THE CIVIL STATUS AND DISABILITIES OF TRADE UNIONS IN ONTARIO

The statutes of Ontario contain no provisions that affect the status, capacities, or activities of combinations of workmen formed for the main purpose of improving working conditions and terms of employment through collective action. Such combinations exist in Ontario. They have increased greatly in membership, wealth, and bargaining power. They exert a steadily growing influence upon the course of industrial policy. They are in a position to bring to bear in certain directions considerable pressure upon governments. Some of them consist of local plant organizations which co-operate closely with the employers. Some are associations of workers throughout an area engaged in the same craft. Some are organizations of all employees in certain industries. While some are local in their scope, and independent, most of them are affiliated with one of the great national Trade Union Congresses. The legal status of all these bodies, with the possible exception of the few that have registered under the Dominion Trade Union Act,[1] is governed by the common law.

At common law individuals may join together in associations for the accomplishment of agreed purposes. If these purposes are not related to the carrying on of some trade, business or profession, for gain or profit, the association is not subject to the law of partnership.[2] If the association is not a corporation, it is not a legal entity and can neither act nor be attacked as such. Unincorporated associations of individuals that are not partnerships may, providing their objects are legal, subject their members to enforceable rules and regulations mutually agreed to by the members.[3] They may impose fines and charge fees and thus accumulate property. The funds of such associations are generally held by trustees on behalf of the members, and must be accounted for as trust funds. Actions brought on behalf of the association take the form of class actions, wherein one or more members sue on behalf of themselves and all other members of the association.[4] Under proper circumstances a class action may be maintained in court against certain members selected to represent the class of members, provided that the trustees of the fund are made parties to the action, and recovery

[1] The Trade Union Act, R.S.C. 1927, c. 202.
[2] The Partnership Act, R.S.O. 1937, 189 section 2.
[3] *Cannon* v. *Toronto Corn Exchange*, 5 O.A.R. 268.
[4] *Barrett* v. *Harris*, 51 O.L.R. 484.

is limited to the extent of the trust fund.[5] The trustees may take the usual steps necessary to protect the trust funds. Individual members may apply to the court to enforce their rights under the constitution and rules of the association in so far as their rights involve a proprietary interest.[6] Combinations of workmen, commonly known as trade unions, insofar as their objects are legal in the eyes of the common law, are associations of this character.

When the court is asked to enforce an agreement underlying any such unincorporated association, or its rules or resolutions, the question of the legality of the objects of the combination is frequently the subject of close scrutiny. If the court finds the main objects of an association to be illegal, the underlying agreement between the members and the rules and resolutions of the association will not be enforced. The members in such circumstances will find that they have no recourse *inter se* nor against their elected officers or appointed agents to compel by law the accomplishment of their agreed purposes. It is a widely held view, although the legal authority is inconclusive, that such organizations become so wholly tainted with illegality that they are denied any right of action in any court for any cause. The most common element of illegality touching the agreements and rules and resolutions of trade unions, arises from objects which are deemed by the courts to be unreasonable in restraint of trade.

Trade unions are formed mainly for the purpose of protecting their members in their relations with employers. Most trade unions under modern conditions are of necessity, to accomplish their purpose of collective bargaining, in restraint of trade. Most trade unions rules bind their members to work or not to work in accordance with the resolutions of the majority of members. Agreements with such objects have generally been held to be void as being unreasonable in restraint of trade. Frequently trade unions join with this main purpose certain benevolent objects, such as sick benefits for members. If the main object as disclosed by the constitution, rules and resolutions, is such as to appear unreasonable in restraint of trade, especially where the union maintains a common fund for all purposes, the objects will not be considered as separable. In such cases a member will have no recourse for the enforcement even of the benevolent objects. Therefore in every case where the question of illegality

[5] *Robinson* v. *Adams*, 56 O.L.R. 217; *Local Union* 1562 v. *Williams and Rees*, 59 S.C.R. 240.

[6] *Rigby* v. *Connol*, 14 Ch. D. 482.

is raised, the main purpose of the association must be ascertained upon the particular facts involved.

The common law principles defining the status of trade unions were applied in three leading English cases: *Hornby* v. *Close*;[7] *Farrar* v. *Close*;[8] and *Russell* v. *The Amalgamated Society of Carpenters and Joiners*.[9] Each of these decisions deals with the question of the illegality of a trade union as being in restraint of trade.

In *Hornby* v. *Close* (1867), the plaintiff was the president of a trade union registered under the Friendly Societies Act.[10] That Act provided for the registration of societies established for benevolent purposes and provided for a summary procedure before Justices of the Peace for the recovery of property misappropriated. By section 44 of the Act disputes between members of any society established for the designated purposes, *or for any purpose which was not illegal,* and its officers, should be decided by the summary procedure. The defendant was an official of the union who had unlawfully withheld certain of its funds. The action was brought under the terms of the Act.

The trade union in question was formed for the usual purposes of trade unions relating to the support of its members on strike, and had a set of rules intending to bind its members to collective action under circumstances that might arise in the course of industrial disputes. The union also included in its objects certain benevolent purposes of the class covered by the Friendly Societies Act. The union assets for all its purposes were held as a common fund.

The Court of Queen's Bench on appeal held that the objects of the union could not be separated. Its major objects were its trade union activities. These activities were not analogous to those of a Friendly Society within the meaning of the Act and it could not be said to be established for a purpose which was not illegal, so as to bring it within the terms of section 44. The trade union objects of the association were held to be illegal as being in restraint of trade. Therefore the plaintiff could not recover.

Cockburn C. J. at p. 158 said:

> It is therefore in each case material to enquire what the purposes of the society were. Here we find the very purposes of the existence of the society not merely those of a friendly society, but to carry out

[7] (1867), L.R. 2 Q.B. 153.
[8] (1869), L.R. 4 Q.B. 602.
[9] [1912] A.C. 421.
[10] Friendly Societies Act 18 & 19 Vict., c. 63.

> the objects of a trades'union. Under that term may be included *every combination by which men bind themselves not to work except under certain conditions, and to support one another, in the event of being thrown out of employment, in carrying out the views of the majority.* I am very far from saying that the members of a trades' union constituted for such purposes would bring themselves within the criminal law; but the rules of such a society would certainly operate in restraint of trade, and would, therefore, in that sense, be unlawful; and on the principles on which the Court of Error, in *Hilton* v. *Eckersley* (11), affirming the decision of this court, held that a bond, given by masters to observe rules in their business which were in restraint of trade, was so far illegal that it could not be enforced in a court of law, we hold that these rules of a society of workmen being in restraint of trade are also so far illegal; . . . . .
>
> The society is not established for a friendly object within the meaning of the act, and it cannot be said to be established for a purpose which is not illegal, so as to bring it within the terms of section 44.

In the case of *Hilton* v. *Eckersley*, above referred to, Alderson B. had stated the principle applicable to a combination of masters, as follows (at p. 75):

> This bond, therefore, if not altogether illegal and punishable, is framed to enforce at all events a contract by which the obligors agree to carry on their trade, *not freely as they ought to do, but in conformity to the will of others*; and this, not being for a good consideration is contrary to public policy.

In *Hornby* v. *Close*, the broad question of "paramount policy which has to do with the protection of owners of property against the defalcations of dishonest custodians". (Duff J. in *Starr* v. *Chase*[11]) was not considered. The case turned upon the interpretation of a statute and the applicability of the special procedure therein provided for Friendly Societies, to a certain trade union. It did not specifically decide that an action properly constituted, could not be brought to recover misappropriated funds.

In *Farrar* v. *Close* (1869),[13] the principle of the *Hornby* case was applied. This case also arose from a proceeding under the Friendly Societies Act. The main question was whether the rules of the particular union under consideration were illegal as being in restraint of trade. The Court of four judges was equally divided upon this question. The real issue was whether the rules of the union were intended to bind the members not to work unless upon terms allowed by the majority. Hannen J. in delivering a dissenting judgment, deciding that in this case the rules were not illegal, fairly stated the general principles at p. 612:

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[11] *Hilton* v. *Eckersley*, (1855), 6 E. & B. 66.
[12] [1925] S.C.R. 495, at p. 505.
[13] L.R. 4 Q.B.602.

> I am however, of opinion that strikes are not necessarily illegal. A strike is properly defined as "a simultaneous cessation of work on the part of the workmen", and its legality or illegality must depend on the means by which it is enforced, and on its objects. It may be criminal, as if it be part of a combination for the purpose of injuring or molesting either masters or men; or it may be simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action, similar to that by which the employers bound themselves in the case of *Hilton* v. *Eckersley*; or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfilment of an engagement entered into between employers and employed, or any other lawful purpose.

He then proceeds to quote the memorandum of Sir W. Erle on "The Law Relating to Trade Unions" (1869):

> As to combination, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms, which one person may exercise and declare singly, many after consultation may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act thereon for the immediate purpose of obtaining the required terms; but *they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination.*

The case of *Russell* v. *The Amalgamated Association of Carpenters and Joiners*,[14] was decided in 1912, after the passing of legislation that affected the rights, status and immunities of trade unions. The question of illegality in restraint of trade depends upon public policy as interpreted by the courts, rather than upon inflexible rules of law. The interpretation is subject to change in relation to the change of economic and social conditions and general public opinion. A statute may be the most conclusive evidence of a change in public policy. Lord Watson in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*[15] said at pp. 553 and 554:

> A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to, and for promoting the interests of, its commerce must as time advances and as the commerce thrives, undergo change and development from various causes which are altogether independent of the action of its Courts. In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function, when a case like the present is brought before

[14] [1912] A.C. 421.

> them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time.

In the case of *Dubowski & Sons* v. *Goldstein*,[16] Rigby LJ. said at p. 484:

> The only test of the validity of an agreement in restraint of trade *now* is whether or not such agreement is reasonably for the protection of the person with whom it was made, If, applying all proper tests, it appears to be so, then it is no longer considered void as being against public policy though it may be in a certain sense in restraint of trade.

Therefore it is of special interest to examine to what extent the English statutes between 1869 and 1912 gave expression to any change of public policy as applied to the conception of unreasonableness of agreements between workmen binding one another not to work pursuant to the decision of a majority.

In 1869 The Trades Union Funds Protection Act[17] extended to trade unions the benefits of the Friendly Societies Act[18] even though such unions had rules, practices or agreements that might operate in restraint of trade, or had objects other than those of friendly societies specified in the act.

In 1871 the act of 1869 was repealed and replaced by the Trade Union Act.[19] This act dealt more broadly with the status of trade unions and gave them a quasi-corporate status, if registered under its provisions. As stated by Slesser in "Trade Union Law",[20] "A registered trade union is thus a statutory legal entity, anomalous in that although consisting of a fluctuating body of individuals, and not being incorporated, it can own property and act by agents." Thus it was held in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*[21] that a union could be sued by employers for damages arising out of an industrial dispute. In *Osborne* v. *The Amalgamated Society of Railway Servants*,[22] it was held that a union registered under the act was limited in its powers to the objects defined in the act, and therefore could not apply its funds to political purposes.

The Trade Union Act by s. 23 defines a trade union as meaning "such combination, whether temporary or permanent, for

[15] [1894] A.C. 535.
[16] [1896] 1 Q.B.478.
[17] 32 & 33 Vict., c. 61.
[18] 18 & 19 Vict., c. 63.
[19] Trade Union Act 1871 34 & 35 Vict., c. 31.
[20] 3rd ed. (1927) p. 49.
[21] [1901] A.C. 426.
[22] [1901] 1 Ch. 163.

regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade. . . . ."

As a result of this defination, a union, to be registered under the Act, had to show by its rules and constitutoin that it was in restraint of trade. Indeed strictly it would have to show that its rules would have been, if the Act had not been passed, deemed to have been unreasonable in restraint of trade. (The Dominion Act, first passed in 1872, retains this definition.)

In 1876[23] this definition was amended to include combinations "whether such combination would or would not if the principal act had not been passed have been deemed to have been an unlawful combination. . . ."

The other sections of the Act, relevant to this discussion are as follows:

> 2. The purposes of any trade union shall not by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.
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> 3. The purposes if any trade union shall not by reason merely that they are in restraint of trade be unlawful so as to render void or voidable any agreement or trust.
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> 4. Nothing in this act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely:
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> (1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall not sell their goods, transact business, employ, or be employed.
>
> (2) Any agreement for the payment by any person of any subscription or penalty to a trade union.
>
> (3) Any agreement for the application of the funds of a trade union:
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> (a) to provide benefits for members; or
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> (b) to furnish contributions to any employer or workman not a member of such trade union in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or
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> (c) to discharge any fine imposed upon any person by sentence of a court of justice; or
>
> (4) Any agreement made between one trade union and another; or

[23] Trade Union Act Amendment Act 1876, 39 & 40 Vict., c. 22.

(5) Any bond to secure the performance of any of the above-mentioned agreements.

But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful.

Section 2 has been held to be declaratory.[24] Unreasonable restraint of trade is not in itself unlawful in the sense of being punishable as a crime, nor even in the sense of being actionable. By common law it is merely illegal, being contrary to public policy, with the effect that an agreement made with such an illegal object is void or unenforceable as between the parties to it.[25] Section 2 therefore does not indicate any change of public policy.

Section 3, insofar as it affects agreements with third parties does not necessarily appear to effect a change in the law. None of the English decisions as to trade unions have held that a combination because it is illegal, cannot by a properly constituted action enforce a contract with some third party which contract in itself is not tainted with illegality. In *Mogul Steamship Co.* v. *McGregor Gow & Co.*,[26] Lord Watson at p. 42 said, with reference to *Hilton* v. *Eckersley*:

> The decision in that case, which was the result of judicial opinions not altogether reconcileable, appears to me to carry the rule no further than this—that an agreement by traders to combine for a lawful purpose and for a specified time is not binding upon any of the parties to it if he chooses to withdraw, and consequently cannot be enforced *in invitum*. In my opinion it is not an authority for the proposition that an outsider can plead the illegality of such a contract, whilst the parties are willing to act, and continue to act upon the ground that they have agreed for a specific period.

Nevertheless section 3 dispelled the serious doubts that prevailed as to the right of a trade union or its members to enforce their property claims as against third parties or against an officer or member of a trade union who might have misappropriated property of the union.[27]

Section 3, insofar as it affects the rights of members of a trade union to enforce their claims against the union or against its other members, is largely negatived by the provisions of section 4. Section 4 declares to be unenforceable what the common law

[24] *Reg.* v. *Stainer*, L.R. 1 C.C.R. 230.

[25] *Mogul Steamship Co.* v. *McGregor Gow & Co.*, [1892] A.C. 25; *Northwest Salt Co.* v. *Electrolytic Alkali Co.*, [1914] A.C. 461; *Attorney-General for Ontario* v. *Canadian Wholesale Grocers* 52 O.L.R. 536 at p. 545. See also s. 497 of the Criminal Code R.S.C. 1927, c. 36.

[26] [1892] A.C. 20.

[27] *Starr* v. *Chase*, [1924] S.C.R. 495 at p. 507.

had declared to be unenforceable by reason of illegality of agreements of the nature therein specified.

It therefore must be concluded that the recognition of trade unions, by thus investing them with quasi-corporate status evidenced a very limited change in viewpoint as to public policy with respect to restraint of trade. The statute left the members of a union free to submit to the rule of the majority so long as they wished to do so. The Act carefully refrained from imposing any legal sanction upon trade union rules so as to bind the members to obey them. The members, under the Act, retained their individual freedom to withdraw from the combination at will with impunity. The statute recognized the co-existence of two freedoms; the freedom to work, unrestricted by the rules of a combination, and the freedom to combine, so long as each member might choose to do so. But both the statute and the common law disregarded the possible reasonableness implicit in a greater freedom which must rest upon the drastic restraint of both of these lesser freedoms. By granting to trade unions a legal status, the Act removed the disabilities and doubts as to their relationship towards third parties arising from the taint of illegality impressed upon them by the common law.

By the Trades Disputes Act, 1906[28] Parliament recognized further the importance and necessity of the trade union movement. Following the disastrous decision in the *Taff Vale* case, the movement appeared to have suffered a fatal blow. As Lord Haldane said in *Vacher & Sons Ltd.* v. *London Society of Compositors*:[29]

> It is common knowledge that this decision (The *Taff Vale*) gave rise to keen controversy as to whether the law required amendment. On the one hand it was contended that the principle laid down ought to remain undisturbed, because it simply imposed on the trades unions the legal liability for their actions which ought to accompany the immense powers which the Trade Union Acts had set them free to exercise. On the other hand, it was maintained that to impose such liability was to subject their funds which were held for benevolent purposes as well as for those of industrial battles, to undue risk. It was said that by reason of the nature of their organization and their responsibility in law for the actions of a multitude of individuals who would be held in law to be their agents, but over whom it was not possible for them to exercise adequate control, they were by the decision of this house exposed to perils which must cripple their usefulness.

The Trades Disputes Act provided that an action against any trade union in respect of any tortious act should not be

[28] 6 Ed. VII, c. 47.
[29] [1912] A.C. 107, at p. 112.

entertained by any court. In the *Vacher* libel case it was held that this immunity applied not only to acts committed in the course of an industrial dispute but to all torts. Thus, as Dicey remarked in "Law and Opinion in England";[30] "Severity has given place to favouritism; the denial of equality has by a national reaction led to the concession of, and promoted the demand for, privilege." Thus, by 1912, the state of public opinion, as expressed in statutes, had undergone a considerable change with respect to the trade union movement. Nevertheless, public policy as applied to the question of restraint of trade, must not be confused with this general trend.

In the case of *Russell* v. *Amalgamated Society of Carpenters and Joiners*,[31] the plaintiff was the widow of a member of the defendant society. She brought the action for payment of money alleged to be due to her deceased husband under a superannuation benefit. The defendant was a trade union registered under the Trade Union Act. The decision turned upon the application of section 4 of that act. Section 4 is not a bar to actions of the kind therein enumerated. It merely states that "nothing in this act shall enable any court to entertain any legal proceeding . . . ." for the breach of certain agreements, including an agreement to provide benefits for members. If therefore the defendant were a society that was not illegal by common law as being in restraint of trade, a right of action would exist. Illegality was therefore still an issue in an action of this kind. The House of Lords decided that the defendant was a trade union the rules and constitution of which were illegal as being in restraint of trade. Therefore the plaintiff could not recover. Although the question of any change in public policy as evidenced by the statutes, was not considered in this case, nevertheless the decision can be accepted as conclusive that public policy as to restraint of trade received the same interpretation as prior to the statutes. For these statutes did not attempt, by altering the legal status of trade unions, to bind their members to adhere to rules that were in restraint of trade. The Acts do not in any way declare that what was formerly deemed to be unreasonable in restraint of trade, is deemed to be reasonable. The freedom of parties to trade union combinations is left unimpaired.

In Ontario this whole question of the illegality of trade unions, and the public policy applicable, was considered by Raney J. in *Polakoff* v. *Winters Garment Co.*[32] This was a represent-

[30] Appendix, note 1, p. 475.
[31] [1912] A.C. 421.
[32] (1928), 62 O.L.R. 40.

ative or class action brought on behalf of a trade union against an employers' association to enforce the terms of a collective bargaining agreement. The defences were (1) that the trade union was an unlawful association whose purposes were in unreasonable restraint of trade, and that therefore the courts would not assist it to enforce its contracts, and (2) that the contract itself was unreasonable in restraint of trade. The agreement was in effect what is known as a "closed shop" agreement, whereby each member of the employers' association was to employ only members of the plaintiff union. Raney J. expressed the view that there was much evidence of a change of public policy since the purposes of trade unions were declared illegal in *Hornby* v. *Close* and *Farrar* v. *Close,* but decided that he was bound by the decision of the House of Lords in the *Russell* case, both as to the rules and practices of the union and as to its collective bargain with the employers' association (p. 69). He stated that he was compelled to hold that in Ontario the plaintiff union was an ilegal society, "incapable because of its illegality of maintaining this action, or indeed any other civil action in Ontario" (p. 58).

No doubt, on the authorities, the learned judge was right in holding that the collective bargaining agreement was unenforceable at law. This agreement in itself was clearly in restraint of trade. Whether it was unreasonably so, in the light of public policy in Ontario may be open to question. For other reasons, a collective bargaining agreement which provides for the fixing of wage scales, and conditions of work is not a fit subject for ordinary litigation. By its nature it is an agreement that does not secure rights which lend themselves readily to legal enforcement. Such an agreement is rather a treaty, which if adhered to in spirit as well as in letter may be valuable in averting a multitude of disputes which would otherwise likely arise. In *Young* v. *Canadian National Railway,*[33] the Privy Council considered a collective bargaining agreement in an appeal from Manitoba. Lord Russell of Killowan at p. 89 said:

> It appears to their lordships to be intended merely to operate as an agreement between a body of employers and a labour organization whereby employers undertake that as regards their workmen certain rules beneficial to the workmen shall be observed. By itself it constitutes no contract between any individual employee and the company which employs him. If an employer refused to observe the rules, the effective sequel would be, not an action by an employee, not even an action by Division No. 4, against the employer for specific performance or damages, but the calling of a strike until the grievance was remedied.

[33] [1931] A.C. 83.

Raney J. however went beyond the necessities of the *Polakoff* case in stating that by reason of its illegality the union could bring no action in Ontario. The judgment of Sir Lyman Duff, then Duff J., in *Starr* v. *Chase*[34] would indicate that under certain circumstances an action properly constituted might be brought on behalf of a trade union, in spite of its illegality, to recover misappropriated funds.

The case of *Starr* v. *Chase* arose in Manitoba. A representative action was brought on behalf of a trade union against an official to recover misappropriated funds. The Court of Appeal for Manitoba decided that the plaintiff was entitled to recover. This judgment was affirmed by the Supreme Court of Canada. In view of the particular circumstances of this case some caution should be observed in accepting the judgment as a binding authority on some of the broad principles that were discussed. There was some question as to whether the rules of the trade union that were before the court, were in effect unreasonable in restraint of trade. If they were, this point had not been pleaded, and as was decided in *Northwest Salt Co.* v. *Electrolytic Alkali Company*,[35] such a defence must be pleaded. Illegality of this nature will not be presumed. Nevertheless in the penetrating discussion of the authorities in the judgment of Duff J. much light was shed upon the more general questions involved in the common law as to the status of trade unions.

Duff J. ap. p. 504, says:

> Is there any real difficulty in holding, either that those parts of the rules which make him the custodian and require him to deal with the funds in his hands according to the orders of the General Committee of Adjustment and to hand it over to his successor are capable of separation from the mass of the rules, so that they are not affected by the nullity attaching to such agreements as may be considered illegal on the ground that they constitute an unreasonable restraint of trade, *or that the policy of the law* that forbids the enforcement of such agreements is not so wide as to forbid the recognition of the interest of the members of the Society in the fund and the protection of that interest by legal process? May one not say that at this point one encounters a *paramount policy* which has to do with the protection of the owners of property against the defalcations of dishonest custodians?

The learned justice then pointed out that the law of England was introduced into Manitoba in 1870, and that consequently the Trades Union Funds Protection Act of 1869 was part of the law of that province.

[34] [1924] S.C.R. 495.
[35] [1914] A.C. 461.

Duff J. then discussed the effect of the Act of 1869. He refers to the remarks of Piggott B. in *The Queen* v. *Stainer*,[36] "It is said that this society cannot hold property because its rules are illegal. Now they are only illegal as being in restraint of trade, *and not affecting their right to property*. By 32 & 33 Vict, c. 61 *the legislature has recognized their right to property*". He further quotes the passage of Blackburn J. in *Reg.* v. *Registrar of Friendly Societies*,[37] dealing with *Hornby* v. *Close*.

> 'It is a great mistake to affirm that there is any decision that trade unions or societies of that kind are, as it were, outlaws and out of the protection of law and equity. All that this court held was that where statutes give certain benefits to friendly societies, societies whose rules were in restraint of trade, and illegal in that sense, could not claim the benefits of the statutes. However, section 3 of the Trade Union Act (1871) *seems to put an end to all doubt* as to the jurisdiction of the Court of Chancery by enacting that the purpose of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful, so as to render void or voidable any agreement or trust.

He also quotes Cockburn C.J. in *The Queen* v. *Stainer*[38] as follows:

> It was argued that the 32 and 33 Vict., c. 61 applies only to registered societies; but even if this were so, it is equally an indication of the intention of the legislature that such societies as the present shall not have a defective title to property.

Duff J. at p. 507 then commented as follows:

> The view of Cockburn C. J. in *Reg.* v. *Stainer* apparently was that the taint of criminality being absent, the members of a trade union, though its purposes were illegal in the sense mentioned, were capable of possessing beneficial ownership in the union funds; that the act of 1869 afforded *conclusive evidence that it was not contrary to the policy of the law* that this beneficial ownership should be protected by legal process. The opinion of Blackburn J. goes further. The language above quoted implies that such an association is entitled to resort to civil as well as criminal remedies for the protection of its property.
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> Blackburn J.'s opinion apparently was that the Act of 1891 did not create a new right, but merely removed doubts as to the authority of the Court of Chancery to afford such protection.

The important feature of these comments is that Duff J. apparently treated the statutes of 1869 and 1871, not as laying down new principles applicable to the property rights of trade unions, but as "conclusive evidence" of the "policy of the law." He does not suggest that they indicate a change of policy in this respect, but that they are merely an expression of existing policy.

[36] 11 Cox 483 at p. 489.
[37] L.R. 7 Q. B. 741.

If this is a correct interpretation to be implied from the above remarks, the case of *Starr* v. *Chase* does not depend entirely for its broad conclusions, upon the fact that the statute of 1869 was part of the law of Manitoba. It has a much broader application as an interpretation of the common law.

Public policy has been described as "an unruly horse." The courts have been hesitant to resort to considerations of public policy to arrive at the settlement of disputes. A free application of interpretations of public policy has its obvious dangers. Also, where rules of public policy have been applied, the limits of such applications should be closely examined. With respect to combinations in restraint of trade considerations of public policy have intervened against the enforcement of the bargains as between the parties. Unless the combination amounts to a conspiracy, and thus become punishable or actionable, the combination is innocent in relation to third parties. Its only aspect of illegality consists, from the viewpoint of public policy, in the terms of the bargain that are onerous by their restraint of freedom of action of the parties themselves. But the vicious feature of such an arrangement seems to disappear as the result its illegality. Since the parties are by law free to withdraw, and their rules are obeyed only so long as the parties give a continuing consent to them, the unenforceability of these combinations would seem to purge them of any real taint. In this respect they are in a category quite different from agreements for an immoral consideration, or for an unlawful or criminal purpose.

It is important to consider, in determining whether or not there has been any real change of public policy which should be recognized by the courts in dealing with the civil status and disabilities of trade unions, the essential distinction with reference to ordinary property rights between public policy as to restraint of trade and public policy as to the legal results that flow from an agreement unenforceable by reason of restraint. Statutes passed in England, the Dominion of Canada, and in the common law provinces of Canada do not give evidence of any change in public policy in its view of the unenforceability of the rules and resolutions and collective bargains of trade unions that are in restraint of trade. The effect of these statutes is indeed quite the reverse. The Trade Union Acts passed in England above referred to specifically reserve the unenforceable features of trade union rules as between the members of the union. The Trade Union Act of 1913,[39] which enabled registered Trade Unions

[38] 39 L.J.M.C. 54.

to apply in a specified manner funds for political purposes did not attempt to alter the unenforceable feature. Nor did the Trades Disputes and Trade Unions Act of 1927,[40] which was designed to prevent the recurrence of a general strike such as took place in 1926.

The same remarks would apply to Dominion legislation. The Dominion Trades Union Act[41] contains the same reservations as appear in the English statutes. Section 497 of the Criminal Code deals only with the criminal aspect and may be regarded as no evidence of change of public policy in this respect. Section 502A of the Criminla Code, enacted in 1939,[42] may indicate a change in public viewpoint as to the necessity of trade unionism for the protection of labour, in so far as this section creates a new criminal offence for the dismissal of workers for the "sole" reason that they engage in trade union activities, nevertheless it does not touch the question of illegality in the sense that is here discussed. Further, if we look at article 427 in the Labour Section of the Treaty of Versailles as a general expression of public policy, even though this section has not been formally ratified by the Dominion parliament or any provincial legislature, we find that it lays down as a second principle, merely: "The right of association for all lawful purposes by the employed as well as the employers."

Five of the common law provinces have recently passed legislation dealing with trade unions. In 1937 an act was passed in British Columbia, "The Industrial Conciliation and Arbitration Act,"[43] which provides that it shall be lawful for employees to bargain collectively through a negotiating committee or a trade union, and employers are compelled to bargain with the agency duly elected. The Act sets up conciliation machinery and provides that "No court shall have power or jurisdiction to enforce any award made under the Act." The element of unenforceability is thus carefully retained. In British Columbia the Trade Union Act[44] limits the liability of trade unions for torts in industrial disputes under certain circumstances.

In Alberta an act similar to the British Columbia Industrial Conciliation and Arbitration Act was passed in 1938,[45]

[39] 2 &3 Geo. V. c. 30.
[40] 17 & 18 Geo. V., c. 22.
[41] R.S.C. 1927, c. 202.
[42] 1939 (Can.) c. 30, s. 11.
[43] 1937 (B.C.), c. 31. 1938, c. 23.
[44] R.S.B.C. 1938, c. 289.
[45] The Industrial Conciliation and Arbitration Act, 1938 (Alta.), c. 57, am. 1941, c. 20.

In Nova Scotia the "Trade Union Act" was passed in 1937[46] providing that it shall be lawful for employees to form themselves into a trade union and to join the same when formed and that it is unlawful for employers not to negotiate with a union. "Trade union" is defined as any *lawful* association formed for the purpose of advancing in a *lawful* manner the interests of employees in respect of their employment. In Saskatchewan a similar act was passed in 1938.[47]

In Manitoba, "The Strikes and Lockout Prevention Act"[48] was passed in 1937. It provides conciliation machinery for the settlement of industrial disputes and recognizes the right of employers and employees to organize for any lawful purpose. It also declares that employers and employees shall have the right to bargain with one another individually or collectively through their organizations or representatives. (Sections 45 and 46.) There is no provision that compels employers to bargain collectively.

Legislation was enacted in Quebec on a different model from that passed in the common law provinces. The Collective Agreement Act[49] passed in 1940, combines collective bargaining procedure with a system for imposing standards of wages, hours, and apprenticeship upon industrial areas. The Lieutenant-Governor-in-council may order that a collective agreement, upon application, shall be binding upon employees and employers, and a cause of action is given for the breach of such agreements. In this respect it differs fundamentally from the legislation of the other provinces. It further enacts that the provisions of such an order shall govern and rule any work of the same nature and kind as that contemplated in the agreement within the area determined by the order. It thus endeavours to accomplish a purpose similar to that of the Industrial Standards Act of Ontario.[50]

In Ontario, the Industrial Standards Act does not deal with trades unions, or collective bargaining as such, but is designed to offer a procedure to fix certain minima of wages, hours, etc., for certain trades. The Industrial Disputes Investigation Act[51] adopts the provisions of the Dominion Act of this same name[52] and applies it to industries within the provincial

[46] 1937 (N. S.) c. 6.
[47] The Freedom of Trade Union Association Act, 1938 (Sask.) c. 87, am. 1941, c. 312.
[48] R.S.M. 1940, c. 200.
[49] R.S.Q. 1941, c. 163.
[50] R.S.O. 1937, c. 191.
[51] R.S.O. 1937, c.203.
[52] The Industrial Disputes Investigation Act, R.S.C. 1927, c.112

jurisdiction. The Dominion Act, by section 67, provides that no court shall have power to enforce an award made under the act. This legislation thus carefully preserves the unenforceability of industrial settlements.

In Ontario any change in the general direction of public policy with regard to the recognition of trade unions has not been chrystallized in legislation, unless the two statutes referred to might be so interpreted (see *Starr* v. *Chase*, at p. 508). Nevertheless, the continued existence, and persistent growth of these organizations and their increasing recognition in industrial practice would indicate a general public recognition of the legitimacy of their purposes and activities, in spite of their inherent illegality as being in restraint of trade. The growth of legislation in England, and the Canadian provinces, and section 502A of the Criminal Code, might also be regarded as a reflection of general public opinion from which Ontario cannot entirely be segregated as if preserved in isolated immunity. It would be strange indeed if the most highly industrialized province in Canada were considered to be untouched by the general trend of public policy.

Yet this apparent change of public opinion merely amounts to this, that in the public mind trade unions are regarded as legitimate organizations in their dealings with employers, and no doubt also as to their general property rights. Is this, however a change in public policy at all? If so, is it a change of which the common law may take cognizance? If it is a rule of the common law that an organization that is illegal in restraint of trade, has no means of enforcing its property rights in any court as against third parties, as was indicated by Raney J. in the *Polakoff* case, it is doubtful whether judicial notice of any general change in public policy could be taken, so as to justify a court in varying a rule that is a rule of law. For it is clear that as to the special question of illegality as being in restraint of trade, public policy as evidenced by all the statutes referred to, has not changed.

We are faced then with two distinct views as to the status and disabilities of trade unions under the common law. The one as expressed by Raney J., and indicated by statements such as appear in Slesser on "Trade Union Law",[53] is that illegality in restraint of trade renders trade unions helpless to take any legal action for any purpose. In this view they cannot protect their property, nor hold land.[54] Their trustees cannot be held liable

[53] *Slesser, Trade Union Law*, 3rd ed. 1927, p. 17.
[54] *Re Amos, Carrier* v. *Price* [1891] 3 Ch. 159.

to account to members.[55] They are beyond the pale of the law except that actions can be brought against their trustees in certain circumstances and recovery obtained to the extent of their trust funds.[56] They cannot sue, but can be sued.

On the other hand there is a second view which is a logical extension of the principles indicated by Duff J. in *Starr* v. *Chase*. That view interprets the rule of common law to be, that although an organization may be illegal as being in restraint of trade, so long as it is not formed for an immoral, unlawful or criminal purpose, it has the same rights and privileges to proceed by representative action for the protection of its property rights as any unincorporated association that is not illegal as being in restraint of trade. It is not clear what Duff J. had in mind when he used the expression "the policy of the law". It may be open to question whether this refers to public policy, or a rule of law in the ordinary sense. It may be logically contended, however, that a broad interpretation of this judgment lends authority to the proposition that the common law does not deprive an organization that is in restraint of trade from exercising ordinary rights of property against third persons.

The doubts that exist from the confused state of the authorities can only be resolved by a judicial decision that deals conclusively with this question, or by a statute that is carefully drafted to clarify these uncertainties.

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[55] *Evans* v. *Heathcote*, [1918] 1 K.B. 418 at p. 437. Cf *Bishop* v. *Kitchin*, 38 L.J.Q.B. 20; *Rigby* v. *Connol*, 14 Ch. D. 482.

[56] *Barrett* v. *Harris*, 51 O.L.R. 484; *Metallic Roofing Co.* v. *Local Union No 30*, 9 O.L.R. 171.