1953

*Feb. 24, 25, 26, 27
*June 8

THE LABOUR RELATIONS BOARD (B.C.)

AND

ATTORNEY GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA ..... APPELLANTS;

AND

CANADA SAFEWAY LIMITED..... RESPONDENT.

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL

Labour Law—Certiorari—Collective Bargaining—Labour Board's Jurisdiction—Power of Court to examine proceedings—Industrial Conciliation and Arbitration Act, R.S.B.C., 1948, c. 155, s. 2(1) "employee", exception (s)2(1)(a) "person employed in a confidential capacity"—ss. 2(4), 58(1).

The appellant applied under the *Industrial Conciliation and Arbitration Act,* R.S.B.C., 1948, c. 155, to the Labour Relations Board for certification as bargaining agent for certain office employees, the majority of whom were comptometer and power machine operators of the respondent. The latter opposed the application and upon the Board granting certification, sought by way of *certiorari* to quash the Board's decision and the certification. It contended that on the face of its decision the Board lacked jurisdiction in that it had found that with few exceptions the employees in question were employed in a confidential capacity within the meaning of the exclusionary clause in the definition of "employee" in s. 2 of the Act and that therefore they were not entitled to be included in any certification. Counsel for the Board argued contra that under ss. 2(4) and 58(1) whether a person is an "employee" within the meaning of the Act is a question to be determined by the Board and its decision shall be final. Farris C.J.S.C. heard the motion and ruled that a body of limited jurisdiction could not by an improper decision acquire jurisdiction and that the court had power to examine the proceedings to ascertain whether there was evidence before the Board to justify its decision. Having done so, he held that there was such evidence, and dismissed the application for the writ. His judgment was reversed by the Court of Appeal for British Columbia which held that the Board had erred in law in the construction it placed upon the relevant definition of "employee" and since the employees in question were employed in a confidential capacity, exceeded its jurisdiction in granting certification and that in consequence ss. 2(4) and 58 of the Act did not prevail to prevent the court from exercising its authority to review, in this circumstance, the decision of the Board as an inferior tribunal.

Held: That there was evidence before the Board to justify its conclusion that the comptometer and power machine operators were not employed in a confidential capacity within the meaning of s. 2(1)(*a*) of the Act.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey and Cartwright JJ.

Rinfret C.J. and Kellock J., dissenting, agreed with the conclusions of the court below.

Decision of the Court of Appeal for British Columbia, (1952-53) 7 W.W.R. (N.S.) 145 reversed, and judgment of Farris C.J.S.C., (1952) 6 W.W.R. (N.S.) 510, restored.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), allowing an appeal from the Order of Farris, Chief Justice of the Supreme Court of British Columbia (2), dismissing the respondent's motion for a Writ of *Certiorari*, and quashing a certificate of the Labour Relations Board.

C. W. Brazier and *R. J. McMaster* for the Retail, Wholesale and Department Store Union, Local No. 580, appellant.

L. H. Jackson for The Labour Relations Board (B.C.) and the Attorney General for British Columbia, appellants.

C. K. Guild, Q.C., for Canada Safeway Ltd., respondent.

THE CHIEF JUSTICE (dissenting): For the reasons stated by the Honourable the Chief Justice of British Columbia I would dismiss the appeal with costs.

KERWIN J.:—Pursuant to s-s. 1 of s. 10 of the *Industrial Conciliation and Arbitration Act* of British Columbia, R.S.B.C. 1948, c. 155, the appellant Union, a "labour organization" as therein defined, applied to the Labour Relations Board (British Columbia), established under the Act, for certification as the bargaining authority for those employees of the respondent Company employed as "office employees" (except department managers and outside salesmen), at the Company's distributing warehouses in Vancouver. So far as relevant, s-s. 1 of s. 10 is in these words:—

10. (1) A labour organization claiming to have as members in good standing a majority of employees in a unit that is appropriate for collective bargaining may apply to the Board to be certified as the bargaining authority for the unit in any of the following cases:—

(*a*) Where no collective agreement is in force and no bargaining authority has been certified for the unit:

Subsection 1 of s. 12 enacts:—

12. (1) Where a labour organization applies for certification as the bargaining authority for a unit, the Board shall determine whether the unit is appropriate for collective bargaining, and the Board may, before certification, include additional employees in, or exclude employees from, the unit.

(1) (1952) 7 W.W.R. (N.S.) 145; 1 D.L.R. 48.
(2) (1952) 6 W.W.R. (N.S.) 510; 3 D.L.R. 855.

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The Board determined that such employees "except those excluded by the Act and except those employed in the positions and in the classes of work listed on the back of this certificate" were a unit of employees appropriate for collective bargaining. On the back of the certificate appeared the following:—

Positions and classes of work excepted from the bargaining unit.
Managers;
Assistant Managers;
Managerial Secretaries;
Personnel Records;
Payroll Clerks;
Chief Accountant;
Accountant;
Supervisor of Comptometer Operators;
Supervisor of Power Machine Operators;
Pricing Department Clerk;
Advertising Clerk;
Bulletin Typist.

In the interpretation section of the Act, it is provided:—

Employee means a person employed by an employer to do skilled or unskilled manual, clerical, or technical work, but does not include:—

(*a*) A person employed in a confidential capacity or a person who has authority to employ or discharge employees:

(*b*) A person who participates in collective bargaining on behalf of an employer, or who participates in the consideration of an employer's labour policy:

(*c*) A person serving an indenture of apprenticeship under the "Apprenticeship Act":

(*d*) A person employed in domestic service, agriculture, horticulture, hunting or trapping:

An application for a writ of *certiorari* to the Chief Justice of the Supreme Court of British Columbia was heard as if a formal order had been issued by the Court and a return made by the Board. A question has been raised as to what should be considered generally as a return by a tribunal such as the Board but it need not be determined in the present case. The Court knows the Board's decision only from a copy of its certificate sent to the solicitor for the respondent, which was produced as an exhibit to an affidavit made by Mr. Theodore Smith on the respondent's behalf, and since it appears (and is admitted) that stapled thereto was a letter from the Registrar of the Board giving the reasons for the decision, I assume that in the present case the return includes not only the certificate but the reasons therefor. I further assume in favour of the respondent

that under the particular circumstances we may look at the records of the respondent, which were also made an exhibit to the affidavit, and at the affidavit itself to show what happened before the Board, since the deponent was cross-examined on that affidavit and such cross-examination is part of these proceedings. I am satisfied that on this evidence the Board and the Chief Justice of the Supreme Court of British Columbia came to the right conclusion on the important question whether those office employees of the respondent who are comptometer operators and power machine operators are persons employed in a confidential capacity within the meaning of exclusion (*a*) in the definition of "employee". This conclusion is arrived at without reference to the provisions of s-s. 4 of s. 2:—

(4) If a question arises as to whether a person is an employee within the meaning of this Act, the question shall be determined by the Board, and the decision of the Board shall be final.

The Board's reasons as contained in the letter enclosing a copy of its certificate to the solicitor for the respondent are as follows:—

A prime question for the decision here is the interpretation of "a person employed in a confidential capacity", (S. 2(1), I.C.A. Act). The employer argues that, with a few exceptions, all of the B.C. zone office staff are employed in a confidential capacity. That is to say that those employees are handling matters which are of a confidential nature in regard to the affairs of the employer.

In the strict sense this view would appear to rule out such employees from any proposed bargaining unit within the scope of the *Industrial Conciliation and Arbitration Act*. Can the considerations really rest there? It seems obvious that many employees of most employers are "confidential" to some and to varying degree. Is not then a further consideration required as to the degree and capacity of the confidential employment met with in this application?

Modern business practice and the emergence of large office organizations require a broad approach to this problem if the *Industrial Conciliation and Arbitration Act* is to be reasonably interpreted. Obviously one, or a few persons, could not be expected to deal with the mass of intimate information required in today's management office organization. Thus, nearly all employees in such an office handle, or have access to, confidential information. The Board's view is then, that the primary question for study is:— does this type of employment make persons so employed persons employed in a confidential capacity according to the Act, and thus rule them out from appointing a bargaining authority to act on their behalf in respect of wages and working conditions?

Many excellent cases and facts, pro and con, were provided by counsel in hearings on this application. The Board's opinion, after study of these cases and facts, and in particular the case of *Ford Motor Company*

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of Canada, Limited, is that the question here resolves itself into a consideration of two classifications of employees which comprise the major portion of the staff employed, viz.—Comptometer Operators and Power Machine Operators.

It is the Board's opinion that while there is merit to the case presented by counsel for the employer, justification exists for the Board to grant certification for the unit applied for, less certain classifications. These latter are: (Then follows the list that appears on the back of the certificate).

The Board rules that certification will issue for a bargaining unit described as: all employees, less the aforementioned categories.

The Board accepted the statements as to what the operators did that appear in the respondent's records as explained by Mr. Smith but counsel for the respondent submitted the Board's reasons to a searching criticism. He pointed to the statement therein:— "Nearly all employees in such an office handle or have access to confidential information." Apparently, before the Board, counsel had used the word "handle" but I take it that by repeating the word, the Board did nothing more than adopt a convenient expression to cover the having access to confidential information. It was also pointed out that in the earlier part of its reasons the Board had stated that the respondent's argument that, with a few exceptions, all of the British Columbia zone office staff were employees in a confidential capacity would in the strict sense appear to rule out from any proposed bargaining unit within the scope of the Act all employees who were handling matters which were of a confidential nature in regard to the affairs of the employer. It was argued that this meant that while strict construction of the Act would, according to the Board, bring the operators within exception (*a*) to the definition of "employee", the Board gave some other construction not warranted by the provisions of the enactment. That is not the proper view to take of the reasons. The Board considered that the construction advanced on behalf of the respondent did not meet the proper test under the Act in relation to the operators in question, and with great respect to the members of the Court of Appeal who thought otherwise, I am of the same opinion.

Counsel for the respondent argued that those operators should be excluded as much as "Accountant; Supervisor of Comptometer Operators; Supervisor of Power Machine Operators;". I disagree because, in my view, the duties of accountants and supervisors comprise much more than

tabulating on machines information from various sources. An employee who had access to outgoing mail, because he was in a position to read all that was going out, or one whose duties might be to open incoming mail, could be said to have access to confidential information. It is in the same way and only to the same extent that the same could be said of the operators. On the other hand, accountants and supervisors would not merely put down figures and have them totalled but would collate the information from these figures with a view of presenting it, and making recommendations, if necessary or advisable, in connection therewith to a superior employee. The fact that an employee had access to confidential information does not mean that he was "employed in a confidential capacity."

It has not been overlooked that in its certificate the Board excepts "those included by the Act". These words appear in the printed form prepared for the purpose and should have been stricken out. However, in view of the last paragraph of the Board's reasons, and also of the fact that the real dispute is as to the operators, the words may be taken as merely surplusage, or as referring to employees who might otherwise possibly fall within exceptions (*b*) and (*c*) in the definition of "employee". The Board's certificate cannot, therefore, be treated as meaningless.

The appeal should be allowed and the judgment of the Chief Justice of the Supreme Court restored. The appellant Union is entitled as against the respondent to its costs of the appeal to this Court and of the appeal to the Court of Appeal. There should be no costs for or against the Board or the Attorney General of British Columbia.

TASCHEREAU J.:—I believe that the learned Chief Justice of the Supreme Court of British Columbia was right in dismissing the application of the respondent for a writ of *certiorari*.

I am of the opinion that there was sufficient evidence to justify the Board to come to the conclusion that certain comptometer operators and power machine operators, were not employed in "a confidential capacity" within the meaning of the Act, and that by virtue of s. 2(4) of the Act, its decision is final and is not open to review.

I would allow the appeal and restore the order of the trial Judge, with costs here and in the court below.

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RAND J.:—The question in this controversy over the certification of a labour union in British Columbia as bargaining agent hinges on the interpretation to be given the exception, "a person employed in a confidential capacity". The company carries on a large system of grocery stores throughout the western provinces and it is with relation to the headquarters office staff in Vancouver of the British Columbia zone that the dispute arises. The persons concerned are twenty-four operators of comptometers, nine operators of power machines, six telephone operators and two duplicating machine operators.

Those in the first group are engaged in the preparation and assembly of all species of statistical and report material. What may be called the primary figures come to the central office from the warehouses, merchandising departments and retail stores in the zone, and are combined, consolidated or summarized in such detail and manner as the company requires. The data include all accounting particulars of the business done in each store, detailed to individual departments; the total operations of the zone in similar form and detail; and the usual statistical calculations in terms of unit volume, labour and return. In this matter appear, of course, prices, wages, bonuses, profits and other items that enter into the final result, elaborated in relation to warehouses, shops, service and all other activities of the business.

The power machines are used, among other things, to make out cheques to all employees except executives paid from the Vancouver office; for the preparation of the invoices of goods to the retail stores in the zone, of records showing cost prices, sale prices and profit margins throughout the zone, and of daily and quarterly reports of volume sales of individual commodities.

The duplicating machine operators reproduce the statistical returns already mentioned. They also distribute incoming and handle outgoing mail.

All of these employees are claimed to be within the exemption, but from the facts stated it is clear that the work done by them is simply the mechanical production of statements of the business, in more or less detail, and reduced to significant units. This is undoubtedly information which the company does not broadcast from the housetops; but the operators do nothing to or about it except to

transcribe it on paper for the use of others. Their work is basically instrumental although there is some consolidation and even, it may be, of calculation by them for the results tabulated. The disability urged arises through their exposure to that information, and the taint is said to disqualify even the clerks who handle the mail.

This condition is present more or less in every business and an employee is under a legal duty as a term of his employment to treat all such matters as the exclusive concern of the proprietor. But the question under the statute is not to be determined by the test whether the employee has incidental access to this information; it is rather whether between the particular employee and the employer there exists a relation of a character that stands out from the generality of relations, and bears a special quality of confidence. In ordinary parlance, how can we say that a person skilled to operate a comptometer and employed primarily because of that skill, who is presumably so fully occupied with the particular work of transcribing or consolidating, that the figures in general would mean little to him, is by that exposure converted into an employee with a "confidential" relation? Between the management and the confidential employee there is an element of personal trust which permits some degree of "thinking aloud" on special matters: it may be on matters in relation to employees, competitors or the public or on proposed action of any sort or description; but that information is of a nature out of the ordinary and is kept within a strictly limited group. In many instances it is of the essence of the confidence that the information be not disclosed to any member of any group or body of the generality of employees.

There is nothing of that sort here. With a large office of upwards of thirty-five employees engaged in similar occupation, the matter which they work into reports, so far as it is known to one of them, is of common knowledge throughout the office; what, practically, could prevent these employees from discussing it among themselves? and if so, what could prevent them from spreading it abroad except their duty not to do so? They occupy no exceptional position in office organization. Most of them are, at the present time, members of the union, and the objection urged is not their being members but that the certification of the union to represent them would open the floodgates of exposure of

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the company's business chiefly to competitors. No such information would be used by any tribunal except by compelling the company to produce it or by permitting it to be disclosed by witnesses: but no evidence would be countenanced that had been obtained by a breach of duty. The feature a union would be interested in is the financial result of the business, and in this case that fact is published to the world. And what conceivable reason could there be to induce employees, because they happen to belong to a certified union, to pass this private information on to competitors of their own employer, the consequences of which could only be to their own injury?

There is an element of confidence between employer and all employees and an ascending scale up to those whose relation takes on the "confidential capacity". The point at which that is reached is a matter of judgment to be formed by weighing all the circumstances. For example, typewritten reports on advanced stages of atomic development where fundamental concepts may be expressed in communicable formulas might well today be classed as done by one in such a capacity; in engaging a person for such work, apart from the qualification as a competent operator and as a far more important consideration, integrity and the capacity for self-discipline and control would be decisive; but in twenty-five years from now all that information may be as common as the formulas of chemistry today. In this case, efficiency units are included in the secret category: but these business health tests are in general use and frequently ordinary items for arbitration between employer and employee. There is nothing special about them or their secrecy. The technician is chosen primarily for his professional or mechanical skill; in confidential employment, personal qualities take on greater importance and may be controlling. Here there is little beyond the relation sustained by the multitude in clerical work today; and the effects of a denial to this group of the privilege of being represented by a certified union must be taken into account in interpreting the statutory language. The task of evaluating all these considerations has been committed by the legislature to the Board; and so long as its judgment can

be said to be consonant with a rational appreciation of the situation presented, the Court is without power to modify or set it aside.

I would, therefore, allow the appeal with costs in this Court and in the Court of Appeal and restore the order of Farris C.J.

KELLOCK J. (dissenting):—Under the provisions of s. 2(1) of the statute "employee" does not include

> "a person employed in a confidential capacity."

By s-s. (4) of the same section, it is provided that

> If a question arises as to whether a person is an employee within the meaning of this Act, the question shall be determined by the Board, and the decision of the Board shall be final.

S. 58, s-s. (1) also provides that

> If a question arises under this Act as to whether:—
>
> (*a*) A person is an employer or employee . . . the Board shall decide the question, and its decision shall be final and conclusive for all the purposes of this Act except in respect of any matter that is before a Court.

As stated by Singleton L.J., in *Rex v. Northumberland Compensation Appeal Tribunal* (1):

> Error on the face of the proceedings has always been recognised as one of the grounds for the issue of an order of *certiorari*.

The provisions of ss. 2(4) and 58(1) do not exclude the supervisory jurisdiction of the court with respect to such questions, as is explained by Lord Sumner in the *Nat Bell* case, (2). The error alleged to be apparent on the face of the record in the case at bar is the view taken by the Board of the statutory definition of "employee". Although it is for the Board to determine whether or not a particular person is brought within the statutory definition, the Board may not misconstrue that definition.

The word "confidential" as it is used in the statute has, in my opinion, the sense of

> "intrusted with the confidence of another or with his secret affairs or purposes,"

see Black's Law Dictionary, 4th ed. 1952, p. 370.

The difference to my mind between a person employed in a confidential capacity and one not so employed is that, in the former case, for reasons, it may be, of convenience or

(1) [1952] 1 All E.R. 122 at 125. (2) [1922] 2 A.C. 128 at 159, 160.

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necessity on the part of the employer in the conduct of his business or affairs, the employee is put in possesison of matter which the employer regards, from his standpoint, as secret or private. In the case of a person engaged in business on a large scale, matters which are private or secret from his standpoint must of necessity be disclosed to varying numbers of employees, depending upon the volume and scope of the affairs in question. This necessity arises from the purely physical consideration of the employer being unable to keep these matters to himself, if his business or affairs are to be properly conducted.

The respondent, in the case at bar, operates a number of "chain" stores on a large scale and of necessity requires the assistance of a considerable number of employees in dealing with matters which it desires to keep private. It is quite true that the respondent is a public company and that its annual profits or losses are published, but, to take one example given by Mr. Guild on the argument, the profitableness or otherwise of an individual store is not ascertainable from such published statements, and it is obvious that the respondent would have the best of reasons for desiring to keep such information to itself and not available to its competitors. It is detailed information of this sort with which the disputed classes of employees dealt.

The view of the Board with respect to the meaning of the statutory definition is disclosed by its reasons as follows:

> A prime question for the decision here is the interpretation of "a person employed in a confidential capacity", (S. 2(1), I.C.A. Act). The employer argues that, with a few exceptions, all of the B.C. zone office staff are employed in a confidential capacity. This is to say that those employees are handling matters which are of a confidential nature in regard to the affairs of the employer.
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> In the strict sense this view would appear to rule out such employees from any proposed bargaining unit within the scope of the *Industrial Conciliation and Arbitration Act*. Can the considerations really rest there? It seems obvious that many employees of most employers are "confidential" to some and to varying degree. Is not then a further consideration required as to the degree and capacity of the confidential employment met with in this application?
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> Modern business practise and the emergence of large office organizations require a broad approach to this problem if the *Industrial Conciliation and Arbitration Act* is to be reasonably interpreted. Obviously one, or a few persons, could not be expected to deal with the mass of intimate information required in today's management office organization. Thus, nearly all employees in such an office handle, or have access to, confidential information. The Board's view is then, that the primary question for

study is:— does this type of employment make persons so employed persons employed in a confidential capacity according to the Act, and thus rule them out from appointing a bargaining authority to act on their behalf in respect of wages and working conditions?

In my view the Board has stated, only to discard, the proper meaning of the statute, because of that very necessity that the conduct of large affairs enlarges the number of persons whom an employer must take into his confidence. For my part, I find nothing in the statute which justifies such a departure from the plain meaning of the language used by the legislature. I do not obtain any assistance from the consideration that confidential employees any more than employees who participate in management, may be members of a trade union under the statute. That is so but such employees are in neither case under the statute to be considered for the purposes of certification for collective bargaining. I adopt the language of the Chief Justice of British Columbia as follows:

> The two disputed classifications of employees, when consideration is given to the nature of their assigned tasks, and the material with which they work, are in my opinion "employed in a confidential capacity" within the meaning of the Act. In consequence the Board erred in law and exceeded its jurisdiction in deciding otherwise.

I think the conclusion of the court below is correct and would dismiss the appeal with costs.

The Judgment of Estey and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—The relevant facts are stated in the reasons of other members of the Court. For the respondent it is argued that the decision of the appellant Board, that certain comptometer operators and power machine operators admittedly in the employ of the respondent, did not fall within the words "employed in a confidential capacity" so as to be excluded from the term "employee" as defined in s. 2(1) of the *Industrial Conciliation and Arbitration Act,* R.S.B.C. 1948 c. 155, was so opposed to the evidence that the inference is irresistible that the Board misconstrued the Statute, that there is therefore error in law apparent on the face of the proceedings and *certiorari* lies to quash the order.

I am in respectful agreement with the learned Chief Justice of the Supreme Court of British Columbia that, on the evidence before it, it was open to the Board to come to

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the conclusion that the operators in question were not in fact employed in such a capacity as to be excluded from the term "employees" within the meaning of the Act. In such circumstances, in my opinion, effect must be given to s. 2(4) of the Act which provides that this question shall be determined by the Board and that its decision shall be final; and I do not find it necessary to inquire whether I would have reached the same conclusion as did the Board had the responsibility of making such decision been committed to the courts.

I would dispose of the appeal as proposed by my brother Kerwin.

Appeal allowed with costs against the respondent in this Court and the Court below. No costs for or against the Board or the A.G. of B.C.

L. H. Jackson, solicitor for the appellants the A.G. for B.C. and The Labour Relations Board.

R. J. McMaster, solicitor for the appellant union.

K. L. Yule, solicitor for the respondent.