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Certification — Right to Certification for a Sectarian Organization Restricted to Members of the Christian Faith — Right Denied

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Résumé de l'article

Section 10 of the Ontario labour Relations Act, concerning certification of unions, as well as Section 4 of The Fair Employment Practices Act require that a trade union must extend the opportunity of membership and the right incidental to membership, equally and impartially and on the same terms and conditions to persons of all creeds. Any arbitrary or discriminatory denial of these right and opportunities is not only inimical to basic democratic principles but is incompatible wtih the union's obligation as an exclusive bargaining agent to represent all employees in the bargaining unit.

Trenton Construction Workers Association, local No 52, affiliated with the Christian Labour Association of Canada, Applicant, and Tange Company Limited, Respondent; Ontario Labour Relations Board, File No. 20576-60, November 13, 1961. L.A. MacLean, Deputy Vice-Chairman, and Board Members G. Russel Harvey and R.W. Teagle.

demeure ce qu'il était à l'origine. C'est donc le litige originairement soumis qui est décidé par le jugement ou par la sentence arbitrale, ce qui implique rétroactivité. Il répugne en quelque sorte à l'idée de justice que des employés soient privés des avantages qui leur sont postérieurement reconnus tout simplement parce que toutes les procédures de l'arbitrage n'ont pu être accomplies simultanément le même jour. Nous croyons donc devoir admettre le principe de la rétroactivité des sentences arbitrales.

Mais à compter de quelle date la sentence doit-elle rétroagir? L'application des principes ci-dessus exposés conduit à la conclusion que la rétroactivité soit accordée, autant que faire se peut, au moment où la demande a été formée devant le Tribunal. Il faut, toutefois, reconnaître qu'en matière de convention collective de travail, ce moment est assez imprécis. Aussi, faut-il considérer toutes les circonstances environnant l'affaire pour en décider selon ce qui paraîtra le plus conforme à l'intérêt général, dans les limites où il est possible de fixer cette rétroactivité.

L'on refait difficilement le passé. Souvent en tentant la chose avec la meilleure foi du monde, l'on crée un plus grand mal soit que cela engendre le désordre quelque part ailleurs que prévu, soit que cela conduise à des situations impossibles, soit que cela amène des procès que la loi ne saurait encourager. Il faut donc s'arrêter quelque part et limiter la rétroactivité en exerçant le plus judicieusement possible la discrétion qu'a ce Conseil d'en déterminer l'étendue.

Prenant tous ces motifs en considération en y joignant les situations particulières révélées par la preuve touchant la régie de l'institution-employeur et les circonstances d'engagement et de travail des membres du Syndicat, il y a lieu de s'attacher à la date de la formation du présent Conseil d'arbitrage pour déterminer le point de départ d'application de la sentence. Aller au-delà nous paraîtrait excessif d'autant que la lenteur des négociations durant les neuf mois précédents semble résulter de causes hors la volonté des parties.

Ainsi que nous l'avons dit au début de ce rapport, la nomination du président du Conseil a été faite le 23 mars 1961 sous l'autorité du Ministre du Travail. Conséquemment nous avons fixé au 1er avril 1961 la date d'entrée en vigueur de la présente sentence tenant lieu de convention collective pour la durée d'une année selon la loi.

Nous limitons son effet rétroactif au seul item des salaires, sans temps supplémentaires, suspendant l'application des autres articles jusqu'au 10 août 1961, date de la signature de la sentence.

— CERTIFICATION — RIGHT TO CERTIFICATION FOR A SECTARIAN ORGANIZATION RESTRICTED TO MEMBERS OF THE CHRISTIAN FAITH — RIGHT DENIED —

— Section 10 of the Ontario labour Relations Act, concerning certification of unions, as well as Section 4 of The Fair Employment Practices Act require that a trade union must extend the opportunity of membership and the right incidental to membership, equally and impartially and on the same terms and conditions to persons of all

creeds. Any arbitrary or discriminatory denial of these right and opportunities is not only inimical to basic democratic principles but is incompatible with the union's obligation as an exclusive bargaining agent to represent all employees in the bargaining unit. [1]

THE FACTS

The applicant association claims to be a newly-constitued trade union entitled to be certified as a collective bargaining agent under The Labour Relations Act. Its constitution states that it is affiliated with the Christian Labour Association of Canada (hereinafter referred to as the C. L. A. C.).

The constitution of the applicant declares, *inter alia,*

II Purposes

The purpose of the union shall be to represent the members on matters concerning grievances, rates of pay, hours of work, conditions of work and employment, and generally to promote their economic and social welfare as wage earners, through the practical application of Christian principles in collective bargaining and other means of mutual aid or protection in co-operation with the parent body.

III Membership

1. All employees of Tange Company Limited except foremen, management personel and office staff, shall be eligible for membership.
2. Every applicant for membership shall fill out an application form prescribed by the Executive Committee.

The application form prescribed by the executive committee referred to in article III contains the following words,

THIS CERTIFIES THAT I, . . . hereby make application for membership in the affiliated union of the Christian Labour Association of Canada designated above, and pledge to uphold the Constitution and By-Laws of the C. L. A. C. and faithfully to fulfill my membership obligations.

The Board had occasion to consider the constitution of the C. L. A. C. in two previous cases, first in 1954 in the *Bosch and Keuning Case,* C C H Canadian Labour Law Reporter, 1949-54 Transfer Binder, par. 17,086, C. L. S. 76-455, and then again in 1957, in the *Woodbridge Concrete Products Limited Cases,* C. C. H. Canadian Labour Law Reporter, 1955-59 Transfer Binder, par. 16,105, C. L. S. 76-589.

For the reasons given the Board in the *Woodbridge Case* we find that the applicant in the instant case is not an autonomous affiliate of a parent organization

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in the usual trade-union sense but is an « integral and organic » part and under the sovereign control of the C. L. A. C. The constitution of the applicant, therefore, does not stand alone but incorporates and must be read and interpreted with and subject to the constitution of the C. L. A. C.

. . . Following the dismissal of its application in the *Woodbridge Case* the membership provisions, and some other provisions of the constitution of the C. L. A. C., were amended in May, 1960. This constitution now reads in part,
Art. 6 *Membership:*

All employees who have reached the legal age for taking employment and who by signing a membership application form *pledge to uphold the constitution and by-laws of the Christian Labour Association of Canada* to faithfully fulfil their membership obligations, *shall be accepted as members of the C. L. A. of C.* or any one of its affiliated local organizations . . . *No applicant for membership shall be refused* by reason of colour, creed, race or national origin. (emphasis added).

. . . *A member may be suspended by the Board of a local by reason of violation of the pledge made at the time he applied for membership* . . . (emphasis added).
Art. 11 Local *Board and Officers: By-laws.*

. . . *No one shall be nominated who is not qualified to give leadership that is in harmony with the character of the C. L. A. of C. or whose public conduct might reflect unfavourably upon the organization* . . . (emphasis added).
Art. 16 *Order of Business*

Except that *every meeting held in the interest* of or under auspices of the C. L. A. of C. *shall* be opened and closed *with prayer — with Scripture reading and/or* singing of an appropriate song at the option of the presiding officer — the Secretary of each subdivision of the National Executive Committee, or the committee in charge of the meeting shall provide the order of business or program for the meeting.

. . . In dealing with the procedure to be folowed at meetings, the applicant's constitution states in part,

XVI PROCEDURE AT MEETINGS

1. At the opening of a regular membership meeting, the President shall take the chair and shall conduct the business in the following order;

   1. Call to order and prayer (with Bible reading at the option of the presiding officer). —

   13. Adjournment of business session, prayer.

Testimony was also given by members of the CLAC (namely J. Overdyke, Y. Teertstra, H. Kuntz, Wm. Span, Edward Huizinga and Terry Einarson). These witnesses all testified that in their experience no prospective member had

ever been asked of he was a Christian nor had any such ever been excluded from membreship because he was not a Christian. They explained that the members were asked only to sign a membership card pledging to uphold the constitution. *None of them, however, did say from his own knowledge that any non-Christian had ever in fact* been admitted to membership in or invited to join the C. L. A. C. or any of its affiliate organizations.

. . . Joseph Overdyke, the president of the applicant organization, explained that the « Christian social principles » referred to in the constitution « are the principles in the Bible about relations between man, love, social justice and the right share of man in creative resources » He stated « We apply the teachings of the Bible to Labour Relations ». In answer to a question put to him by counsel for the applicant, « Would a Mohammedan or a thiest be denied membership », he replied, « Not at all ». To the question, « Would he be asked whether he was or intended to be a Christian as a basis of membership », he again said, « Not at all ». Mr. Kuntz, the National President of CLAC, also replied in the negative to the same questions. He asserted that a prospective member was not required to accept Christian doctrine as a condition of membership. He contended that the Christian social principles adopted by his association are not Christian doctrine. He explained that with the exception of St-Luke 7:37 and 38, some of the Christian social principles adopted by the constitution are to be found in the Biblical references contained in Exhibit 9.

THE LAW

Needless to say the Board's inquiry as to whether a newly constitued organization is a trade union entitled to certification is not foreclosed by the mere introduction into evidence of a constitution and set of by-laws which formally or in substance express it to be « an organization of employees formed for purposes that include the regulation of relations between employees and employers » as defined in section 1 (1) (j) of The Labour Relations Act. It must also be constituted and actually function or be capable of functioning for purposes which include collective bargaining as contemplated by the Act. While Labour organizations may, and often do, have purposes in addition to the collective bargaining of relations between employees and employers, it is the existence and scope of the latter purpose which gives the organization its identity and character as a trade union under the legislation. The words in the definition section, « formed for purposes that include the regulation of relations between employees and employers », only gain their content and meaning when interpreted in context with the provisions and intent of the Act as a whole. Ostensible labour organizations cloaked with the formal accoutrements of collective bargaining but which in fact are not constituted for, or which cannot or do not exist and function as collective bargaining agencies as contemplated by the Act, will not be entitled to be certified as collective bargaining agents.

The Act obviously endows a trade union as an exclusive bargaining agent for all employees in a bargaining unit with the capacity for effecting far-reaching consequences over their economic life. The importance of extending equal rights and opportunities of membership to all employees in a bargaining unit is self-evident.

Any arbitrary or discriminatory denial of these rights and opportunities, is not only inimical to basic democratic principles but is incompatible with the union's obligation as an exclusive bargaining agent to represent all employees in the bargaining unit. Any argument that a trade union is purely a private institution to be likened to a golf club or fraternel organization is surely not only belied by the consequences of its existence but is inconsistent with the powers and obligations conferred upon it by the legislation. It seems difficult to perceive how a labour organization can truly be said to represent all employees in a bargaining unit unless the opportunity of membership is made equally available to all employees in the unit upon compliance with such rules as may be reasonably appropriate to the stability and usefulness of the organization's function as a collective bargaining agent.

However, whatever qualifications for membership a union may legitimately impose, section 10 of The Labour Relations Act plainly and expressly prohibits the Board from certifying a trade union,

> . . . *if it discriminates against any person because of his race, creed, colour,* nationality, ancestry or place of origin.
> Also, section 4 of The Fair Employment Practices Act provides that,
> No Trade union shall exclude from membership or expel or suspend any person or member or discriminate against any person or member because of race, creed, colour, nationality, ancestry or place of origin.

While no definition of discrimation is contained in these statutes, it seems plain that they require that a trade union must extend the opportunity of membership and the rights incidental to membership, equally and impartially and on the same terms and conditions to persons of all creeds. Discrimination, of course, may take place, and it is often designed to elude detection by subtle and indirect modes of implementation. In this respect words, rules or practices of purported impartiality may well assume a different meaning and effect when viewed in the context of their actual aplication or practical consequences. In dealing with the question as to whether an organization discriminates against persons on account of their creed, the Board is concerned not only with the interpretation of the written words of the constitutional documents but also with the functional operation of the organization itself. In other words the Board is interested in deeds as well as words.

In our view it would be clear discrimination against persons on the basis of their creed if they were required to subscribe to a theology other than their own as a condition of membership. The fact that the constitution or practices of an organization give formal lip-service to the fact that membership is open to persons of all creeds would not make such a condition any less discriminatory. It would merely amount to saying, for example, that a Jew could not be refused membership because of his creed, so long as he subscribed allegiance to the faith of Christianity for purposes and as a condition of membership. There seems little doubt that such a provision would exclude many persons from membership because of loyalty to their creed, which might well treat a pledge of allegiance to another creed for such purposes as a betrayal of their faith. It seems to us that it would be idle to say that because the choice is left to them to decide whether or not they wish to join such an organization, that such a pledge does not subject such persons to discriminatory treatment on account of their creed. This would amount to saying that,

while discrimination on the basis of creed cannot be done directly, it may be done indirectly. In our view this is not the meaning of the legislation. It is our opinion that the legislation means that a person has a right not to be denied or excluded from membership or subjected to unequal conditions or terms of membership on account of his creed.

It may be argued that in one sense the same argument would apply equally to all trade unions for there will always be persons, who, because of their particular creed, will have conscientious objections to joining a « neutral union ». It does not appear, however, that such persons could be in any different position than persons who because of their faith, object to receiving blood transfusions or joining the armed services. If on account of certain precepts of their creed, they were dissuaded or excluded from joining « a neutral trade union », the rules of membership or practices of which did not purport and were not designed or calculated to select them for unequal treatment on the basis of their creed, it is difficult to conceive how such a « neutral union » could be considered guilty of discrimination. It is our view that the discrimination must be found in the constitution, rules and/or actual practices of the organization itself. If the constitution, rules and/or practices deliberately accord a significant partiality of treatment, or deliberately limit membership or the right thereof to persons of a particular creed, then in our view they will likely be discriminatory within the meaning of the legislation.

The fact that persons are, by section 3 of The Labour Relations Act, free to join a trade union of their own choice, does not authorize the Board to certify a union of their own choice, does not authorize the Board to certify a union restricted to persons of a particular creed. The freedom which people claim for themselves to believe in any religion or no religion, or to belong to any faith or to none, makes it impossible in our democratic and multi-religious society for one faith to obtain a monopoly on this freedom. The human rights legislation is designed to ensure that this freedom will be preserved to members or prospective members of bargaining units whose economic life may be affected by their being represented by a collective bargaining agency.

THE DECISION

It now remains for us to determine the applicant's position on the evidence in this case. Having regard to the testimony of Mr. Fuykschot in the Bosch & Keuning Case, the contents of its original constitution and the reasons given for the origination of the C. L. A. C., the conclusion is irresistible that, at the time of the Bosch & Keuning Case, the C. L. A. C. was intended to be, and was, a sectarian organization restricted to members of the Christian faith.

. . . It is now material to consider the evidence relating to the practices and policies of the C. L. A. C. since the *Woodbridge Case*. While the C. L. A. C. has amended some of the membership provisions of its constitution, it has as it says still insisted on the retention of the references to the Bible « so that there would be no question in the future as to what principles the C. L. A. C. was committed to ». The constitution expressly incorporates Biblical principles « as taught in the Bible », and refers to the Creator, to Divinely given law and to the requirement

and practice of prayer, psalm-singing and scripture reading at its meetings. Also looking at its rules relating to dual membership as quoted in the *Woodbrige Case*, it is significant that, unlike a « neutral organization » it « is committed to adherence to Christian social principles as taught in the Bible . . . while the other is not so committed claiming instead neutrality concerning commitment to any *religious principles* ». (emphasis added).

While the constitution says that « no applicant should be refused by reason of colour, creed, race or national origin », it is nevertheless open to the construction that a member may still be suspended for reasons based on creed. In this regard it states that « a member may be suspended by the Board of a local by reason of violation of the pledge at the time he applied for membership ». The pledge, of course, requires the person to uphold a constitution, which incorporates Christian social principles « as taught in the Bible », and which provides for the religious accompaniments of prayer, psalm-singing and scripture reading at meetings. It is quite clear that if a person defaults on his pledge he cannot be nominated for office and he is subject to suspension from membership. But does this pledge require a person to accept and subscribe to religious principles as a condition of membership? While the language in the original constitution might have been considered as disclosing an ambiguity on this point, its application at the time of the *Bosh & Keuning Case* was explained in unequivocal terms by Mr. Fuykschot, when he testified that a Mohammedan would not be admitted to membership in the C. L. A. C. Later, at the time of the *Woodbrige Case* Mr. Fuykschot asserted in effect that a contrary interpretation should be given to this language. In spite of this obvious difficulty as to the meaning of the constitution, it is apparent that no real effort has yet been made to clarify the language of the constitution and to set out the requirements of membership in clear and unequivocal terms. Indeed, it seems evident that the C. L. A. C. has resisted any amendment to its constitution. Since the *Bosh & Keuning Case* it has amended its constitution in only a minor way. If the matter was as simple and clear as the witnesses would have us believe why was it not incorporated into the constitution? By comparison the constitution of the Christian Trade Union of Canada, placed in evidence by the applicant, appears to express the matter clearly and unequivocally when it states,

> It is not and shall not be a condition of eligibility for membership in the C. T. U. of C. or any local union affiliated therewith, that any applicant shall profess to be a member of or adherent to any religious denomination or organization or subscribe to any particular religion, doctrine, belief or creed.

Also, and probably of more importance, there is nothing in the remaining provisions of this constitution to qualify or detract from these words. Further, while the latter constitution purports to apply « Christian principles » in collective bargaining, there is no reference to the Bible nor to the Creator, or Divinely given law, nor to the requirement of prayer, psalm-singing or scripture reading as there is in the constitution of the C. L. A. C.

It will be noted that the Board examined the character of the Christian Trade Unions of Canada in the *Harm Schilthuis & Sons Case* in March, 1959. (Board file

17088-59): On the basis of the evidence before it, including the constitution containing the clause quoted above, it found that the Christian Trade Unions of Canada were entitled to certification as a trade union under the Act. Since the latter case, the Board has had occasion to certify the same organization in several other cases.

The existence of clear evidence in the *Bosch & Keuning Case* that the C. L. A. C. did discriminate because of creed must necessarily place a heavy onus upon the association to satisfy the Board by some form of concrete and persuasive evidence that it in fact does not discriminate on the basis of creed. In looking at the evidence before us, it is our view that, apart from several very minor amendments to its constitution, and the reiteration by interested witnesses of what amounts to the same verbal denials of discrimination, the case of the C. L. A. C. remains substantially the same as it was in the *Woodbridge Case*. Also, as in the *Woodbridge Case*, there is no evidence of any practice that persons of different faiths have in fact been admitted to membership. Further as in the latter case, the evidence is destitute of any firm and unequivocal proof that the C. L. A. C. has made any real transition of character from its position at the time of the *Bosh & Keuning Case*. On the contrary, the evidence and lack of it in this case, when construed with the evidence referred to by the Boards in the two earlier cases, leads us to the same conclusion reached by the Board in the *Woodbridge Case*.

In the result and for the foregoing reasons, the aplication must be dismissed.

« *L. A. MacLean* »
for the Board

November 13, 1961.