industrial relations?" Does it in any way change the conditions of employment or does it affect the contract of employment? On the face of it, the answer to all of these questions is unequivocably "no". However, a sophistic argument might run somewhat like the following: If you restrict the union from contributing to political parties, then more funds would be available for use in *true* labour matters. This argument contains at least two flaws: (1) It concedes that in fact political activities are not *true* labour matters. One of the two grounds relied on by the A.-G. of B.C. in his support of the B.C.C. of A. decision (affirmed in the instant case) is that it "prevents money collected by check-off and as a condition of union membership being diverted from the support of normal union activities in the fund of labour relations to the more *remote* field of political activity."[6] (2) Such legislative decision amounts in fact to a transfer of the internal control of union policies to the legislature and abrogates the autonomy of the union. This could have the effect of destroying the independence of the union and its effectiveness as a bargaining agent.

Martland J. relying heavily on the implications of the decision in *International Brotherhood of Teamsters v. Therien*[7] and its inter-

---

[4] 30 & 31 Victoria, c. 3.
[5] (1952) 29 M.P.R. 377 at p. 396.
[6] *Supra,* footnote 1 at p. 603.
[7] [1960] S.C.R. 265.

pretation of the B.C. *Labour Relations Act,* makes the point that the ability to create a trade union as a legal entity by certification in itself gives the legal creator the right to set bounds over its legitimate activity. If this were not so, one would have the legal creation of a Frankenstein. The argument runs thus: The *Labour Relations Act* of B.C. by providing for certification of trade unions and the valid assignment of monies by workers of part of their wages to these certified unions gives the province authority to legislate as to the uses, the propriety of which would justify the powers derived from certification.

> The legislation which is under attack in the present proceedings in my opinion does nothing more than to provide that the fee paid as a condition of membership in such an entity by each industrial employee cannot be expended for a political object which may not commend his support. That individual has been brought into association with the trade union by statutory requirement.[8]

With respect it is submitted that Martland J. is pushing the legalistic argument based on the legal creative act to its logical absurdity.

One must quarrel with the importance Martland J. attaches to the act of certification. Even today uncertified trade unions enjoy many of the rights which he attributes to certification. These rights existed prior to labour legislation and were not dependent on the recognition of unions as a specific legal entity. It is submitted that his Lordship's argument is improperly based on the analogy of the creation of a company. Closed shops and collective bargaining are not legal creations *ex nihilo* but the result of the historic achievement of trade-unionism. Martland J.'s argument is an attempt to subsume a living organism within a convenient legal pigeon-hole. He does this in order to justify finding that the acts of a trade-union which have any remote connection with the *Labour Relations Act* are within provincial competence.

> When the Legislature clothes that entity with wide powers for the exaction of membership fees by methods which previously it did not, in law, possess, it can set limits to the objects for which funds so obtained may be applied.[9]

With respect the ultimate implications of this reasoning spell the doom of a free trade-union movement. His reasoning could also apply to any industry such as a utility under the supervision of the Board of Transport. Since the government must approve a change of rates and hence is in fact sanctioning the exaction of money for services it is conceivable that revenue so raised be made subject to control over its distribution and expenditure.

(b) Civil rights outside the province

One argument raised by counsel at the trial level was that this legislation interfered with civil rights outside the Province. Here the local union was under contract within its international parent

[8] *Supra,* footnote 1 at p. 593.
[9] *Ibid,* p. 595.

union whose head office was in Denver to pay $2 per capita per month. Section 9(6)(*c*) would prevent the local union from fulfilling its obligations to the parent union because it is a matter of record that the parent union has contributed to a political party in Canada and may reasonably be expected to do so in the future. Whittaker J. does not deny that this contract is enforceable outside the provinces. He simply asserts that the constitution of the international union does not provide specifically for the expenditure of funds for political purposes. He adopts an ostrich-like attitude and says in effect the local union really cannot be expected to anticipate that the money will be expended as it has been in the past.

There is authority for the proposition that provinces have not the right to interfere with civil rights outside the Province. In *R. v. Royal Bank of Canada*[10] the Court held that the Province of Alberta did not have authority to affect the interest payable on bonds which were held by a bank whose head office was located outside Alberta. The reason given was that a contract involved civil rights outside the Province. It is submitted that even if the impugned legislation were to be regarded as civil rights legislation since it affects the civil rights of the local union outside the province, that the reasoning in *R. v. Royal Bank of Canada*[11] applies.

(c) Fundamental Political Freedoms

Another branch of Martland J.'s argument is the contention that if the impugned legislation is not property and civil rights because it is labour legislation that it is still property and civil rights if characterized as legislation in relation to the fundamental political freedoms of individuals. It was submitted by the appellants that only the Federal Parliament could pass legislation in relation to the fundamental political rights of individuals. Martland J. rejected this submission thus:

> I do not agree with this contention. It is the very fact that provincial legislation, in some instances, has apparently sought to derogate from fundamental political freedoms which has led to the expression of the view by some members of the Court, in cases such as the *Alberta Legislation*[12] case and *Switzman v. Elbling*,[13] that it could not be regarded as falling within the sphere of property and civil rights in the Province, within s. 92 of the *B.N.A. Act*. The same reasoning does not apply to legislation which seeks to protect certain civil rights of individuals in

10 [1913] A.C. 283.

11 *Ibid.*, at p. 298. "Their right was a civil right outside the Province and the Legislature of the Province could not legislate validly in derogation of that right. . . . In the opinion of their Lordships the effect of the Statute of 1910, if validly enacted, would have been to preclude the bank from fulfilling its legal obligation to return their money to the bondholders, whose right to this return was a civil right which had arisen, and remained enforceable outside the Province. The Statute was on this ground, beyond the powers of the Legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to propertly and civil rights within the Province nor directed solely to matters of merely local or private nature within it." per Lord Haldane.

12 [1938] S.C.R. 100.

13 [1957] S.C.R. 285.

> a Province from interference by other persons also in that Province. Legislation of that kind appears to me to be legislation in respect of civil rights within the Province.[14]

Martland J.'s argument is cast in the form of a tautology. First he asserts that legislation which derogates from fundamental political freedom is not within property and civil rights. Then he equates the words fundamental political freedoms with civil rights. He proceeds to substitute civil rights for fundamental political freedoms and he concludes that legislation which protects civil rights in the province is legislation in respect of civil rights in the province. No authority is cited by him for the proposition that the derogation from fundamental political freedoms is not property and civil rights whereas the protection of the same fundamental political freedoms is within property and civil rights.

Apart from asserting that the ratio of *Switzman v. Elbling*[15] was that the legislation there was *ultra vires* the province as criminal law, he contends that the three judges who relied on the reason of "interference with freedom of speech and expression essential to the democratic form of government established in Canada"[16] were merely striking down the legislation because it was a derogation from fundamental political freedoms. There is no logical inference that the same judges would uphold provincial legislation which sought to protect fundamental political freedoms. It is difficult to imagine that anyone would be interested in contesting such a protective declaration so that Martland's view besides being a *non sequitur* is strictly speculative.

It was on these judgments that a commentator on the *Switzman* case suggested that the Court was evolving a Bill of Rights and "a valuable bulwark of democratic freedom against legislative invasion."[17] in *Switzman v. Elbling*[18] Kellock J. incorporated part of his judgment in the *Saumur*[19] case. He approved there a distinction recognized by Mignault J. between civil rights, political rights and public rights. As well he approves the passage of Duff C.J. in *Re Alberta Legislation*[20] which expresses the view that the *B.N.A. Act* presumes the existence of parliamentary institutions. Abbott J. in his dissent in the instant case relies on his former opinion in *Switzman v. Elbling.*[21] There he expressed the view albeit by way of *obiter* that free discussion as a fundamental political right could not be infringed *even* by the Parliament of Canada. "I am of opinion that as our constitution Act now stands parliament itself could not abrogate this right of discussion and debate."[22] His view depends on

---

[14] *Supra,* footnote 1 at p. 596.
[15] *Supra,* footnote 13.
[16] *Supra,* footnote 1 at p. 595.
[17] (1957) 35 Can. Bar Rev. 554 at p. 557.
[18] *Supra,* footnote 13.
[19] [1953] 2 S.C.R. 299.
[20] *Supra,* footnote 12.
[21] *Supra,* footnote 13.
[22] *Ibid.,* at p. 328.

his approval of Duff C.J.'s assertion that the *B.N.A. Act* presumes the existence of parliamentary institutions.

The three dissenting judges in the instance case stress the importance of the *Switzman*[23] case as decided by Kellock, Rand and Abbott JJ. Rand J. in his judgment in the *Switzman* case decided squarely on the grounds that the impugned legislation was a threat to the institutions presumed and approved by the preamble to the 1867 Act. It is a commitment to a specific kind of political society.

> The political theory within the Act is that of parliamentary government, with all its social implications, and the provisions of the statute elaborate that principle in the institutional apparatus which they create or contemplate, whatever the differences in its working Canadian government is in its substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society the effectiveness of which, as events have not infrequently demonstrated is undoubted.[24]

It is possible that with the judgment of Martland J. this emerging jurisprudence has for the moment been suspended or been used in a perverse fashion. Fauteux, Taschereau and Ritchie JJ. it may be inferred subscribe to Martland J.'s view of the legislative competence of a provincial legislature to legislate for the protection of political and public rights under the head of property and civil rights. If they subscribe to the further statement that the provincial legislatures could not derogate from these political and public rights, which accounts for former decisions of the Court declaring invalid legislation which infringed on fundamental rights, then the problem emerges that they recognize the Court as a protector of these rights, the destruction of which would be above either legislative body. At issue here is the concept of legislative sovereignty. The orthodox position is that complete power to legislate on any matter vests in either the provincial legislature or the parliament of Canada. (Except of course amendment to the *B.N.A. Act.*) So every law may be passed as long as the competent legislative body has dealt with it. If the protection of fundamental political rights is in the legislative competence of the province, then orthodox constitutional theory demands that it also be within the competence of the province to derogate from these rights. Unless this is so, paradoxically Martland J.'s remarks amount in fact to an approval of Abbott J.'s natural law interpretation of the *B.N.A. Act.*

The orthodox theory would fall if Martland J.'s interpretation of provincial competence in civil and property rights were extended to other heads of sections 91 and 92.

What Martland J. fails to do is to characterize properly the subject matter under consideration. It is contended that fundamental political freedoms, both derogation and protection thereof, have been carved out of the head of property and civil rights and regarded under the orthodox view as within the competence of the federal

---

[23] *Ibid.*
[24] *Ibid.*, at p. 306.

government (either under peace order and good government or under the residual power vested in the federal government).

This has been achieved by the distinction of separating fundamental political rights in their quality as public and/or political rights from the all inclusive definitions given to property and civil rights. See *Saumur*,[25] per Mignault J.

Even if one accepts Martland J.'s contention that the province cannot derogate it is asserted that properly characterized the nature of the instant legislation indicates an attempt on the part of the British Columbia legislature to derogate from the fundamental freedom of participation in political activity by a trade-union.

Martland J. focuses on what he regards as the compromise of the fundamental rights of individuals which is recognized by the labour legislation under consideration. He does not examine the collective rights of the union which are cut down by this legislation. The union exists outside the narrow province of labour legislation. In this extra-legislative life, as it were, it should have the rights to engage in activities which in the view of the leadership advances the interests of the trade union. In the political control of Canadian life the emphasis has shifted from the isolated support of individuals to the organized activity of special interest groups. It is unacceptable to try to limit the scope of a labour union's activity so that it is precluded from achieving its ends through political means. In no sense does union use of members' dues for political purposes preclude the individuals from free participation in politics. This legislation is fatal for union political activity.[26]

With respect, the impugned legislation is correctly characterized by Judson J. when he puts it thus:

> . . . that the questioned clauses . . are in relation to the political activity of trade unions is an accurate characterization of this legislation. The subject-matter of the legislation concerns political and constitutional rights not property rights. In the result this legislation does what Martland J. says provincial legislation cannot do; namely, it derogates from the fundamental political rights of groups to participate in political activities.[27]

To prohibit this group political activity in the political context today is to undermine the operation of parliamentary institutions whose existence is presumed in the *B.N.A. Act*.

---

[25] *Supra*, footnote 19.

[26] It must be pointed out that generally speaking moneys contributed by means of check-off or as a condition of membership make up practically the entire income of a trade union. In the case before us money so paid made up more than 99.8% of the union's total revenue for the year preceding the issue of the writ. Taking these figures into consideration it is easily seen that this legislation which prohibits more than 99.8% of the total union revenue certainly prevents the union from practically speaking engaging in political activities by contributing to the party of its choice.

[27] *Supra*, footnote 1 at p. 604.

II. Is the impugned legislation federal election legislation?

The last argument which Martland J. rejects is that the legislation in question encroaches a field reserved to the federal parliament, viz., federal elections. He does not deny that the impugned legislation relates to federal elections. However, he contends that you cannot argue from the existing statutory prohibition of an act, that subsequent repeal will have the effect of enabling the act. Former *Federal Elections Acts* contained provisions [Stat. Can. 1930, c. 16, s. 9] [R.S.C. 1927, c. 53, s. 36] which forbade contribution of funds by companies or associations. These sections were subsequently repealed. The real issue is the effect of this repeal. Martland J. considers the repeal has no effect whatever as to the rights of the bodies considered in the repealed legislation to contribute. This view is difficult to accept. If a statute prohibiting an act is repealed, then it must follow that the act is no longer prohibited. So, if companies and association did not have the legal right to contribute prior to the statute, then the prohibition would be senseless and unnecessary. A sounder view of the effect of the repeal is suggested by Judson J.:

> The *Canada Elections Act*, 1960, c. 39, contemplates in terms broad enough to include a trade union the making the contributions to and expenditures on behalf of political parties and candidates for political office. This provincial legislation is really a re-enactment against trade unions in British Columbia of the former prohibition contained in the *Dominion Elections Act* and repealed in 1930.[28]

In contrast to this Martland J. contends that the right of a company or association to contribute to a federal election depends in some cases on the powers conferred on them by provincial legislation. It is submitted that the provincial legislature would have no authority to confer any powers in the field of federal elections. We submit on the authorities, federal elections is an exclusive field for the parliament of Canada. In another place (*supra*) Martland J. has stated the proposition that the power to enable an act implies the power to prohibit it. It is submitted that the converse in logic must follow, viz., the power to prohibit implies the power to enable. Only in the unorthodox view that some rights may be enabled but not derogated from—a view which incorporates a natural law theory within the *B.N.A. Act*, is it possible to reject the proposition that the power to prohibit implies a power to enable. Before the prohibition was in the Act one must presume that it was lawful for companies and other organizations to contribute to support of political parties in federal elections. The prohibition inserted in the Act was a declaration that this field of human activity fell within the legislative competence of parliament. And this is so just as forcefully as if the legislation had been enabling. The repeal does not remove the activity from the legislative competence of parliament, nor does it invite encroachment by another legislative body.

---

[28] *Ibid.*, at p. 605.

It is instructive to pull together the threads of Martland J.'s reasoning. First, in addressing himself to the restriction of funds raised through check-off, he points out the condition of union membership has a statutory sanction. "The Legislature which confined the statutory right could also take it away again, and if the right can be eliminated entirely, in my opinion it is equally possible for the legislature to apply limitation in respect of the exercise of power thus created."[29] This states the proposition that the power to enable implies the power to prohibit wholly or in part.

In his analysis of the significance of *Switzman v. Elbling*[30] on the classification of fundamental political rights as properly within property and civil rights, Martland J. states the proposition that legislation which protects fundamental political rights will qualify as property and civil rights. Abbott, Rand and Kellock JJ. indicate in Martland J.'s view that the derogation from these fundamental political rights is not *intra vires* the province as property and civil rights. Hence the inference to be drawn here is that the province which can protect fundamental political freedoms cannot derogate therefrom. Putting it in the terms used to describe the former legislation, it is competent to the province to pass enabling legislation on fundamental political freedoms, but it is not competent to the province to prohibit wholly or in part from a subject matter so curiously within its competence.

Finally in his examination of the effect of the repeal of s. 9 of the *Canada Elections Act,* 1930, Martland J. states that you cannot infer from a power to prohibit a power to enable. In other words, although it may be within the federal competence to prohibit certain conduct relating to a subject matter, there is no necessary inference that it would be within the federal competence to enable such conduct. This proposition the reader will recognize as the inverse of that derived from his lordship's interpretation of *Switzman v. Elbling.*[31]

Martland J. uses these three variations of the significance of legislative competence. With respect, if such specialized approaches to legislative competence are permitted to apply in going from one subject matter to another in the *British North America Act* the whole thing will collapse with all its involutions and convolutions. It is submitted the very niceness of Martland J.'s reasoning derives from the eclectric nature of his logic. A proposition applies to some statutory enactments, but not so to others.

The characterization of human activity for constitutional purposes is as tricky as Hamlet's cloud; so much, for better or for worse depends on the eye of the beholder. To us the legislation looks most like legislation in relation to political activity including federal elections. A.A.G.

---

29 *Ibid.,* at p. 592.
30 *Supra,* footnote 13.
31 *Ibid.*