CASE AND COMMENT

LABOUR RELATIONS — CERTIFICATION OF BARGAINING AGENT WITHOUT A VOTE — REPORT OF INVESTIGATING OFFICER — RIGHT OF RESPONDENT TO CROSS-EXAMINE. — A recent case decided by the Wartime Labour Relations Board (National), on appeal from the Nova Scotia Wartime Labour Relations Board, raises several questions that are significant, not only for their bearing on labour relations generally, but more especially on the rights of interested parties before quasi-judicial tribunals.[1] The Nova Scotia Board had certified the petitioning trade union following a check of company payrolls and union records by the Board's investigating officer. The report of the officer revealed that 241 out of a total of 477 employees were members of the union. The company appealed the order for certification to the National Board on the grounds *inter alia* that:

(1) "in the circumstances disclosed by the evidence the Provincial Board should have directed that a vote be taken", and

(2) "the Provincial Board acted upon information that was not disclosed or made accessible to the present Appellant and consequently the Appellant had no opportunity to check or cross-examine on such evidence".

The National Board dismissed the appeal, pointing out, with respect to item (1) above, that under the Wartime Labour Relations Regulations[2] the Provincial Board could exercise a discretion as to whether or not a vote of employees should be taken and that, in the absence of evidence that it was mistaken in its findings of fact, the National Board would not interfere with the exercise of such discretion.

It may be of interest to note however that in a previous case,[3] which came to the National Board in the first instance, that Board issued some procedural rulings including the following: "if the Board finds that the majority of the employees affected who belong to the applicant Union is not substantial . . . . , the Board will in most cases, on the application of the employer,

[1] *Cosmos Imperial Mills Limited (Cosmos Division)*, Appellant (Respondent), and *United Textile Workers of America (A.F.L.) Lodge 152*, Respondent (Petitioner), 1 D.L.S. 7-655.

[2] See section 7, Order in Council P.C. 1003 of February 14th, 1944 (the Wartime Labour Relations Regulations).

[3] *International Union of Mine, Mill and Smelter Workers, Local 240*, Petitioner, and *Wright-Hargreaves Mines Limited et al.*, Respondents, and *Independent Canadian Mine Workers' Union et al.*, Interveners, 1 D.L.S. 7-542.

direct a vote". It was not stated clearly whether it was intended that this should apply to the practice of Provincial Boards nor did the National Board ever define what circumstances were contemplated by the qualification "in most cases". Therefore it cannot be said that the Nova Scotia Board's decision was inconsistent with the National Board's previous ruling. Nevertheless it has come to be an accepted practice in labour relations circles that under P.C. 1003 some of the Boards at least will, as a matter of course, order a vote at the request of the employer where the majority revealed by a check of records does not reveal a substantial majority. It is suggested that the practice in this respect might be more clearly defined.

In its practical aspects the question of a vote of employees versus an examination of union and payroll records, as a mode of determining whether a majority favours the union, is still the subject of some debate among both employers and unions. The Wagner Act in the United States (and Ontario's now repealed Collective Bargaining Act) provides merely for a vote of employees. In Canada employers, and particularly employer organizations, have generally favoured an examination of actual membership records by an inspecting officer. Hence the provision in P.C. 1003 for this method as an alternative procedure to a vote and hence also the procedure in Quebec where certification is based solely on actual membership and a vote is only provided for in exceptional circumstances.[4]

Unions were at first opposed to the method of determination by an examination of records because it complicated their organizing efforts. It is generally considered that in a vote up to twenty per cent of the ballots for the union are cast by non-member sympathizers; the vote is therefore indicative of an informal preference rather than of actual and considered support. The current impression is however that the "audit" procedure is quite acceptable to the unions.

It should be emphasized that the system of certification on the basis of a membership inspection by an officer of a Board is by no means fool-proof. In the instant case the employer, in view of the second ground of appeal mentioned above, apparently had some doubts about the accuracy of the investigating officer's conclusions. The Board, in dealing with the contention that the employing company should have been given an opportunity to cross-examine the investigating officer and to examine the union records, stated that:

[4] Quebec Labour Relations Act, sections 7 and 8.

> the position of the Company on an application for certification is not, however, the same as that of a litigant in court proceedings. Upon an application for certification, the Company as an interested party is entitled to give evidence and to make representations to the Board, but it does not follow that it also has the right to check Union membership records or to cross-examine the Board's investigating officers with respect thereto. It is the duty of the Board to satisfy itself as to the strength of the Union in the employee unit.

Despite this generalization by the National Board, there is a suggestion that the case may have been decided on another ground, namely the fact that at the original hearing the Company stated it did not question the investigating officer's findings.

In any event, while it may be conceded that an employer in such a proceeding is not a litigant, does it follow that he should *not* be allowed to cross-examine the investigating officer? While the employees themselves are primarily concerned in the selection of a bargaining agent, it would seem only equitable that the employer should not be relegated to a purely passive position. It is one thing to insist upon neutrality on the part of an employer but quite another to insist that he shall have no status to assure himself, and to help the Board assure itself, that a majority of his employees have in fact chosen a particular bargaining agent. "Fishing expeditions" may be impracticable and even undesirable, but in such proceedings, when the Board's functions of examination and checking must of necessity be delegated to an administrative officer, the accuracy of his methods and the validity of his deductions, as well as possibly his integrity, should surely not be considered immune to scrutiny by the parties.

If it is the law that they are immune, then both employers and unions might be well advised to press for statutory elections, particularly where a preliminary check of records reveals close results. In any event there are persuasive reasons for greater certainty in such matters, as well as for provincial uniformity.

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PRACTICE AND PROCEDURE — METHODS OF MAKING "APPLICATIONS" — STATUTES AUTHORIZING "APPLICATIONS" WITHOUT PROVIDING SPECIAL PROCEDURE. — The judgment of Boyd McBride D.C.J. in *In re The Mothers' Allowance Act; In re Julas*[1] paves the way for a sequel to the case note on *Kempf* v. *Kempf*[2]

[1] [1946] 3 W.W.R. 18.
[2] [1945] 3 W.W.R. 614.

published in the Canadian Bar Review for April 1946.[3] Like the *Kempf* case, *In re Julas* considers the method by which an application to the court should be made where the statute authorizing the application does not specify the form to be used.

Only a few of the facts in the *Julas* case relate to the question of procedure. After Julas died a dispute arose as to whether, for the purposes of The Mothers' Allowance Act of Alberta,[4] he had had his home at the time of his death in the City of Edmonton or in the Municipal District of Eagle. Section 13 of the act reads as follows:

> In the event of any dispute arising as to where a man had his home at the time of his death . . . . the District Court Judge . . . . shall decide the same . . . .

The Superintendent of the Mothers' Allowance Branch commenced proceedings to have the dispute determined by the District Court Judge. The proceedings took the form of an application to the judge and were launched by the filing of an originating notice. Both of the municipal corporations were named as respondents. No objection was raised as to the form of the proceedings.

Although his Honour thought that the use of a simple notice of motion would have been preferable he entertained the application, found in fact that the home of the deceased had been in the City of Edmonton and granted consequential relief.

Towards the end of his judgment[5] the learned judge took the opportunity of saying something about the form of the proceedings. As a point of departure he held that section 13 gives no indication of the procedure to be required by the judge, that the judge is entirely untrammelled and that it is a matter wholly in his discretion.

His own view was that the proper practice, or at least the preferable practice, is to use a simple notice of motion. For that option he advanced two somewhat distinct arguments.

The first was that the right to resort to originating notice under The Mothers' Allowance Act is not expressly conferred by statute nor by the Rules of Court, and, therefore, is not the proper practice "if the judgment of Walsh, J. in *Baldwin* v. *Bowden*[6] is strictly adhered to". Walsh J. had expressed that very view in *Baldwin* v. *Bowden* and had dismissed an application on the ground that it had been made by originating summons and that

[3] (1946), 24 Can. Bar Rev. 319.
[4] R.S.A., 1942, c. 302.
[5] [1946] 3 W.W.R., at pp. 25-26.
[6] [1912] 2 W.W.R. 844.

the right to proceed in that way was not available because it had not been expressly conferred under some statutory provision or some rule of court. It is possible however that Walsh J. was not intending to consider whether an application can be made by originating notice in cases where an application to the court is authorized, but that he was dealing with the anterior question of the choice between an action and an application and was merely holding that the proper procedure in the case before him was to commence an action and not to make an application.

At all events McBride D.C.J. did not strictly adhere to the precedent set by Walsh J., which, as in the *Baldwin* case, would have entailed the dismissal of the application; quite to the contrary he heard the application and made an order, thereby indicating that he must have concluded that the application could be made by originating notice even though some other procedure might be preferable.

The reasoning of *Baldwin* v. *Bowden* can hardly be reconciled with the decisions of Warrington J. in *In re Meister Lucius & Bruning, Ltd.*[7] and of Taylor J. in *In re The Great West Life Assurance Co. and Appleby.*[8] They espouse the theory that an originating notice can be used whenever an act provides for an application being made but does not prescribe any form; this principle is more liberal than the one suggested by Walsh J.; it does not require that an originating notice be expressly authorized but is satisfied if no other method is provided. This would be sufficient to validate the proceedings in the *Julas* case. At the same time it does not go to the extent of preventing the Julas application from being made in some other way.

Two very recent English decisions — *Re Squire's Settlement*[9] and *Re James*[10] — appear to refer to *In re Meister, supra,* and to carry its effect one step further by holding that where a statute permits an application to be made but there is no provision prescribing the procedure to be followed the application not only may, but must, take the form of an originating motion and that if it is made in any other way, *e.g.* by summons, the application must be dismissed. Complete reports of these two decisions are not yet available. They are mentioned in The Law Journal.[11] Their attitude seems to be less liberal than that of the *Meister*

[7] [1914] W.N. 390.
[8] [1934] 1 W.W.R. 13.
[9] (1946), 62 T.L.R. 133; [1946] W.N. 11. See also (1945), 174 L.T. Rep. 150.
[10] (1946), 90 Sol. Jo. 320.
[11] The Law Journal, Vol. 96, pp. 170 and 409.

and *Appleby* cases, but, at the same time, it is diametrically opposed to the view advanced by Walsh J.

The other reason put forward in *In re Julas* for giving preference to a notice of motion is that the applicant should adopt the most inexpensive and expeditious means of getting before the court. For this view the authorities relied on were *Royal Trust Co.* v. *Bonsall*[12] and *Stubbs* v. *Allen*,[13] both of which are judgments of Taylor J.

Taken by itself, the *Julas* case, in addition to furnishing a decision on one particular kind of application, supplies further authority for the proposition that, where no special procedure is prescribed, the application to the court can be made either by notice of motion or by originating notice and that, while the court may have a preference for one method (probably a notice of motion), the use of the other should not affect the success of the motion. Its weight is however diminished by the fact that the two English cases, which are almost contemporaneous with it, favour the use of the originating notice and actively discountenance the use of any other procedure.

The results are still inconclusive and confusing. While this note and the earlier note on *Kempf* v. *Kempf* have tried to analyse the majority of the cases and to draw some conclusions as to general trends they do not attempt to lay down any general rule to be used in every field in all jurisdictions. To transplant decisions from one field to another field in the same jurisdiction may sometimes prove dangerous. To transplant decisions from one jurisdiction to another jurisdiction may prove even more dangerous because of fundamental but half-concealed differences in statutory provisions and Rules of Court.

While the point cannot be made positively until the reports are available, there is apparently the danger that *In re Squire's Settlement*[14] and *re James*[15] in contrast with *In re Meister Lucius & Bruning, Ltd.*[16] and some of the Canadian cases, may advocate that where a mistake is made in choosing the form of the application the court should not excuse the error as being an innocuous irregularity but should apply the sterner solution and dismiss the application.

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[12] [1925] 2 W.W.R. 103; [1925] 3 D.L.R. 141.
[13] [1934] 1 W.W.R. 122.
[14] (1946), 62 T.L.R. 133; [1946] W.N. 11.
[15] (1946) 90 Sol. Jo. 320.
[16] [1914] W.N. 390.

WRIT FOR SERVICE EX JURIS — CONCURRENT WRIT — VARIATION FROM FORM 2 — IRREGULARITY OR NULLITY — ONTARIO — Are rules of practice to serve as a tyrant, denying the trial of an issue on the merits, where a departure therefrom has not misled or substantially injured the opposite party, or, as so aptly stated by Middleton J. in *Bank of Hamilton* v. *Baldwin*,[1] as "a nurse yet more gentle and sympathetic than the common law, enabling the defect to be cured".

What significance is to be attached to Rules 184 and 809? What non-compliance, variation or modification constitutes a curable irregularity and what a nullity? The distinction between mere irregularity, which is amendable, and such a defect as to render the proceedings incurable and void is not easily to be drawn.

While not of paramount importance, the decisions of Barlow J. in *Fairweather* v. *Fairweather et al.*[2] and *Freeman* v. *Freeman et al.*[3] raise an interesting point of practice, by which many practitioners may be affected in respect to actions now pending trial.

As such, these judgments deserve close consideration and study. In both cases a concurrent writ had been issued pursuant to an order for service ex juris. The writ had been marked "concurrent", as required by Rule 7, and in the *Freeman* case, while the writ and concurrent writ were both issued on the same day, the date of teste did, but the date of issue did not appear. In the *Fairweather* case the writ was issued on one day and the concurrent writ on the day next following, and here the concurrent writ failed to show the date of teste in addition to the date of actual issue of the concurrent writ. His Lordship ruled that the concurrent writ should have been marked "concurrent this day of 1946".

The concurrent writs for service ex juris were in both cases in Form 1 rather than in Form 2, as prescribed by Rule 6, and, while the date for entry of appearance had been changed to conform to the order of the Master authorizing the issue thereof, the words "and of the Plaintiff's Statement of Claim delivered herewith" had not been inserted.

Whatever may be the effect of the failure to have the concurrent writ show both the teste date and the date of actual issue, it is respectfully submitted that the failure to have the writ for service ex juris conform to Form 2, by reason of the omission of

[1] (1913), 28 O.L.R. 175.
[2] [1947] OW.N. 2.
[3] [1947] O.W.N. 11.

the words quoted above, does not render it a nullity, but that this is a curable irregularity as not being "in matter of substance".

The reason for the addition of the words "and of the Plaintiff's Statement of Claim delivered herewith" is quite apparent, in that Rule 28 provides that where a defendant is to be served out of Ontario with a Writ of Summons, the Statement of Claim shall be served therewith, unless the writ is specially endorsed. These being matrimonial causes, it was necessary, in any event, to serve the Statement of Claim with the Writ of Summons. What then would be the situation in the case of a specially endorsed writ, where the Statement of Claim does not have to be served therewith? The use of Form 2, incorporating the language aforementioned, would in such a case prove ambiguous and the presence of these words redundant.

The cases quoted by His Lordship in support of his decision can be distinguished on closer reading.

In *Grant* v. *Kerr*[4] an ordinary form of writ was taken by the plaintiff to New York City and served there upon the defendant. There was no order at all for a concurrent writ or, in the first instance, for an order authorizing the issue of a writ for service ex juris. The service was necessarily held to be void.

In *Edgeworth* v. *Allen*[5] the Master's order provided for appearance in twenty days, but the writ said ten days. The writ itself was unsigned and undated. This was obviously a case where the court should not amend, since the opposite party had necessarily been misled by the error.

In *Sedgwick* v. *Yedras Mining Co.*[6] a writ was issued in which the defendants' residence was set out as New York and London, the latter address being fictitious. The secretary of the defendant company was served while in London, no order had been made for a concurrent writ and the original writ could not have been issued without an order if only New York had been shown as the proper residence of the defendant. This writ was obviously void from its inception.

A case not considered by his Lordship, but which is directly in point, is *Dickson* v. *Baldwin.*[7] Here a writ in the form provided for service within the jurisdiction was served out of the jurisdiction and the notice prescribed to be endorsed upon a writ where service is made out of the jurisdiction was entirely absent. It was held

[4] (1911), 2 O.W.N. 770.
[5] (1912), 3 O.W.N. 1375.
[6] (1887), 35 W.R. 780.
[7] [1895] 2 Ch. 62.

that the defendant was not misled and the motion to set aside the proceedings was refused. This judgment was cited with approval by Middleton J. in *Bank of Hamilton* v. *Baldwin* (*supra*) where an old form of writ was used printed during the reign of King Edward VII, and no change was made in it, so that the command in the writ was in the name of the deceased, and not the reigning Sovereign. In concluding Middleton J. says:

> I have no doubt that this is the kind of defect or irregularity in the proceedings which the Court is empowered to amend. The duty cast upon the Court by Con. Rule 312 is to make all amendments necessary for the determining of the real matter in dispute. The real matter in dispute here is the existence of the debt. When the plaintiffs issued the Writ, they had, within the time limited by the law, resorted to the Court for the enforcement of their claim. The defect in the Writ arose from the default of the solicitor, an officer of the Court, in using the wrong form. This defect was not discovered because of the default of another officer of the Court, the Local Registrar; and the defendant was in no wise misled. When the Writ was served, the defendant knew that he was called upon to defend himself in the Court. He knew the place where he was to enter his appearance; and the fact that there was a mistake in the name of the Sovereign was abundantly plain.

In *Thompson* v. *Thompson et al.*[8] Roach J. cites with approval this judgment of Middleton J. and enunciates the general principle that "the Court should amend where the opposite party has not been misled or substantially injured by the error".

How could a defendant served ex juris be misled by the absence of the words "and of the Plaintiff's Statement of Claim delivered herewith" in the writ? The Statement of Claim being served with the writ, time for appearance ran from the date of service of the writ. This is clearly a case where the opposite party has not been misled or substantially injured by the error and it is submitted, therefore, that the error should have been treated as curable and not fatal.

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THE CROWN AND THE CABINET: A NOTE ON MR ILSLEY'S STATEMENT. — On November 12th, 1945, Mr. Ilsley, then acting Prime Minister, told the House of Commons that "The authority of the government is not delegated by the House of Commons; the authority of the Government is received from the Crown. . . His Majesty's advisers are sworn in as advisers to the crown. The government is responsible to parliament, . . . but that is a

[8] [1944] O.W.N. 55.

different thing from the doctrine that the government is a committee of the House of Commons or that it exercises authority delegated by the House of Commons. That is not so."[1]

The Opposition parties fiercely attacked this position, quoting freely from speeches by Mr. King, notably one of January 29th, 1934, in which he described the Cabinet as "an executive which derives its powers from and is responsible to the House of Commons".[2] Curiously enough, no one quoted Mr. King's attack, in the autumn of 1926, on Mr. Meighen's Government of that year, when he asked: "When was there a ministry in British history that undertook to carry on the government of the nation having no authority from parliament and no authority from the country?"[3] The attack has recently been renewed in an article by the Honourable C. G. Power in the issue of Maclean's Magazine for February 1st, 1947.

Mr. Ilsley stoutly maintained that he was not only "technically correct" (*i.e.* as a matter of strict law), which no one seems to have questioned, but also "constitutionally correct . . . and correct in spirit".[4] It was on this point that he was challenged, and the challenge was on the face of it impressive. But those who upheld the opposite doctrine, that the authority of the Government is delegated by the House of Commons or the electorate, appear to have overlooked certain highly important facts.

(1) Between the dissolution of one Parliament and the election of another, a period which in Canada may last for several months, the Government continues to hold office and exercise its functions. It may have to make vitally important decisions, both in domestic and external affairs. It might have to decide the question of peace or war. Where does it get its authority? Not from the House of Commons, for there is no House of Commons; the old one is gone and the new one has not yet been elected. Nor from the electorate, for the electorate has yet to pronounce. The case is particularly clear if, as not infrequently happens, the old House was dissolved because the Government had been defeated in it. This was the position of Mr. Meighen's Government in the summer of 1926, after its defeat in the House on July 1st.

(2) If, as in Britain in 1834, December 1905 and October 1922, or in Canada in November 1873, a Government resigns without having been defeated in the House or at the polls, the new Government takes office without any authority from either

[1] House of Commons Debates, unrevised edition, pp. 2041, 2043.
[2] *Idem.*, November 13, 1945, p. 2098.
[3] *Idem.*, 1926-27, p. 47.
[4] *Idem.*, November 13, pp. 2100-01.

the House or the country and can claim no authority from either till it has been upheld in the House or at a general election.

(3) If a Government has secured a dissolution and comes back in a minority, it may decide to retain office till the new Parliament can meet and pronounce judgment. During that period it can certainly claim no authority from either the House or the electorate. This was the position of Peel's Government in 1835, Melbourne's in 1841, Derby's in 1852 and 1859, Salisbury's in 1886, Mr. Baldwin's in 1924 and Mr. King's from the end of October 1925 till January 1926.

(4) If, as in Britain in 1783 and 1807, in Quebec in 1878 and 1891, and in British Columbia in 1898, a Government undefeated in the House is dismissed, the new Government takes office without any authority from the House or the country and can claim no such authority till it has been upheld in the House or at a general election. This case is unlikely to arise under modern conditions, but cannot be entirely ruled out.

It is therefore evident that repeatedly in British history Ministries have undertaken to carry on the government "having no authority from parliament and no authority from the country"; that this is bound to continue to happen; that in the circumstances indicated above and possibly others as well, Governments, under the British system, derive their authority, not only in law but in constitutional fact, solely from the Crown and could derive it from no other source; and that Mr. Ilsley was absolutely right in claiming that his statement was "constitutionally correct and . . . correct in spirit".

All the criticism of his position, in fact, appears to have arisen from the mistaken notion that there is some conflict between the principle that the Government's authority is derived from the Crown and the principle that the Government is responsible to the House of Commons and the electorate. As Mr. Ilsley himself pointed out, there is no such conflict. The Government derives it authority from the Crown *and* is responsible to the House and the electorate. Any Government can be removed from office by the House or the electorate: no Government can retain office without the support and confidence of the House which represents the electorate.

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