INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. *THERIEN* AND THE SUABILITY OF TRADE UNIONS IN ALBERTA

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The decision of the Supreme Court of Canada in *International Brotherhood of Teamsters* v. *Therien*[1] has left in a most uncertain state the law regarding the suability of trade unions in provinces other than British Columbia. This uncertainty has resulted from the court's disapproval of its *dicta* of three years earlier in *Orchard* v. *Tunney*[2] to the effect that trade unions were not legal entities.

Although *Orchard* v. *Tunney* was an action against the officers of a union in their personal and representative capacities, rather than an action against the union in its own name, Locke, J., in the following passage from his judgment in that case, left no doubt that legal non-existence was the very reason why the representative form of action alone had succeeded against the union in the Manitoba courts:

> A trade union in Manitoba not having the status . . . of such organizations in England to which the *Trade Union Acts* of 1871 and 1876 applied and not being a corporate entity, a representation order was made in the present action by the Court of Appeal in advance of the trial.[3]

Rand, J., whose judgment in *Orchard* v. *Tunney* does not attain his usual standards of scholarly clarity, concludes that, "Not having contractual capacity, it follows, *a fortiori*, that a union as such cannot incur liability in tort."[4]

These plain words from Canada's highest court certainly appeared to justify, and perhaps, in the light of earlier decisions to the same effect, to dictate the conclusion reached by Riley, J. in *Charleston et al* v. *MacGregor and Brotherhood of Railway Trainmen*[5] that *Orchard* v. *Tunney*

> is clear authority for the proposition that a union cannot be sued as a legal entity and that action against its members can only be taken by way of a representative action . . . .[6]

However, in the *Therien* case, all sitting members of the Supreme Court of Canada in effect concurred in the diminution by Locke, J. of his own *dictum*, and that of Rand, J., in the *Orchard* case. Because the action in the *Orchard* case was a representative one, that case, according to Locke, J.

> cannot be taken as deciding that in Manitoba a trade union certified as bargaining agent under the Manitoba [*Labor Relations*] Act, (which closely resembles that of British Columbia) is not an entity which may be held liable in tort. A case is only authority for what it actually decides.[7]

Where does this leave the legal status of trade unions in those provinces, such as Manitoba and Alberta, which have no legislation similar to the British Columbia *Trade-unions Act*?[8] Was this Act the real reason for the decision

[1] [1960] S.C.R. 265.
[2] [1957] S.C.R. 436.
[3] *Ibid.*, 452.
[4] *Ibid.*, 455.
[5] (1957-58) 23 W.W.R. 353.
[6] *Ibid.*, 364.
[7] [1960] S.C.R. 265, 272.
[8] R.S.B.C. 1948, c. 342.

of the Supreme Court of Canada in the *Therien* case? Would it be inconsistent with the *Therien* case for the Supreme Court of Canada to refuse to follow it in a similar case coming from a province without such an Act? The purpose of this note is to suggest that the Supreme Court of Canada, while paying lip-service to the necessity of the *Trade-unions Act* to its finding of union suiability, in reality cannot justify its departure from earlier authority by the terms of the *Trade-unions Act* alone, and that its decision in the *Therien* case must, if the court is to be consistent, be the same in any similar case coming from a province with a *Labor Relations Act* alone. Let us examine the *Therien* case in search of the basis for these suggestions.

International Brotherhood of Teamsters v. *Therien* was an action brought against a trade union in its own name for damages and an injunction. The plaintiff, Harry Therien, owned and operated a Vancouver trucking business, driving one truck himself and hiring servants to drive the others. City Construction Company Limited had for years engaged his services as an independent contractor, under an unwritten arrangement which apparently had prospects of continuing indefinitely. Local 213 of the defendant trade union entered into a closed shop agreement with City Construction, requiring that City Construction hire only union members, or require non-union employees to join the union within thirty days. Therien was informed of this development, and agreed to employ only union drivers for his trucks. The union's agent demanded that Therien himself join the union, something which Therien, being an employer, could not do under the terms of the *Labor Relations Act*.[9] Because of the union's threats to picket City Construction's projects if it continued to allow Therein to drive, City Construction stopped doing business with Therien. Therien then brought action against the defendant union in its own name for damages and for an injunction to restrain it from interfering in the operation of his business. Therien alleged that the union, by threatening to picket instead of resorting to the grievance procedure contained in its agreement with City Construction, had committed a breach of the agreement and a breach of s. 21 of the *Labor Relations Act*, which required compliance with the terms of a collective agreement.

On an interlocutory motion by the defendant to strike out the writ on the ground that it was not a suable entity, Wilson, J. held[10] that the defendant could be called upon to plead as a *persona juridica*, since it was being sued in respect of what could be a breach of the *Labor Relations Act*. At trial, Clyne, J.[11] followed the decision of Wilson, J. on the interlocutory motion, and further held that the plaintiff had a cause of action against the defendant union not only under the *Labor Relations Act* but, primarily on the authority of *Quinn* v. *Leathem*,[12] also at common law for interfering by means of an unlawful act with the plaintiff's right to earn his living.

The defendant union appealed to the British Columbia Court of Appeal on three grounds, the first two of which denied breach of the common law and the *Labor Relations Act*. The third ground, the only one with which we are here concerned, denied that the union was a legal entity and that it could be

[9] 1954 (B.C.), c. 17, s. 4.
[10] (1956-57) 20 W.W.R. 647.
[11] (1958) 26 W.W.R. 97.
[12] [1901] A.C. 495.

sued as such. The Court of Appeal dismissed the defendant's appeal,[13] Sheppard, J.A. dissenting. Although DesBrisay, C.J.B.C. and Davey, J.A., both of whose judgments were concurred in by Bird and Coady, JJ.A., were concerned mainly with the question as to whether the plaintiff had any cause of action, both briefly discussed the question of the legal status of trade unions. Davey, J.A. held that earlier British Columbia cases and two House of Lords cases, *Taff Vale Railway Company* v. *Amalgamated Society of Railway Servants*[14] and *Bonsor* v. *Musicians' Union*,[15] established that the legislative recognition accorded to trade unions by the *Trade-unions Act* and the *Labor Relations Act* made such unions legal entities at least for the purpose of actions under the *Labor Relations Act*. The learned justice of appeal then stated that earlier cases had expressly reserved judgment on the question of the suability of trade unions in actions of contract and tort independent of the *Labor Relations Act*, but came to the conclusion that logic required trade unions to be held legal entities for the purposes of such actions, provided only that the wrongful act on which the cause of action was based was "done to promote one of the objects for which the entity was formed."[16] With regard to the case at bar, Davey, J.A. concluded:

> In attempting to enforce what the union believed to be its rights under the collective agreement it was carrying out one of the purposes for which the Act made it a legal entity.[17]

The appellant union carried its appeal to the Supreme Court of Canada on these three grounds:

1. The union's conduct was lawful at common law.
2. The union's conduct was lawful under the *Labor Relations Act*.
3. The union is not a suable entity:
   (a) at common law
   (b) under the *Labor Relations Act*
   (c) under the *Trade-union Act*.[18]

The entire judgment of Martland, J., and most of the judgment of Cartwright, J., deal with the first two points. The main judgment, delivered by Locke, J., is the only judgment above the trial level which places primary emphasis on the third ground. The reason for this shift in emphasis is, as Kerwin, C.J. implies,[19] the appearance in the appellant's factum of the very weighty argument, not considered in the British Columbia court, that section 2 of the *Trade-unions Act* "does not make a trade union a legal entity. It bears no resemblance to the trade union legislation that was before the courts in the *Taff Vale* case."[20] Section 2, the only relevant section of the Act, provides, in essence, that no trade union is liable in damages for any wrongful act committed in connection with a labor dispute unless the union has authorized or concurred in the act.

Locke, J. first disposes of the appellant's contention that *Orchard* v. *Tunney* settled the point in its favor by holding, as we have seen, that every passage in that case which might help the appelant was mere *dictum*. Locke, J. then

[13](1958-59) 27 W.W.R. 49.
[14][1901] A.C. 426.
[15][1956] A.C. 104.
[16](1958-59) 27 W.W.R. 49, 72.
[17]*Ibid.*
[18]Appellant's factum, 7.
[19][1960] S.C.R. 265, 267.
[20]Appellant's factum, 20.

quotes extensively from the *Taff Vale* case, where Farwell, J., whose judgment was approved by the House of Lords, held that the *Trade Union Acts* of 1871 and 1876,[21] by legalizing trade unions and giving them the capacity to own property and to act by agents, had implicitly made them legal entities suable in their own namts. By unassailable logic, Farwell, J. reached the conclusion that in giving to trade unions these legal rights of individuals, Parliament must, in the absence of contrary enactment, be held to have imposed upon them the corresponding legal liabilities of individuals. By a parallel of reasoning, Locke, J. holds that the British Columbia *Trade-unions Act,* in that it refers to trade unions as such and restricts their liability in tort and that of their servants and agents, "recognized the fact that a trade union was an entity which might be enjoined or become liable in damages for tort."[22] In addition, the *Labor Relations Act,* in that it gives wide rights to unions and imposes certain restrictions upon them, is held to recognize trade unions as legal entities.

Locke, J., still following the reasoning of Farwell, J., therefore holds that "the appellant is a legal entity which may be made liable in name for damages either for breach of a provision of the *Labor Relations Act* or under the common law."[23] Before reaching this conclusion, however, Locke, J. distinguishes *Local Union No. 1562, United Mineworkers of America* v. *Williams and Rees,*[24] where, despite the existence of the *Alberta Labor Act,*[25] the defendant trade union was held not to be suable in its own name. Locke, J. made the distinction in these words:

> Were it not for the provisions of the *Trade-unions Act* and the *Labor Relations* Act if the union was simply an unincorporated association of workmen, it would not, in my opinion, be an entity which might be sued by name, and what was said by Duff, J. and by Anglin, J. (with whom Brodeur, J. agreed) in *Local Union* v. *Williams* above referred to would apply.[26]

It thus appears clear that Locke, J. would have decided this case differently had the *Trade-unions Act* not been in existence. The *Labor Relations Act,* he implies, was not enough in itself to provide that statutory recognition of a union's legal existence which is necessary to the union's suability.

But why should this be so? It is submitted that the appellant is correct in its contention that the terms of the British Columbia *Trade-unions Act* are entirely dissimilar to those of the English *Trade Union Acts* of 1871 and 1876 which led to the *Taff Vale* decision. The brief British Columbia Act does little more than to exempt trade unions from liability in certain circumstances, whereas the English *Trade Union Acts* legalize the usual trade union contracts, establish a registry of trade unions, authorize ownership of property by trade unions through the medium of trustees, set out various requirements with regard to accounts, registered offices, amalgamation and winding-up, and impose penalties for violations. As Locke, J. himself admits,[27] the British Columbia Act was passed in 1902[28] to counteract the effect of the *Taff Vale*

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[21]34 and 35 Vict. c. 31; 39 and 40 Vict. c. 22.

[22][1960] S.C.R. 265, 267.

[23]*Ibid.*, 278.

[24](1919) 59 S.C.R. 240. *Cf. Mackay and Mackay* v. *International Association of Machinists Lodge No. 1057,* [1946] 2 W.W.R. 257.

[25]Now R.S.A. 1955, c. 167.

[26][1960] S.C.R. 265, 267.

[27]*Ibid.*, 274.

[28]1902, c. 66.

decision in British Columbia, not to codify or reinforce that decision. It therefore served a similar function to that of the English *Trade Disputes* of 1906.[29] Is it consistent, then, to hold that the British Columbia *Trade-unions Act* is, for the purpose of the *Therien* case, equivalent to the 1871 English Act? With all respect, I think not. An examination of the judgments in the courts below in this case, and in the other British Columbia cases cited throughout, will show that it is not the *Trade-unions Act* but the *Labor Relations Act* itself, with its detailed provisions dealing with unfair labor practices, limitations on the activities of trade unions, collective bargaining, certification, mediation, conciliation, and arbitration, which was held to be the main source of the statutory recognition necessary to make trade unions legal entities for the purposes of suing and being sued.

The leading case in the British Columbia Court of Appeal holding that a trade union which is subject to the provisions of the *Labor Relations Act* (known as the *Industrial Conciliation and Arbitration Act*[30] until its 1954 re-enactment) is a legal entity for the purposes thereof is *In re Patterson and Nanaimo Dry Cleaning and Laundry Workers Union.*[31] Neither Sloan, C.J.B.C. nor Roberton, J.A. so much as mentioned the *Trade-unions Act.* Sloan, C.J.B.C. stated that he arrived at his conclusion "from a careful examination of the provisions of the *Indutrial Conciliation and Arsbitration Act.*"[32] Robertson, J.A. quoted from the decision of Farwell, J. in the *Taff Vale* case, then held:

> In my opinion [the *Industrial Conciliation and Arbitration Act*] has constituted a union, a *persona juridica.* The Act confers upon the union certain benefits and immunities and imposes certain restrictions and liabilities upon it.[33]

Clearly, then, both Sloan, C.J.B.C. and Robertson, J.A. held that the existence of the *Industrial Conciliation and Arbitration Act,* which is very similar to the present British Columbia *Labor Relaitons Act* and to the Alberta *Labor Act,* was sufficient to make the union a legal entity for the purpose of suits under that Act. O'Halloran, J.A. relied on both the *Industrial Conciliation and Arbitration Act* and the *Trade-unions Act* to reach this conclusion, but nowhere in his judgment did he state that the result would have been different had there been no *Trade-unions Act.*

This decision of the British Columbia Court of Appeal was expressly approved in an Alberta case, *Medalta Potteries Limited* v. *Longridge et al.*[34] H. J. Macdonald, J. (as he then was) said:

> I think that, for the purposes of the Alberta *Labor Act* . . . and preceedings thereunder the defendant unions are legal entities, separate and distinct from their members.[35]

A similar conclusion is reached by the Manitoba Court of Queen's Bench in *Peerless Laundry and Cleaners Limited* v. *Laundry and Dry Cleaning Workers Union et al.*[36]

It will be noted that these cases held only that a trade union is suable in

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[29]1906, c. 47.

[30]R.S.B.C. 1948, c. 155.

[31][1947] 2 W.W.R. 510.

[32]*Ibid.*, 511.

[33][1947] 2 W.W.R. 510, 521.

[34][1947] 2 W.W.R. 856.

[35]*Ibid.*, 857.

[36](1952) 6 W.W.R. (N.S.) 443.

its own name for breaches of the *Labor Relations Act* or its equivalent. However, an interesting point with regard to suability in Alberta for common law causes of action is raised by D. J. Sherbaniuk in his article, "Actions By and and Against Trade Unions in Contracts and Tort."[37] Referring to *Bennett and White Alberta Ltd.* v. *Van Reeder and International Union of Operating Engineers, Local 933,*[38] Professor Sherbanuik submits:

> It may be that [unions] are also entities for purposes not falling within the purview of [the *Labor Act*], for the Appellate Division of the Supreme Court of Alberta, without mention of union status or suability, recently affirmed a trial judment awarding an injunction and damages against a union sued by name for picketing that had caused a breach of contract.[39]

In provinces without *Trade Union Acts* which in some way refer to a union's tort liability, it must be admitted that several cases have held trade unions not to be legal entities for the purpose of actions not directly based on a breach of the province's *Labor Relations Act.* Riley, J. in *Charleston* v. *MacGregor*[40] cited a line of case from provincial courts as authority for the proposition that a union cannot be sued as a legal entity, and held that another line of authority, including the *Nanaimo Dry Cleaning, Medalta Potteries,* and *Peerless Laundry* cases, decided only that a union is a legal entity for the purposes of actions under the applicable *Labor Relations Act.* However, Riley, J. derives the proposition that a union cannot be sued in its own name from those *dicta* in *Orchard* v. *Tunney* which have since been rejected by the *Therien* case, and uses the former line of authority only to support these now-fallen *dicta.* With regard to the latter line of authority, the *Therien* case concluded only that in British Columbia, with its *Trade-unions Act,* a union may be sued for breach of the common law as well as for breach of the *Labor Relations Act.* However, if, as has already been suggested, the *Therien* case did not in fact rely upon the *Trade-unions Act,* then the conclusion of the Supreme Court of Canada in favor of suability for breach of the common law must be extended to cover similar cases in those provinces without *Trade-union Acts,* and it would follow that in every province with a *Labor Relations Act* or its equivalent, trade unions would be suable in their own names for breach of the common law as well as for breach of statutory provisions.

The ratio of the *Therien* case, that a trade union in British Columbia may be sued in its own name for breach of the common law and for breach of the *Labor Relations Act,* is undoubtedly correct in view of the *Taff Vale* decision and the trend of earlier British Columbia authority. It represents, in effect, the approval by the Supreme Court of Canada of the judgments of Lord Morton of Henryton and Lord Porter in the *Bonsor* case, although this very thorough but somewhat inconclusive decision of the House of Lords was not mentioned in any of the judgments in the *Therien* case.

It is submitted, however, that the *dictum* of Locke, J, by negating the *dicta* in *Orchard* v. *Tunney,* has left in a most uncertain and unsatisfactory state the legal position of trade unions in provinces other than British Columbia. It would have been more satisfactory for the court to have held that the *Labor Relaions Act* alone provided that statutory recognition necessary to

[37] (1958) 12 U.T.L.J. 151.

[38] (1956-57) 20 W.W.R. 369.

[39] *Supra.,* 199.

[40] (1957-58) 23 W.W.R. 353, 364.

make trade unions legal entities for the purpose of being sued for breaches of that Act or for breaches of the common law, and to disapprove of those cases in lower courts which held the opposite. The belief is prevalent that trade unions must be made legally responsible for wrongs committed in the abuse of their vast powers, and a statement from the Supreme Court of Canada that this has been accomplished by the statutory provisions already in existence in the various provinces would achieve the desired result. Since the Supreme Court of Canada has not seen fit to do this, the only course of action open to the provinces is to pass legislation expressly making trade unions legal entities for the purpose of suits for breach of both statutory and common law.[41]

[41]While the *Therien* case was before the courts, the Legislative Assembly of British Columbia passed a new *Trade-unions Act*, 1959 c. 90, of which section 7 (2) provides: "A trade-union is a legal entity for purposes of prosecuting and being prosecuted for offences against the *Labor Relations Act* and for purposes of suing and being sued under this Act." This section does not go as far as the decision in the *Therien* case in that it makes no mention of suability for breach of the common law.