

## Correspondence

### Judicial Policy-Making in Labour Relations

TO THE EDITOR:

Mr. Gordon's comment at page 85 of your January issue, in which he questions the judgment of the Supreme Court of Canada in *Smith & Rhuland Ltd. v. The Queen ex rel. B. Andrews*, leads me to offer some additional observations. Granted that the labour relations boards are administrative tribunals, that the rules of statutory construction yield nothing but a series of conflicting and often contradictory precepts on the interpretation of the words "may certify . . .", and that the courts have a remarkable latitude in the extent to which they may interfere with the discretion of administrative tribunals, the question remains: Is it advisable that an administrative tribunal should exercise its discretion, in as vital and sensitive an area as the decertification of Communist-controlled trade unions, in order to solve a national policy problem? Professor Cohen, in his comment on the judgment of the Supreme Court of Nova Scotia in the same case (1952), 30 Can. Bar Rev. 408, expresses some doubts on this matter. The present writer would more definitely assert that such is not the function of a labour relations board, or any other tribunal.

The reason is not that courts have no policy functions. The fiction of a purely mechanical judicial interpretation of statute or precedent has long been discarded by all serious contemporary students of jurisprudence. The irony of the situation is that courts by and large tend to apply this mechanistic interpretation to the judge-made "lawyer's law", that is, to a field where the legislator intervenes rarely, accidentally and insufficiently, and where the development of the law in accordance with changing social needs remains, as in the past, a paramount function of the law court. On the other hand, the courts are inclined to interfere, albeit somewhat arbitrarily and uncertainly, through their prerogative jurisdiction with matters which are eminently in the sphere of "political law", that is, in the sphere which is not and cannot be ignored by the legislator. The question of certification of a labour union which is a genuine bargaining agency and quite clearly engaged in the

processes of collective bargaining outlined by the Trade Union Act, but is subject to Communist influence, is quite obviously a policy problem of direct and central importance. It can be presumed to be of sufficient importance to be dealt with by the legislator.

The Canadian Parliament has quite clearly and deliberately refused until now to pass legislation which would discriminate against trade unions on the ground of Communist influence. At the time of writing, the province of Quebec has passed legislation which will discriminate against trade unions whose executives are influenced by Communists, and the constitutionality of this measure will possibly be tested in due course. In other countries which have recently coped with this problem, interference, if any, has been by legislative measures. A detailed account of the Australian experiment has been given by Professor F. R. Beazley in this review (1951), 29 Can. Bar Rev. 490. There is also recent South African legislation on the subject. The position is far more complex in the United States where the Smith Act has been used—and this use has been confirmed by the interpretation of the United States Supreme Court in *Dennis v. U.S.* (1951), 341 U.S. 494—not indeed to outlaw the Communist Party but to convict and thereby render ineffective active members of the party for offences against the act because of their membership as such. In this context, it is particularly interesting to note the recent discussion of the whole problem by an American lawyer in the *Notre Dame Lawyer*—a journal which will not easily be accused of Communist sympathies (A. L. Scanlon, *The Communist Dominated Union Problem*, Vol. 28, p. 458).

The learned author, after a careful survey of the different attempts, legislative, administrative and judicial, which have been made or could be made to prevent Communist-dominated unions from exercising the rights accorded to unions in general, concludes that all these measures are precarious, and most of them likely to have an effect opposite from that intended. Mr. Scanlon, in referring to the Canadian decision of *Branch Lines Ltd. v. Canadian Seamen's Union*, [1951] O.R. 178, 2 D.L.R. 358, a decision also referred to in the judgment of Rand J. in the case under discussion, points out that American law would not permit the "de-certification by definition" technique employed by the Canada Labour Relations Board. Mr. Scanlon's concluding observations, however, definitely apply to the attempt to cope with the problem of Communist control by decertification:

The question of whether a certain union is under the control of individuals who themselves are Communists presents fact questions of the broadest possible scope, not related to any employer-employee relationship, at any particular time, nor at any particular place, but spilling

over into the broad avenues of political philosophy. To proceed there would be a very difficult and possibly dangerous adventure

The writer concludes, possibly where he began, recognizing the threat which the Communist-dominated union will continue to pose as long as it maintains collective bargaining strength in strategic areas of American industry; but, nevertheless, aware of the difficulties which any attempt to deal with the problem presents. If legislation is absolutely necessary, it would appear better to have legislation aimed directly at the suspected individual union leaders; and not to place the great majority of loyal members on a contingent liability basis, whereby they may be penalized for the actions of their leaders over whom, for all practical purposes, they may have no control. Such an approach, while still open to some of the criticism discussed herein with respect to other suggested remedies, would seem to better preserve the dual objective of maintaining security within the bounds of liberty.

The doctrine of separation of powers has never been absolute. In the complex conditions of contemporary society we have become fully aware of the many fields in which the legislative, administrative and judicial functions overlap. Nor is a distinction between "lawyer's law" and "political law" one which can be used without considerable reservations. It does, however, remain true that there is a broad area of law which the legislator traditionally leaves to the courts to develop. The vast majority of contract, tort and property relations are in that field. On the other hand, problems which are deeply influenced by the changing pressures and conditions of contemporary policy must normally be handled by a legislator. As the recent example of Quebec shows, there is no reason whatever to assume that the Dominion and provincial legislatures are not in a position to act on the problem of Communist controlled unions if they were so minded and a majority supported the measures. This being so, the majority decision of the Supreme Court must be welcomed, as an attempt to keep judicial policy-making within proper bounds.

W. FRIEDMANN\*

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### Litigation under the Excise Tax Act

TO THE EDITOR:

I have read with interest the excellent article entitled "Problems of Litigation under the Excise Tax Act" written by Mr. Wolfe D. Goodman in the February issue of the *Canadian Bar Review*.

Under the heading of "Civil Proceedings" Mr. Goodman deals at pages 185-187 with the onus of proof in an action by the Crown for recovery of excise tax and points to the divergence of

\* Professor of Law, University of Toronto.

opinion between the views expressed by Kelly D. J. in his reasons for judgment in the *King v. Allison*, [1950] Ex. C.R. 260, and the alternative views of Cameron J. in the case of *King v. Pacific Bedding Company Limited*, [1950] Ex. C.R. 456, as compared with the opinions in other cases such as *Sarnia Brewing Company v. The King*, [1929] S.C.R. 46. The fact that the decision in the *Sarnia* case was a decision of the Supreme Court of Canada might give the impression that it is of higher authority than the decision in the *Pacific Bedding* case. The fact is, however, that the decision of Cameron J. was also upheld by the Supreme Court of Canada on appeal. Unfortunately the decision of the Supreme Court is not reported, although a reference to the dismissal of the appeal will be found in [1951] S.C.R. at page viii. It would accordingly seem that, in so far as recent authority is concerned, the view of Cameron J. in the *Pacific Bedding* case is the latest and most authoritative on this vexed question.

GEORGE L. MURRAY\*

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## Books Received

*The mention of a book in the following list does not  
preclude a detailed review in a later issue.*

*American Liberty and "Natural Law"*. By EUGENE C. GERHART. With an introduction by ROSCOE POUND. Boston: The Beacon Press. 1953. Pp. xi, 212 (\$3.00)

*Annuaire de Jurisprudence de Québec 1953* Sous la direction de ROBERT LÉVÊQUE, c.r. Montréal: Wilson et Lafleur (limitée). 1954. Pp. 504. (\$6.50 bound)

*Annual Report of the Council of the Law Society of Scotland for the Year ended 31st December 1953*. Edinburgh: The Law Society of Scotland. 1954 Pp 132. (No price given)

*Archbold's Pleading, Evidence & Practice in Criminal Cases*. Thirty-third edition. By T. R. FITZWALTER BUTLER and MARSTON GARSIA. London: Sweet & Maxwell Limited, Toronto: The Carswell Company, Limited. 1954. Pp. cxciv, 1691. (\$16 25; Noter-up Service, \$1.50 extra)

*The Carriage of Goods by Sea Act, 1924*. By RAOUL P. COLINVAUX. London: Stevens & Sons Limited, Toronto: The Carswell Company, Limited. 1954. Pp xxv, 203. (\$4 25)

*Civil Liberties and the Vinson Court* By C. HERMAN PRITCHETT. Chicago: The University of Chicago Press. Toronto: The University of Toronto Press 1954. Pp vi, 297 (\$5 00)

*A Concise Law Dictionary*. By P. G. OSBORN. Fourth edition London: Sweet & Maxwell, Limited, Toronto: The Carswell Company, Limited. 1954. Pp vii, 399. (\$3 25)

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\*George L. Murray of Campbell, Meredith & Murray, Vancouver.

*Elements of English Law.* By WILLIAM GELDART Revised by SIR WILLIAM HOLDSWORTH and H. G. HANBURY, D C.L. Fourth edition. The Home University Library of Modern Knowledge London, New York and Toronto. Oxford University Press 1951. Pp x, 220 (\$1.25)

*Essays on the Conflict of Laws.* By JOHN DELATRE FALCONBRIDGE, Q C., LL.D. Second edition. Toronto: Canada Law Book Company Limited. 1954. Pp. xxxii, 862. (\$25.00)

*Expropriation in International Law.* By S. FRIEDMAN, Docteur en Droit. Published under the auspices of The London Institute of World Affairs. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1953. Pp xv, 236 (\$6 75)

*The Federal Constitution of Switzerland.* Translation and Commentary by CHRISTOPHER HUGHES, with German Text. Oxford: At the Clarendon Press Toronto Oxford University Press 1954. Pp 223 (\$3 75)

*Government and Parliament A Survey from the Inside.* By HERBERT MORRISON, P.C., C.H, M.P London, New York and Toronto. Oxford University Press. 1954. Pp xiii, 363. (\$4 25)

*Governmental Liability: A Comparative Study* By H STREET, LL M., Ph D. Cambridge Studies in International and Comparative Law, No. IV. Cambridge: At the University Press Toronto: The Macmillan Company of Canada Limited. 1953. Pp. 223 (\$4 25)

*The Growth of Scandinavian Law.* By LESTER BERNHARDT ORFIELD. Foreword by BENJAMIN F. BOYER. Philadelphia: University of Pennsylvania Press for Temple University Publications. 1953. Pp. xx, 363. (\$8.50 U.S.)

*Hatred, Ridicule or Contempt: A Book of Libel Cases.* By JOSEPH DEAN. London. Constable & Company Limited. Toronto: Longmans, Green & Co. 1953. Pp. 271. (\$3.00)

*Income Tax Law and Practice (Commonwealth): Being the Income Tax and Social Services Contribution Assessment Act with Regulations and Other Acts, Together with Full Explanatory Notes* By N E CHALLONER, LL.B., A C.A (Aust.), and C. M. COLLINS, B.A, LL.B Australia: The Law Book Co. of Australasia Pty Ltd. Toronto: The Carswell Company, Limited. 1953. Pp. xlii, 1092. (\$22.00)

*the income tax: root of all evil.* By FRANK CHODOROV. With an introduction by J. BRACKEN LEE, Governor of Utah. New York: The Devin-Adair Company. 1954. Pp x, 116. (\$2.00 U.S.)

*Jurisprudence in Action: A Pleader's Anthology* Legal Essays Selected by the Association of the Bar of the City of New York Committee on Post-Admission Legal Education. With a foreword by HONORABLE ROBERT H. JACKSON. New York: Baker, Voorhis & Co, Inc. 1953. Pp. xii, 494. (\$5.75 U.S.)

*The Law of Expropriation.* By THE HONOURABLE GEORGE S. CHALLIES, M.A., M.C.L. Montreal: Wilson & Lafleur, Limited 1954. Pp. xli, 597. (\$17.50)

- The Legal Aid Society New York City 1876-1951.* By HARRISON TWEED. With a foreword by REGINALD HEBER SMITH New York: The Legal Aid Society 1954. Pp. ix, 122 (No price given)
- Origins of the Natural Law Tradition.* By ROBERT N. WILKIN, JOHN S. MARSHALL, THOMAS E. DAVITT, S.J., ARTHUR L. HARDING. Edited with an introduction by ARTHUR L. HARDING. Dallas. Southern Methodist University Press 1954 Pp. ix, 96 (\$3 00)
- Philosophy of Law* By PAUL SAYRE. Iowa City: State University of Iowa. 1954 Pp. 148 (No price given)
- Procedure at Meetings in Canada* By ARTHUR BEAUCHESNE, C.M.G., Q C, LL D, Lit D., F.R.S C, F R I S Toronto. Canada Law Book Co Ltd 1954 Pp vii, 198 (No price given)
- Report Concerning Alleged Attempt at Resale Price Maintenance in the Sale of Certain Household Supplies in the Chicoutimi-Lake St. John District, Quebec* By the Restrictive Trade Practices Commission. Ottawa. Department of Justice. 1953. Pp vii, 30 (No price given)
- Report Concerning an Alleged Combine in the Distribution and Sale of Gasoline at Retail in the Vancouver Area* Restrictive Trade Practices Commission Ottawa. Queen's Printer. 1954 Pp. vi, 165. (No price given)
- Report Concerning Alleged Instances of Resale Price Maintenance in the Sale of China and Earthenware* Restrictive Trade Practices Commission Ottawa. Queen's Printer 1954 Pp. ix, 79 (No price given)
- Snell's Principles of Equity* Twenty-fourth edition by R. E. MEGARRY, M A, LL B, and P. V BAKER, M.A, B C.L London: Sweet & Maxwell Limited Toronto: The Carswell Company, Limited. 1954. Pp. cxix, 627 (\$8 50)
- The Statute of Westminster and Dominion Status.* By K. C WHEARE, F B A Fifth edition London, New York, Toronto: Oxford University Press 1953 Pp. xvi, 347 (index pages unnumbered). (\$3.25)
- Sudbury Basin: The Story of Nickel.* By D M LE BOURDAIS. Toronto: The Ryerson Press. 1953. Pp xiv, 210. (\$3.00)
- Temperley's Merchant Shipping Acts.* Fifth edition by the HON. SIR WILLIAM LENNOX MCNAIR, LL.M, and JOHN PHILIPPE HONOUR, M.A. London. Stevens & Sons Limited. Toronto. The Carswell Company, Limited 1954. Pp lxxxiii, 923. (\$19.75)
- You and Your Family under Quebec Law: An Explanation of the Legal Status of the Married Woman in Quebec.* By WILHELMINA M. HOLMES and JOAN C. GILCHRIST. Toronto: McClelland & Stewart Limited. 1954 Pp 64. (\$1.00)